REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 22791/2019
REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES
REVISED.

In the matter between:

PETER MTHANDAZO MOYO	Applicant
and	
OLD MUTUAL LIMITED	First Respondent
OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LIMITED	Second Respondent
TREVOR MANUEL	Third Respondent
THE NON-EXECUTIVE DIRECTORS OF OLD MUTUAL LIMITED	4th to 16th Respondents

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 16 May 2022.

JUDGMENT

THE COURT (RAULINGA J, TWALA J AND OPPERMAN J)

INTRODUCTION

[1] The first and second respondents shall be referred to as 'Old Mutual' and the third to sixteenth respondents as 'the Directors'. Where Old Mutual and the Directors are referred to collectively, they will be referred to as the respondents.

[2] The termination of the applicant's ('Mr Moyo's') contract of employment as the Chief Executive Officer ('the CEO') of Old Mutual, gave rise to his urgent application for reinstatement. An interim order was granted by Judge Mashile whereafter a dispute arose as to the interpretation of such order. Mr Moyo contended that he was entitled to be physically re-instated and Old Mutual contended that the order reinstated the contract only but that Old Mutual's filing of an application for leave to appeal had in any event suspended the order because, although interim in nature, was final in effect and interim orders which are final in effect are suspended by applications for leave to appeal in terms of section 18 of the Superior Courts Act 10 of 2013 ('the Superior Courts Act'). Old Mutual brought an urgent application for a declarator that their interpretation of the order was correct and if not, that the interim order reinstating Mr Moyo be suspended pending the appeal. Judge Mashile who had granted the interim order dismissed this latter application and that development entitled Old Mutual to an automatic urgent appeal in terms of section 18 of the Superior Courts Act. In that appeal the Court found that Old Mutual's interpretation on most fronts was correct, confirming too that the filing of the application for leave to appeal had indeed suspended the operation of the interim order. After the granting of the interim order by Judge Mashile and in the run up to the appeal hearing, Old Mutual had refused to permit Mr Moyo back onto the Old Mutual premises to resume his position as CEO and these 'lockouts' formed the cornerstones of a contempt application for non-compliance with the interim reinstatement order. Certain public utterances by Old Mutual's chairman, Mr Trevor Manuel, a former Minister of Finance, contributed to Mr Moyo's allegations of contempt by scandalising the Court, which was brought as a counter application to Old Mutual's urgent application for declaratory relief as to the status of the interim order (with the alternative relief being the suspension of the interim order). Mr Moyo subsequently also brought an application to declare the Directors to be delinquent and he sought their removal from the board of Old Mutual in terms of the Companies Act 71 of 2008 ('the

Companies Act'). The application for an order declaring the Directors of Old Mutual to be delinquent directors and the application to have them declared to be in contempt of court came before this Full Court by the means described below.

[3] On 23 August 2021, Malindi J granted an order in terms of which the application in which Mr Moyo sought to have the Directors declared delinquent in terms of section 162(5)(c) of the Companies Act under case number 22791/2019 ('the delinquency application') was consolidated with the contempt application which Mr Moyo had instituted as a counter application when Old Mutual brought the urgent application in terms of section 18 of the Superior Courts Act, application ('the contempt application') to proceed as one application which we understand to mean that the two applications would be heard simultaneously. This accords with the manner in which the applications were argued before us. The applications against the fifth respondent were withdrawn and this consolidated application thus proceeds against 15 respondents only.

COMMON CAUSE FACTS OR FACTS TO BE ACCEPTED BY VIRTUE OF THE PLASCON-EVANS RULE

[4] Old Mutual and Mr Moyo were both shareholders in NMT Capital before it appointed him as its CEO. Mr Moyo, Mr Sango Ntsaluba and Mr Thabiso Tlelai each directly and indirectly held 26,6% of the shares in NMT Capital. Mr Moyo was at all times a director of that company. Old Mutual invested in NMT Capital as a BEE investment in January 2005. It took up 20% of the shares in NMT Capital and provided funding to it by subscribing for preference shares at a price of R5,5m.

[5] On 25 January 2005, Old Mutual entered into a Preference Share Subscription Agreement with NMT Capital (then known as Amabubesi Investments Pty Ltd) and its ordinary shareholders including Mr Moyo. It included the following provisions: In terms of clause 4.3.3 read with Schedule 1, NMT Capital undertook to pay prescribed preference dividends to Old Mutual every six months; Clause 1.2 of the Schedule 1 provided that "*[n]o dividends may be paid on ordinary shares before all arrear preference dividends have been paid*" and in terms of clause 5, NMT

Capital undertook to redeem the preference shares after five years, that is, in January 2010.

[6] Old Mutual and the NMT Capital shareholders, including Mr Moyo, also entered into a Shareholders' Agreement on 25 January 2005. It too stipulated in clause 19.2, that "*dividends may only be declared on the ordinary shares once all arrear dividends have been paid*".

[7] Old Mutual thereafter provided further preference share funding to NMT Capital. The total value of its investment in NMT Capital's preference shares ultimately came to R46m.

[8] Old Mutual and Mr Moyo executed his contract of employment in March 2017 ('the contract of employment'). The contract of employment made it clear that Mr Moyo's employment was based on the parties' relationship of confidence and trust. Clause 3.6 emphasised the importance of interpersonal compatibility recording that it formed an inherent requirement of his appointment; in clause 3.7, Mr Moyo agreed that Old Mutual's confidence in his performance formed an inherent and essential requirement of his appointment and continued employment; in clause 12.1, Mr Moyo acknowledged that his employment relationship with Old Mutual was based on trust and mutual respect; clause 12.2 elaborated on Mr Moyo's fiduciary duties to Old Mutual. It identified a number of specific duties and added that a breach of any of them would warrant termination of his employment.

[9] The contract of employment made elaborate provision for the disclosure and resolution of any conflicts of interest. Clause 5.2 identified Mr Moyo's existing business interests set out in addenda A and B. They included his interests in NMT Capital. He undertook "*that such business interests shall not detract from his duties as Chief Executive Officer*". Clause 14.1 obliged Mr Moyo to disclose any actual or potential conflict of interest to Old Mutual as soon as he became aware of it. In addendum A, Mr Moyo undertook to manage his interest in NMT Capital in accordance with certain requirements. He agreed in the penultimate bullet point that any conflict resulting from his directorship of NMT Capital "*will be dealt with by the Chairperson of (Old Mutual)*". Addendum B was a protocol for the regulation of

potential conflicts between Mr Moyo's duties as CEO of Old Mutual and his interests in NMT Capital.

[10] Clause 24 provided for the termination of Mr Moyo's employment. In terms of clause 24.1.1, either party had the right to terminate their contract on six months' notice in writing ('the termination clause').

[11] Under the Preference Share Subscription Agreement, NMT Capital was meant to pay preference dividends to Old Mutual every six months and redeem the preference shares after five years. It, however, requested and obtained Old Mutual's agreement to delay those payments from time to time.

[12] At the end of January 2018, the parties to the Preference Share Subscription Agreement concluded an agreement to extend the redemption date of Old Mutual's preference shares in NMT Capital, until 30 June 2018. Mr Moyo signed this agreement on 29 January 2018. At that time, NMT Capital was also in arrears with its payment of preference dividends to Old Mutual. The amount outstanding was R63,5m. NMT Capital made further requests for the extension of the date for redemption of the preference shares beyond 30 June 2018. Old Mutual, however, declined those requests.

[13] On or about 1 March 2018, the board of directors of NMT Capital approved the declaration of an ordinary dividend in an amount of R10m. Mr Moyo participated in the decision to declare this dividend. NMT Capital declared this ordinary dividend at a time when its preference share dividends due to Old Mutual were in arrears. The total amount outstanding as at 31 December 2017 was R63.5m.

[14] Mr Moyo's share of the R10m ordinary dividend was R1.6m paid to him on 8 March 2018.

[15] On 30 June 2018 the full amount of Old Mutual's preference share funding to NMT Capital became due and payable to Old Mutual in accordance with the agreement concluded in January 2018. Mr Moyo knew that this amount was payable to Old Mutual because he had signed the agreement.

[16] On 4 July 2018 the NMT Capital board decided, in a meeting chaired by Mr Moyo, by a resolution proposed and supported by Mr Moyo, to distribute an amount of R105m to ordinary shareholders. Of this, an amount of R21m was paid to Mr Moyo in his personal capacity (being his 20% portion of the R105m dividend) on 5 July 2018 and a further R7m was paid to the company owned by his family trust. He thus personally (directly and indirectly) benefitted to the extent of R28m. In the circumstances, the declaration of the ordinary dividend of R105m was made in breach of clause 19 of the NMT Shareholders' Agreement; in breach of clause 1.2 of schedule 1 to the Preference Share Agreement; in breach of clauses 3.3, 12.2.3 and 12.2.4 of Mr Moyo's contract of employment; and in breach of clauses 4.4, 4.5 and 6.2 of Addendum B to his contract of employment.

[17] Mr Moyo did not at any stage during 2018 approach Mr Manuel or any other representative of the Board or NomCom[1] to disclose or discuss his conflict of interest in respect of the declaration of the NMT Capital ordinary share dividends (an omission that violated clause 14.1 of his contract of employment, as well as the final clause of Addendum A and clause 6.1 of Addendum B to his contract of employment); take steps to ensure that arrear preference share dividends were paid to Old Mutual; and treat the R65.9m current liability to Old Mutual as an amount that was due and payable.

[18] Around August 2018, the Related Party Transaction Committee ('RPC'), whose function it is to manage conflicts of interest, made a request to be briefed on Mr Moyo's interests in NMT Capital and on whether any conflicting interest was being handled in a manner consistent with sound principles of corporate governance. A memorandum was prepared by Old Mutual's Chief Legal Officer, Mr Craig McLeod (Mr McLeod), for the RPC for the purposes of its meeting scheduled to be held on 7 February 2019 and later a report by Old Mutual Corporate Finance representative, Mr Christoph Kuhn (Mr Kuhn). The memorandum and report expressed concerns, *inter alia*, regarding the ordinary share dividends that Mr Moyo

[1] The NomCom is a committee of the Board responsible to review and monitor (i) the integrity of Old Mutual's non-executive director nomination and appointment processes, and (ii) the adequacy, efficiency and appropriateness of the corporate governance structure and practices of companies in the Old Mutual Group, in accordance with the Group Governance Framework.

received in his personal capacity whilst preference dividends payable to Old Mutual had been substantially in arrears.

[19] Following consideration of the reports presented by Mr Kuhn and Mr McLeod, the RPC expressed concern over the NMT Capital decisions that had apparently been made in breach of the Preference Share Agreement. It however, concluded that it did not have sufficient information to determine whether or not the breach of the agreement had occurred deliberately and to determine whether the relevant sequence of events amounted to coincidence, negligence or wilful intent. The RPC felt that it could not finalise recommendations to the Corporate Governance and Nominations Committee without further investigation. Consequently, it agreed with a recommendation that NMT Capital board packs and board minutes for the preceding two years be obtained.

[20] Following the meeting of the RPC on 7 February 2019, the RPC prepared a written report, dated 25 February 2019, to NomCom. The RPC recommended to NomCom that an independent forensic investigation in respect of the abovementioned matters be commissioned and Old Mutual's decision in respect of future support of NMT Capital be informed by the outcome of that investigation.

[21] At its meeting on 6 March 2019, NomCom agreed with the RPC's recommendations, including that further investigations be conducted by the RPC.

[22] Following the meeting with the NomCom, the Chair of the RPC made a request to NMT Capital to provide it with information that would enable it to complete its investigations. This request was extended to Mr Moyo. When no information was forthcoming from NMT Capital and through Mr Moyo's intervention, Mr Du Toit engaged Mr Deon de Klerk from Bowmans to assist in seeking information formally from NMT Capital. Eventually, the RPC obtained access to the information from Old Mutual's archival records. That is when Old Mutual became aware of all the information that had been placed before the NMT Capital board at the meeting chaired by Mr Moyo on 4 July 2018.

[23] On 23 April 2019, in the midst of the ongoing investigation of these matters by the RPC, Old Mutual received a further request from NMT Capital that Old Mutual should agree to a subordination of its preference share rights against the NMT Group. This request was discussed at NomCom's meeting on 24 April 2019. Members of NomCom supported the RPC proposal that Old Mutual extricate itself from its investment in NMT Capital. It was agreed that NomCom should reconvene on 29 April 2019 to allow the members to acquaint themselves with relevant material. On 28 April 2019 the RPC submitted a written report to NomCom. The RPC recommended to NomCom that Old Mutual disengage from NMT, by not extending the redemption of the preference shares and by moving towards disinvestment from the NMT group. In the view of the RPC, Mr Moyo, as a recipient and beneficiary of the NMT Capital ordinary share dividends, had been instrumental in the NMT Capital decision to declare and pay dividends in breach of Old Mutual's rights (in terms of the Preference Share Subscription Agreement and the NMT shareholders' agreement) as preference shareholder in NMT Capital. The RPC concluded that Mr Moyo had breached the terms of the protocols included in his contract of employment, and that the Board should consider applying the strongest possible sanction of Mr Moyo.

[24] The RPC's views were considered by NomCom at a meeting on 29 April 2019. After having considered and discussed the matter, NomCom essentially agreed with the RPC's recommendations and, accordingly, resolved, subject to the approval of the Old Mutual board of directors, that a letter should be addressed to the NMT group to notify them of a decision by Old Mutual not to agree to the proposed subordination agreement, or to a further extension of the term of the preference shares, or to the requested "roll over" of the preference shares debts, and that Old Mutual intended to disengage from NMT Capital. Because Mr Moyo had been instrumental in NMT Capital's decision to declare and pay ordinary dividends (including to himself) in breach of Old Mutual's rights as preference shareholder and in breach of the protocols included in his employment contract, Mr Manuel should, together with members of NomCom, meet with Mr Moyo to communicate certain key points to him arising from the RPC investigation. Mr Manuel should report on that engagement to the Board at a meeting to be held on 1 May 2019.

[25] On 30 April 2019, Mr Moyo sent an email to Mr Manuel. Mr Moyo did not attempt to engage with the merits of the issues raised by the committees in this email but instead indicated that he was surprised that there was a view that he had not conducted himself in line with the terms of the protocol document and that he had not acted in the best interests of Old Mutual. Furthermore, that in his view he had conducted himself in the best interests of Old Mutual. Noteworthy in this email is the absence of an explanation by Mr Moyo of the declaration of ordinary dividends for his own benefit whilst Old Mutual Preference share dividends were still in arrears.

[26] At the combined Board meeting of Old Mutual Limited and Old Mutual Life Assurance Company held on 1 May 2019, a report on the RPC's investigation, deliberations and recommendations was provided. After having deliberated on these issues, the Board decided (i) to disengage in an orderly manner from the NMT group, and to notify NMT accordingly; and (ii) to establish an *ad hoc* sub-committee to engage with Mr Moyo on the concerns that had arisen in relation to his management of the conflict of interest. The Board felt that Mr Moyo should be afforded an opportunity to address the relevant matters with the *ad hoc* sub-committee, after which the *ad hoc* sub-committee would make recommendations to the Board. The Board noted that members of NomCom, on the basis of the information at their disposal, came to the conclusion that they had lost confidence in Mr Moyo as CEO, however, it decided to defer any decision on that matter until after the sub-committee's engagement with Mr Moyo.

[27] The *ad hoc* committee met with Mr Moyo on 2 May 2019. They discussed the Board's concerns at length. The meeting continued for approximately two hours. The concerns raised with Mr Moyo related to his role in the declaration of NMT Capital's ordinary share dividends in apparent disregard of Old Mutual's preference rights, and the apparent elevation of his own interests above those of Old Mutual in disregard of the terms of his contract of employment.

[28] Following that meeting, certain emails and letters were exchanged between Mr Moyo and the *ad hoc* sub-committee.

[29] Mr Moyo's summary of his conduct was reflected in his email of 8 May 2019. In essence he alleged that he was never involved in the detailed dealings between Old Mutual and NMT and that for a long time up to 2018 Old Mutual had a director on the NMT board, Mr Mobasheer Patel, who had been appointed long before he joined Old Mutual; his involvement in the declaration of NMT's ordinary dividends was in his capacity as a non-executive director and he was not aware that Old Mutual's preference dividends had not been paid at the time the ordinary dividend was paid. He was however informed by NMT that the reason for that was that it was in discussion with Old Mutual on a package of transactions. When Old Mutual asked NMT not to bring the preference dividends into the discussion, NMT paid Old Mutual as soon as it could. He notes that when the big dividend was declared, he was at the meeting and he made sure that provision was made for Old Mutual's preference dividends. Mr Moyo contended that he could not, nor be expected to do anything more than what he did as he was not an executive at NMT and that no one from Old Mutual had raised the delay in payment with him; he did not understand how it could be construed that he put his interests above Old Mutual and how he acted outside the protocols.

[30] Mr Manuel responded by explaining the issues again to Mr Moyo and why it was said that he had breached the Preference Share Subscription Agreement and his contract of employment, in a response to Mr Moyo dated 16 May 2019. He gave Mr Moyo another opportunity to explain his side by 19 May 2019, which was extended to 21 May 2019. Mr Moyo responded on 21 May 2019: Mr Moyo alleged that there was always a plan to pay Old Mutual's arrear preference shares from the proceeds of an upcoming Growthpoint distribution; he indicated that the entire dividends received from the proceeds of the Growthpoint distribution in March 2018 were paid over to Old Mutual; in relation to Old Mutual's outstanding preference shares, Mr Moyo stated that Old Mutual had always agreed in the past to extend the redemption period and there was nothing to suggest that it would not be the case in 2018. He noted that prior to that, there had been extensions in 2010, 2013 and 2017; he put the blame on Mr Patel, the other Old Mutual nominated director on the NMT board and said that Mr Patel always knew that the plan was to pay the full amount of Old Mutual's arrear preference shares out of the Growthpoint distribution.

[31] The *ad hoc* sub-committee reported back to the Board at its meeting on 23 May 2019. The Board was briefed on the RPC's investigations and its recommendations to NomCom. It was further briefed on NomCom's recommendations to the Board and the *ad hoc* sub-committee's interactions with Mr Moyo and his responses.

[32] The Board discussed the matter with its legal advisors. It considered Mr Moyo's argument that it had been the responsibility of Mr Patel (and not of Mr Moyo himself) to safeguard Old Mutual's interests in the context of the business relationship with NMT, and to make the necessary disclosures in that regard. The Board felt that the manner in which Mr Patel may have handled the matter did not detract from Mr Moyo's positive duties under his contract of employment. The Board concluded that Mr Moyo had a fiduciary duty of care, and that the manner in which Old Mutual had managed its investment in NMT did not absolve him from his explicit contractual duties.

[33] The Board also considered Mr Moyo's statement that there was no reason to believe that the term of the preference shares would not be extended further. The Board considered that there was no indication of any agreement to a further extension, and that Mr Moyo was expected to have been aware of that.

[34] Mr Moyo was asked to join the meeting and various board members engaged in a discussion with him on the matters of concern to them. Once Mr Moyo had been excused, the Board members again discussed and deliberated on the information that had been placed before them, including the responses and explanations given by Mr Moyo. The Board generally agreed that there was enough evidence to conclude that Mr Moyo, given his fiduciary duties, as well as what was expected by the Board of its CEO, had fallen short of the standard of care required and had failed to discharge his contractual obligations.

[35] The Board concluded that it no longer had sufficient trust and confidence in Mr Moyo's leadership as CEO of Old Mutual. Consequently, the Board concluded unanimously that the trust relationship with Mr Moyo had broken down, and it resolved to pursue an amicable separation between Old Mutual and Mr Moyo. It

decided that this should be explained to Mr Moyo, and that the Board would then consider the next steps towards a separation.

[36] The Board nominated three directors to approach Mr Moyo to communicate that conclusion to him, and to engage with him with a view to achieving a dignified separation. The nominated directors were Mr Manuel, Mr De Beyer and Ms Molope. They were mandated to engage with Mr Moyo on the Board's conclusion and its implementation. At that point in time, the Board had not decided to terminate Mr Moyo's contract of employment unilaterally.

[37] On 23 May 2019, the three-member delegation met with Mr Moyo. They told Mr Moyo of the Board's conclusion that a serious breakdown in trust had occurred and that they had been mandated to discuss the next steps with him, which would include an attempt to reach agreement on the terms of a separation. After an explanation of the Board's reasons, the delegation offered Mr Moyo the opportunity to resign. Mr Moyo refused to resign but indicated that if the Board wished him to leave, it should submit a separation proposal for his consideration.

[38] Before the Board could come back to Mr Moyo, he had already informed his executive team that the Board had concluded that it no longer had the requisite trust and confidence in him. This created a serious risk that it could no longer be possible to contain and safeguard the confidentiality of the Board's conclusion on the serious breakdown in its relationship with Mr Moyo.

[39] Once it had been reported to the Board that news of the material breakdown in the relationship with Mr Moyo had spread to employees outside the executive committee, the Board discussed the implications and concluded that decisive action was required to avoid asymmetry of information in the market and damage to Old Mutual's reputation if this conclusion was not announced prior to the annual general meeting that was scheduled to take place the following day.

[40] After discussion and consideration of this question, and later in the afternoon following the resumption of the combined Board meeting of 23 May 2019, the Board concluded that it was necessary and appropriate to announce the breakdown in the

relationship to the market, and that it would be appropriate to suspend Mr Moyo from his duties pending the outcome of engagement with him on the terms of his exit from Old Mutual. The Board then considered and approved the terms of a letter of suspension, which was duly handed to Mr Moyo ('the suspension letter').

[41] The suspension letter made it clear that the reason for the suspension was that there had been a material breakdown in the relationship of trust and confidence between the Board and Mr Moyo.

[42] Whilst the Board still intended to engage with Mr Moyo on the terms of an amicable and mutually acceptable separation, Mr Moyo gave various interviews to the media in which he criticised the Board's decision. He claimed that he did not know the reason for the Board's decision.

[43] The Board engaged with Mr Moyo through its attorneys Bowmans, and informed him that giving interviews to the media not only violated the terms of his contract of employment and the terms of his suspension but also jeopardised the remaining prospects of the parties reaching agreement on terms of separation. However, the parties did not make any progress in negotiating the terms of an agreed exit. It became apparent that an agreed separation between Old Mutual and Mr Moyo would not be possible.

[44] The Board then held a meeting by telephone conference on the evening of 14 June 2019 in order to discuss the situation that had developed. The Board remained of the view that it no longer had trust and confidence in Mr Moyo's leadership. The Board resolved unanimously to terminate Mr Moyo's employment on notice in accordance with clause 24.1.1 of his contract of employment. Although the Board believed that it was probably entitled to dismiss Mr Moyo summarily, it chose instead to invoke the "no fault" notice provision in clause 24.1.1 to mitigate any adverse impact on Mr Moyo.

[45] The Board notified Mr Moyo of its decision by a letter dated 17 June 2019 ('the first termination of employment notice'). The letter makes clear again in paragraph 4 that the reason for the Board's termination of Mr Moyo's employment

was that there had been a complete breakdown in the relationship of trust and confidence between him and the Board emanating from the NMT matters. Concerning the termination of employment, the Board indicated in paragraph 13 that it had resolved to terminate Mr Moyo's employment on notice as provided for in clause 24.1.1 of his contract of employment.

[46] On 27 June 2019, Mr Moyo launched the urgent application which culminated in the judgment and order of Mashile J on 30 July 2019. The order, in relevant part, reads:

> "...
>
> 2. Pending the hearing of Part B, the Applicant is temporarily reinstated in his position as Chief Executive Officer of the first respondent;
>
> 3. The First to 17th Respondents are interdicted from taking any steps towards appointing any person into the position of CEO of the First Respondent ..."
>
> ('Judge Mashile's Part A order')

[47] Judge Mashile's Part A order had been handed down during the afternoon of 30 July 2019 whereafter Old Mutual's board of directors met, considered it and decided that they should apply for leave to appeal. They also decided that Mr Moyo should not be required or permitted to render services pending the appeal process.

[48] After Judge Mashile's Part A order had been granted, Mr Moyo indicated in a media statement that he intended to report for duty the following day, Wednesday 31 July 2019. Upon learning of Mr Moyo's intention to report for duty, Old Mutual and its directors, through their attorneys of record, Bowman Gilfillan, addressed a letter to Mr Moyo's attorney of record, Mr Mabuza. In the letter, Mr Mabuza was advised that Old Mutual would be bringing an application for leave to appeal against Judge Mashile's Part A order and requested that Mr Mabuza advise Mr Moyo that he

would not be required to report for duty. The material portion of the letter reads as follows:

> "We are instructed by our client to apply for leave to appeal. We anticipate that the application will be served this evening or by tomorrow morning at the latest.
>
> We are advised that your client has indicated that he intends to report for duty tomorrow. Your client will not be either required or permitted to return to our client's premises pending the outcome of any appeal proceedings. Kindly advise your client accordingly."

[49] Mr Mabuza responded to the letter and asserted that Judge Mashile's Part A order of 30 July 2019 was interim and interlocutory in nature with the result that it was not suspended by the delivery of an application for leave to appeal. Relying on section 18(2) of the Superior Courts Act, Mr Mabuza communicated to Old Mutual that if it "*wishes to have the decision suspended, you are kindly advised to bring an application to that effect in terms of section 18(2) read with section 18(3) ...*". Mr Mabuza recorded further that "*any other course or steps taken by your clients to prevent or impede our client from executing the decision of the court by returning to his office with immediate effect will accordingly be in wilful contempt of court.*"

[50] On 31 July 2019, Bowmans responded in writing and the letter, in relevant part, reads:

"...

> 2.1 Our client's application for leave to appeal has been served and filed.
>
> 2.2 We do not agree that the relevant court order is an interlocutory order or is solely an interlocutory order in the sense contemplated in section 18(2) of the Superior Courts Act. Consequently our client persists in contending that the court order is suspended as contemplated in section 18(1) of the Superior Courts Act, or is suspended in material part.

2.3 We acknowledge that you disagree with this approach...

2.4 Your client has, however, been instructed that pending any further process he is not required or permitted to return to work. We have made it clear that this is the decision of our client's board.

3. If your client does not agree with this, he is at liberty to institute enforcement proceedings, which will be opposed. Our client similarly reserves the right to approach the court if necessary... ."

[51] The refusal of Old Mutual to permit Mr Moyo to return to work on 31 July 2019 is referred to as 'the first lockout'. It is important to note that the application for leave to appeal had been served and filed on 30 July 2019. For reasons that will become apparent, this timing had a material bearing on the issue of whether the first lockout constituted contempt of court.

[52] On 2 August 2019, Old Mutual launched an urgent application in which they sought a declarator that Judge Mashile's Part A order of 30 July 2019 contained decisions and orders contemplated in section 18(1) of the Superior Courts Act and that they are suspended pending the outcome of the application for leave to appeal lodged on 30 July 2019 and, if such leave is granted, pending the outcome of the ensuing appeal. In the alternative to such appeal, Old Mutual sought a declarator that they had satisfied the requirements in section 18(2) of the Superior Courts Act for the suspension of Judge Mashile's Part A order of 30 July 2019 and that it be suspended pending the outcome of the application for leave to appeal and if applicable, pending the outcome of the appeal itself ('the section 18(1) application').

[53] On 12 August 2019, Mr Moyo filed an answering affidavit to the section 18(1) application together with a counter application for contempt of court (previously defined as the contempt application).

[54] On 12 August 2019, Mr Paul Baloyi of Old Mutual,[2] was interviewed and was asked whether Old Mutual wanted Mr Moyo back to which he responded that they

[2] To be distinghuished from Mr Baloyi at Mabuza Attorneys.

did not and added "*we have made a firm decision that we have lost confidence in Peter [Mr Moyo] and to be quite blunt about it, I don't think we can ever entertain to have him back as the CEO.*"

[55] On 16 August 2019, the section 18(1) application was heard before Judge Mashile and judgment was reserved.

[56] The High Court held on 30 July 2019 that the letter, by which Old Mutual had terminated Mr Moyo's employment, had suggested that it was based on his misconduct. The High Court accordingly held that the termination was invalid because Old Mutual was not allowed to terminate Mr Moyo's employment for misconduct without a formal disciplinary inquiry.

[57] The Board terminated Mr Moyo's employment on six months' notice for a second time by a letter dated 21 August 2019 ('the second termination of employment notice'). Old Mutual explained its renewed termination as follows:

> "Without detracting from the due notice, then, but because of the untenable position that has arisen from subsequent events, Old Mutual has decided that it is in the best interests of the Company and its Shareholders to give further notice to terminate your contract of employment.
>
> Accordingly this letter, which is addressed to you on the authority of the Board, serves to give you notice of termination of your employment in terms of clause 24.1.1 of the contract of employment."

[58] On 6 September 2019, Judge Mashile dismissed the section 18(1) application ('the 6 September 2019 judgment').

[59] On 8 September 2019, Bowmans addressed correspondence to Mr Mabuza which, in relevant part, reads:

> "3. Our client's stance and the reasons for it have been made clear, in a form that your client is at liberty to raise in proper form in any further court proceedings, whether concerning alleged contempt or otherwise. This means

that if your client indeed chooses to go to the workplace, knowing that he will not be admitted, it will be clear that his sole purpose is confrontation and publicity. This can never be believed by your client to be in the interests of the company, its employees and other stakeholders. We trust that you will advise your client in this regard.

4. Our client will now approach the court on an urgent basis for further orders regulating your client's position. Papers will be served on your office as requested, as soon as possible. It would clearly be appropriate for your client to await the outcome of that further court process rather than seek to take the law into his own hands in this way. Our client, for its part, will continue to be guided by the courts and its own legal advice concerning its rights and obligations in these circumstances, and will not simply follow assertions made by or on behalf of your client, including those which it is advised are incorrect in law."

[60] On 9 September 2019, Mr Mabuza responded to such letter in the following terms:

"2. We confirm that our client indeed intends to return to work to tender his services in terms of the employment contract which was temporarily reinstated by the South Gauteng High Court, per Honourable Justice Mashile on 30 July 2019. The executability of that court order, in spite of your now successful application for leave to appeal, has been reconfirmed in a further judgment of Honourable Mashile J delivered on 6 September 2019 in which he dismissed your client's application in terms of section 18 of the Superior Courts Act 10 of 2013. Your client's latest conduct is therefore in wilful contempt of both court orders."

[61] The letter continues to caution Old Mutual that their conduct is contemptuous, that the second termination of employment notice is unlawful, that the legal advice is baseless in law and that this could not be asserted in good faith.

[62] The 'second lockout' occurred on 9 September 2019 as Old Mutual was making plain that it would not welcome Mr Moyo's return to work.

[63] On 11 September 2019, Bowmans responded that Mr Moyo was not to report for duty and that an urgent application would be launched as soon as reasonably practicable.

[64] On 13 September 2019, Mr Trevor Manuel made remarks about Mr Moyo and referred to Judge Mashile and said:

> "... We are duty bound to appeal that kind of judgment because if you take a board and its responsibility and accountability and you get that overturned by a single individual who happens to wear a robe, I think you have a bit of a difficulty… ."

[65] On 23 September 2019, Mr Moyo was granted a rule 6(5)(e) application in terms of which he sought to introduce the second termination of employment notice dated 21 August 2019 into the contempt application.

[66] On 24 September 2019 Bowmans addressed a letter to Mr Mabuza in which they recorded that they had learned from media interviews given by Mr Moyo that he intended to report for duty on 25 September 2019 and he was cautioned not to do so. Thus it was that on 25 September 2019 a 'third lockout' occurred.

[67] On 27 September 2019, Mr Moyo issued summons against the respondents for reinstatement, alternatively contractual damages, and on 30 September 2019 he launched the delinquency application. Between September 2019 and March 2021, the trial and the delinquency application were certified Commercial Court matters and they were both allocated to Wright J to case manage.

[68] On 15 October 2019, Mr Moyo filed his replying affidavit in the counter application for contempt of court. This elicited a letter from Bowmans to Mr Mabuza dated 18 October 2019 in which Mr Moyo was invited to withdraw and abandon the new ground of complaint and the new evidence sought to be introduced in the

replying affidavit, including all allegations made by Mr Moyo to the effect that Old Mutual had insulted Judge Mashile.[3]

[69] Mr Mabuza responded on 18 October 2019 in which he countered that the statements contained in the replying affidavit did not constitute a new ground of contempt and he asserted that they were merely further substantiation for existing grounds of complaint. He added that Mr Moyo would not be withdrawing any statement in the replying affidavit.

[70] On 4 and 5 December 2019, the section 18(3) appeal of the 6 September 2019 judgment of Judge Mashile was heard and judgment was delivered on 14 January 2020 in terms of which a host of findings were made not least of which was that Judge Mashile's Part A order, although interim in nature, was final in effect. This meant that the application for leave to appeal delivered on 30 July 2019 had suspended the operation of the order of 30 July 2019.

[71] Following thereon, the respondents advertised the post of the CEO. On approximately 20 March 2020, Mr Moyo's consequential urgent application in which he sought an order interdicting Old Mutual from appointing a new CEO, was dismissed.

[72] On 10 April 2020, Mr Moyo launched an application in which he sought the postponement in the delinquency application *sine die* until a date falling after the date of the hearing in the trial (for reinstatement, alternatively contractual damages) and secondly, he sought the consolidation of the contempt and delinquency applications. This application was heard by Malindi J on 17 August 2021 and on 23 August 2021, Malindi J dismissed the application for the postponement and granted the consolidation order.

[73] On 13 September 2021, Old Mutual launched an application to strike out portions of the replying affidavit in the contempt application.

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[3] The specific allegations that Mr Moyo was invited to withdraw are listed in 11 paragraphs of the letter dated 11 October 2019 – CaseLines 008-30 to 008-31.

PROCEDURAL INADEQUACIES

[74] At the commencement of the proceedings the court expressed disquiet on a number of procedural issues. It was placed on record that the court had to prompt the applicant in respect of, amongst other things, the indexing and pagination of the applications and that the directive of Acting Deputy Judge President Victor dated 16 September 2021, had not been followed. Documents were still being filed the week before the hearing and on the morning of the hearing, further correspondence was received. During the hearing of oral argument the court said it had difficulty in dealing with a matter when presented in the manner in which the papers were presented to it.

[75] Mr Mpofu SC, representing Mr Moyo, apologised unreservedly to the court for any part the applicant had in what he labelled the "*confusion*". He made it plain that there were no excuses for any inconvenience caused but explained that the reason for this confusion was in part due to the complexity of the matter and that '*the paper*' was very difficult to manage. He told the court that he would therefore devote the first thirty minutes of the hearing to "*the management of the paper and how the matters fit into one another*". What Mr Mpofu then embarked upon was a summary of the litigation history, most of which is recorded herein. During this leg of his address, Mr Mpofu explained that he would be dealing with the delinquency application and that Mr Ngcukaitobi SC, also representing Mr Moyo, would be dealing with the contempt application. He explained that there was some overlapping which he would unpack. Absent from this part of his address was the distillation of the issues which fell for determination in both the applications.

[76] During Mr Mpofu's argument dealing with the delinquency application, he was asked by the court to clarify whether he relied on the 11 grounds initially formulated in the application or whether Mr Moyo's grounds were limited to what had been labelled 'the big five' grounds. The impression was created that the grounds had been grouped together. What was not distilled as a potential difficulty until Mr Trengove SC, representing the Directors in the delinquency application, had addressed the court, was the status of the grounds falling outside the ambit of the

big five grounds i.e. whether they were substantive self-standing grounds or whether they were only aggravating factors. More about this later.

[77] Mr Mpofu referred the court to sections D and G of Mr Moyo's founding affidavit in the delinquency application and advised the court that he would not be arguing those two issues in this hearing. The two issues were section D: "*the reckless decisions to suspend and subsequently terminate my employment contract*", and section G: "*breaching the Protected Disclosure Act read with the Companies Act*". He made it plain that Mr Moyo was not abandoning those points but simply that they were issues in the upcoming trial and that this court was not to concern itself with such issues.

[78] Mr Trengove during his address, pointed out that Mr Moyo had, in his replying affidavit in the delinquency application, limited the grounds of his application in the following terms:

> "10. Secondly, it matters not, in the present proceedings, whether I was 'guilty' of the alleged conflict of interest or anything else that the respondents accuse me of, which is vehemently denied. **The only issue** is whether the conduct of the respondents in, inter alia:
>
> 10.1 suspending me without a just cause and/or a hearing as to whether I should be suspended (which is common cause);
>
> 10.2 terminating my contract in June 2019 without giving me a hearing, despite having accused me of misconduct, gross misconduct and the like (which is also common cause);
>
> 10.3 purporting to terminate my contract for the second time in August 2019;
>
> 10.4 thrice locking me out of my office in defiance of court orders; and

10.5 associating with and defending an unwarranted attack on the Judiciary (which is also common cause), which resulted in the erosion of shareholder value and serious reputational damage to the Old Mutual brand,satisfies the elements of section 162(5) or not.

I shall refer to the individual categories of the aforesaid conduct as 'the big five', for shorthand and to distinguish them from **the other aggravating factors** which appear from the pleadings." (emphasis provided)

[79] Mr Trengove explained that he would address the first, second and third grounds of 'the big five' grounds and that Mr Marcus SC, who acts for the Directors in the contempt application, would address the fourth and fifth grounds.

[80] During Mr Mpofu's argument in respect of the relief relating to the delinquency application, he recalled two grounds, which were not part of 'the big five', being the 'conflicts of interest' ground and the 'legal fees' ground. These grounds, Mr Trengove argued, had been disavowed by Mr Moyo in his replying affidavit. It was submitted by Mr Trengove that it was improper for Mr Moyo to go back on his word, but Mr Trengove said that he would deal with them nonetheless should this court hold the view that the ambit of Mr Moyo's case had not been limited in his replying affidavit.

[81] During Mr Ngcukaitobi's address, it became apparent that Mr Moyo was persisting with the relief he sought in paragraph 4 of his interlocutory application brought in terms of rule 6(5)(e) of the Uniform Rules of Court. In such application he sought the leave of the court to admit further evidence in the contempt application in the form of the second termination of employment notice dated 21 August 2019 ('the rule 6(5)(e) application'). Paragraph 4 of such application sought a declarator that the respondents were in breach of section 165(3) of the Constitution ('the section 165(3) issue').

[82] Mr Marcus argued that the section 165(3) issue had been abandoned in front of Judge Mashile. Mr Ngcukaitobi argued that the issue was kept alive which he said

was evident from paragraph 29 of the replying affidavit in the contempt application, a document filed after the delivery of the judgment dealing with the interlocutory relief.

[83] Because of these conflicting positions in both the delinquency and the contempt applications (which only became evident during the hearing), this court called for, amongst other things, a post-hearing practice note from the applicant's legal representatives to be filed defining all the issues, which fall for determination. Such request was communicated to the parties after the conclusion of the hearing and on Friday 5 November 2021 in the following terms:[4]

> "Dear All,
>
> At the commencement of the hearing on 3 November 2021, the Judges expressed their dissatisfaction with the manner in which the papers had been prepared including the failure by the applicant to have complied timeously and fully with the directive of Acting Deputy Judge President Victor dated 16 September 2021.
>
> Although the respondents filed a joint practice note, the applicants failed to engage the respondents in the process contemplated in paragraph 120 of the Judge President's revised - 18 September 2020 Consolidated Directive dated 11 June 2021 ('the Directive'). The respondents had defined the issues in paragraph 4 of their practice note dated 20 October 2021. There being no practice note from the applicant, the assumption was thus that the issues had been correctly defined. This assumption was evidently incorrect as further issues were argued not traversed in the heads of argument and disputes arose as to whether or not other issues had been abandoned.
>
> By virtue of the aforegoing, the Judges have directed that the applicant's legal team prepare a note defining the issues requiring determination together with reference/s (both to the hard copy paginated papers and the Caselines numbering) to the relief sought and the affidavits filed together with

[4] The email correspondence was despatched by the Registrar of Judge Opperman. The Senior Judge, Judge Raulinga, had requested Judge Opperman to attend to this task but the note was one sent by the Full Court.

supplementary heads of argument in respect of those issues not addressed in the heads of argument already filed. The supplementary heads of argument are also to deal with paragraph 10 at Caselines 005-7 and should explain why the applicant is not to be limited to those issues in respect of the delinquency application.

The practice note is to define all the issues which fall for determination and the supplementary heads of argument are to be confined strictly to additional issues identified by the applicant in his practice note and not dealt with in the heads of argument already filed.

This is to be done by close of business on 12 November 2021. Should the respondents wish to respond hereto, they are to do so by 19 November 2021.

Kind Regards,

Ms X [registrar's name deleted for purposes of the judgment]

Registrar to the Honourable Madam Justice Opperman"

[84] On Monday 8 November 2021, the Judges added to the request in the following terms:

"The Judges have requested that the parties include, in the supplementary heads of argument to be filed, submissions on the application of the principles applied in *MultiChoice Support Services (Pty)Ltd v Calvin Electronics t/a Batavia Trading and Another* [2021] ZAA 143 (8 October 2021), to the facts of this case."

[85] To this, Mr Baloyi,[5] Mr Moyo's attorney of record at the time, responded as follows:

[5] The letter is signed by Mr Baloyi and we accordingly assume that he authored it. The reference in the letter records that the following individuals at Mabuza Attorneys were dealing with the matter: Mr ET Mabuza, Mr RN Baloyi and Mr T Sibuyi.

"1 We refer to your email correspondence to the parties dated 5 and 8 November 2021, respectively. Kindly pass on this letter to Hon Judge Opperman and copy or distribute it to the other two members of the Full Court, namely Judge Raulinga (Presiding) and Judge Twala.

2. Our client has instructed us to voice his strongest possible objection to the post- hearing process which has gradually developed in the days following the full arguments and total ventilation of the matter over a period of more than 12 hours of hearings, in which all parties duly exhausted the issues and responded to all questions from the Bench in open court and in public.

3. During the hearing, our client, despite all our assurances and those coming from the Bench, gained the distinct impression that there was an effort to assist the case of the respondents, even when the facts and the law stubbornly pointed the other way. Our client's concerns started with the manner of questions and interventions reserved for our client's lead counsel, who were repeatedly questioned, including the unfair and unfounded accusation of making "political speeches", which was correctly withdrawn with an apology only upon the protestation of Mpofu SC. The apology was accepted and that issue is therefore behind us. However, the latest developments have only served to increase and revive his earlier fears of a predetermined outcome and reasonable perception of bias.

4. We are therefore under strict instructions to communicate what is stated hereunder, under the separate topics of the housekeeping issues and the substantive request for supplementary heads, aimed at putting our client's concerns in their proper perspective.

Housekeeping requests

5. Regarding the dissatisfaction expressed at the commencement, the applicant's lead counsel, in his opening address, unreservedly apologised to the court for any share of the blame which resided with the applicant's attorneys. No apology was forthcoming from Old Mutual despite their own

contribution to the situation of the state of the file. The impression was given that the apology was accepted but the issue has now been resuscitated. In order to mitigate any harm, both applicant's lead counsel invested a lot of time in taking the court through the anatomy of the case and providing a written chronology, which was also duly welcomed by the court. As a result, the hearing proceeded with relative smoothness. No related issues were raised during the hearing.

6. It is disputed that there was ever any genuine confusion about the issues raised in the pleadings by the applicant, who instituted the proceedings. It is furthermore not the case that there was ever any genuine dispute about "whether or not other issues had been abandoned". Judge Raulinga, separately and on both days of the hearing, correctly summarised that the convenient categorisation of the so-called Big 5 issues did not entail any alleged "abandonment" of issues. This issue was also repeatedly explained by counsel with reference to the papers. Any proper reading of the applicant's practice note and heads of argument puts the falsity issue of an alleged "abandonment" beyond any question.

7. In the first email from Judge Opperman:

7.1. it is stated that "the applicants (sic) failed to engage the respondents in the process contemplated in paragraph 120 of the Directive of Judge President dated 11 June 2021". It is not clear what the factual basis of this accusation is. Again, an objective reading of the relevant directive will show that it places the burden of holding a pre-hearing conference specifically on all "Counsel for the several Parties" and not on any one party. A copy of the relevant page of the JP's directive is annexed hereto for the sake of convenience and marked "**X**". This issue was never raised in open court so as to ascertain the real reasons for any non-compliance.

7.2. the applicant is further accused of having failed to deliver a practice note. This is completely incorrect. The applicant's practice note in

relation to the delinquency application is contained in the papers at Caselines 006-167 to 006-170. For the sake of completion, we annex hereto a copy thereof marked "**Y**". For emphasis, it may be appropriate to quote verbatim from the operative words of paragraph 14 of the practice note:

"Without abandoning the other pleaded grounds and against the backdrop of five consolidated or main grounds of delinquency, which are the following … [14.1 to 14.5]" (emphasis added).

8. Further reference is made to paragraphs 5 to 7, 15.1 to 15.11 and 16 and 17 of the applicant's heads of argument.

9. It should therefore be abundantly clear that any alleged confusion or false claims of "abandonment" were contrived.

10. Finally and without derogating from any of the above, we seek to register a reminder that Old Mutual's counsel, fully cognisant of the true facts, decided to divide their arguments as follows:

10.1. Adv Marcus SC :

Argued the contempt application plus the grounds of delinquency based on contempt of court (ie Items 4 and 5 of the "Big 5");

10.2. Adv Trengove SC:

Argued the non-contempt grounds of delinquency (ie Items 1 to 3 of the "Big 5")

10.3. Adv Maleka SC :

Argued what he called "the non-Big 5" grounds of delinquency (subsequently referred to as "the small 5")

11. If there was any genuine and honest confusion as to the scope and ambit of the applicant's case, then the rhetorical question would be: What was Adv Maleka SC doing in the matter?

12. The record will show that at the end of the hearing, the only issue raised from the Bench was a request for the respondents to circulate a schedule in respect of the legal advice defence advanced by them in respect of the non-compliance leg of the contempt of court application.

13. In light of the above, it has somewhat come as a surprise that, subsequent to the hearing, the same above issues are being re-raised and all blame is being unjustly piled on the applicant and/or his legal representatives. Be that as it may, new issues of substance have also been raised, to which we now turn.

The substantive issues

14. In spite of the above and on 5 November 2021, we received the email requesting us to file a note "defining the issues requiring determination together with references…". We have done so above in paragraphs 7 to 13 of this letter.

15. In the same email, we were requested to file supplementary heads "in respect of those issues not addressed in the heads of argument already filed". It is not immediately clear what issues are being referred to under this heading. The issues which were argued in court are issues foreshadowed in the parties' respective heads of argument and practice notes. Naturally, the oral reply canvassed issues which arose in the respondents' oral submissions.

16. On 8 November 2021, we received a further request to include in the supplementary heads submissions on the application of the case of *Multichoice v Calvin Electronics*, relied upon by the respondents. This issue was in fact argued fully in oral argument. The short answer to that question is that the case assists the applicant's case, in that it confirms that a court order of reinstatement must first be implemented before any subsequent termination, based on the contract.

Conclusion

17. Despite his abovementioned concerns, which he specifically wishes to be recorded, as we hereby do, our client has agreed that we should still comply with all the various requests made to us subsequent to the hearing.

18. In the process, we will also comply with the request made by the Presiding Judge to give the references of any material cases which were referred to during oral argument but may not appear in the written heads.

19. In the premises, the relevant supplementary heads will be duly furnished on the nominated deadline of 12 November 2021, in the belief that the matter can and will receive the proper consideration of the court, in spite of the circumstances and concerns detailed above.

…"

[86] We did not invite the applicant to convey to us his concerns. We must make it quite plain as to the reason why we are embarking upon this time-consuming exercise of analysing the correspondence and submissions that we received pursuant to our request sent after the conclusion of the hearing: obviously, as part of deciding a matter we must know what the issues are requiring determination. To decide non-issues is not part of a Court's function.[6] The portion of the replying affidavit referred to by Mr Trengove and quoted above conveys that in the delinquency application there were five issues 'only'. That did not tally with the argument presented in court by the applicant's representative, who traversed other issues too, not as aggravating grounds, but in some instances, as substantive self-standing grounds. Whether the section 165(3) point remained a live issue also appeared to be in dispute.

[87] Mindful of the importance of the matter involving senior business leaders in a matter in which there is considerable public interest we thought it wise to get clarity

[6] *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* [2022] ZASCA 51; *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) at para 13 affirmed by the Constitutional Court in *Public Protector v South African Reserve Bank*, 2019 (6) SA 253 (CC) at para 234.

on what it is that we are required to decide. This is what we sought assistance in. In order to facilitate the process of hearing opposed motions and in particular the process of crystallising the issues which are to be adjudicated, paragraph 120 of the Judge President's revised - 18 September 2020 Consolidated Directive dated 11 June 2021 ('the Directive'), provides:

> "120 In any opposed motion or special motion, Counsel for the several Parties must hold a pre-hearing conference and prepare a joint practice note setting out:
>
> a. the relevant factual chronology,
>
> b. common cause facts,
>
> c. issues requiring determination,
>
> d. relevant portions of the papers to be read,
>
> e. whether or not the parties have agreed to forgo an oral hearing,
>
> f. whether supplementary submissions are expected in the event that the matter will be heard on paper,
>
> g. an updated estimate of the duration of the hearing,
>
> h. and other matters relevant for the efficient conduct of the hearing, to present to the Judge seized of the matter.
>
> 121 The joint practice note should be uploaded to the case file on CaseLines and also transmitted by email to the email address designated by the Judge, no later than 5 Court days prior to the hearing date, to the Judge in order to facilitate, where necessary, a pre-hearing conference with the Judge.
>
> 122 At the same time, the parties must upload onto CaseLines an updated index with cross-referencing to the CaseLines page numbers.

...

125 **The Applicant remains dominus litis and is ultimately responsible for the efficient disposal of the application."** (emphasis provided)

[88] Had the practice directive been complied with, the issues requiring determination would have been distilled, alternatively, it would have been clear from the commencement of the proceedings that there was a dispute about the issues which fell for determination and that this court would be called upon to rule on what the issues are.

[89] On 20 October 2021, the respondents, jointly, filed a practice note in which the issues in respect of both the contempt application and the delinquency application were formulated in the following terms:

"4. **THE ISSUES**

4.1. In the contempt application, the main substantive issues to be decided are as follows:

4.1.1. Whether paragraphs 6; 23.4 to 23.6; 47 to 59; 63 to 73 (including Annexures PMC 6 and PMC 8); 75 to 77; 199; 203; 257; 270.4 to 270.7; 270.10 to 270.11; and 276 of the applicant's further replying affidavit, at CL page 011-183, should be struck out;

4.1.2. Whether by declining to allow the applicant to resume his duties, the respondents conducted themselves in contempt of the order of His Lordship Mr Justice Mashile ("Mashile J") on 30 July 2019, and thereby committed contempt of court for non-compliance with a court order;

4.1.3. Whether by making certain public statements, subsequent to the order of Mashile J, the directors committed the offence of scandalising the court;

4.1.4. Whether, in the event that the Court holds that contempt of court is established, a further hearing on the appropriate sanction would be appropriate.

4.2. In the delinquency application, the main issues to be decided in relation to the five grounds are concerned with the same conduct, and are as follows:

4.2.1. Whether by suspending the applicant the directors were guilty of "*gross negligence, wilful misconduct or breach of trust*" within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act;

4.2.2. Whether by terminating the applicant's employment as CEO of Old Mutual in June and August 2019 the directors were guilty of "*gross negligence, wilful misconduct or breach of trust*" within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act;

4.2.3. Whether by declining to allow the applicant to resume his duties after Mashile J granted interim reinstatement on 30 July 2019, the directors were guilty of "*gross negligence, wilful misconduct or breach of trust*" within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act;

4.2.4. Whether in relation to a media briefing held on 13 September 2019 the directors were guilty of "*gross negligence, wilful misconduct or breach of trust*" within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act;

4.2.5. Whether the applicant has properly invoked the provisions of sections 162(5)(c)(i), (ii), (iv)(bb) and 162(5)(d) of the Companies Act; and

4.2.6. Whether the applicant is entitled to introduce new relief for personal costs in terms of section 77(3) of the Companies Act in his heads of argument."

[90] On 23 August 2021 the applicant had filed a practice note in the delinquency application only (the day Malindi J granted the consolidation) in which his representatives defined the issues to be determined as follows:

> "14. Without abandoning the other pleaded grounds, and against the backdrop of five consolidated or main grounds of delinquency, which are the following:
>
> 14.1 Suspending Mr Moyo without a just cause and/or a hearing as to whether he should be suspended;
>
> 14.2 Terminating Mr Moyo's contract in June 2019 without giving him a hearing, despite having accused him of misconduct, gross misconduct and the lie;
>
> 14.3 Purporting to terminate his contract for the second time in August 2019;
>
> 14.4 Thrice locking him out of his office in defiance of court orders; and
>
> 14.5 Associating with and defending an unwarranted attack on the judiciary."

[91] In applicant's counsel's practice note in the delinquency application it is stated in paragraph 13:

> "This application has since been consolidated with the application for contempt brought under the same case number. **A joint or separate practice note will be filed in due course in this regard** in this regard dependent on an anticipated case management meeting before Victor ADJP." (emphasis provided)

[92] No 'joint or separate' practice note as contemplated was filed.[7] No practice note at all, on behalf of Mr Moyo, the applicant, was filed in respect of the contempt

[7] The respondents entitled their practice note a joint one but it was only joint insofar as the various counsel for the respondents had agreed on its contents. The applicants' counsel had not been engaged in the composition of the practice note filed by respondents' counsel.

application set down for hearing on 3 November 2021.[8] Had a practice note been filed on behalf of Mr Moyo in respect of the contempt application, he would, presumably, have identified that he sought substantive relief in respect of the section 165(3) issue.

[93] Mr Mpofu's 30 minute summary of the litigation history during the oral argument, although useful in other respects, cast no light on the issues in dispute in the contempt application (nor the difficulty in relation to the defining of the issues in the delinquency application) and there was no reference to the section 165(3) issue during this part of his address.

[94] Despite our post-hearing request, this court is yet to be provided with a note defining the issues in the contempt application. One would have expected that Mr Moyo would, in view of the apology tendered during the opening address, have been grateful for the opportunity to cure the procedural defects identified. Instead, he instructed his attorney, Mr Baloyi, to "*voice his strongest possible objection to the post hearing process which has gradually developed following the days of the full argument ...* ."

[95] A court is not a litigant. It is not an adversary. It is a neutral decision making body appointed by law to decide disputes.[9] To treat the court as if it were litigating against the applicant could lead to a conclusion of unprofessional conduct. As a result, we did not answer the correspondence. Mr Moyo has not sought any relief in relation to his "strongest possible objection." To the decision of this matter, these accusations against the court are irrelevant.

[96] Mr Baloyi concluded his letter by stating that his client has instructed him to, despite all of these concerns, comply with the various requests made subsequent to the hearing. It should be remembered that what the court required was –

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[8] Mr Baloyi's assertion in para 7.2 of his letter that the applicant failed to deliver a practice note "is completely incorrect', is, in respect of the contempt application, completely correct.
[9] *Four Wheel Drive Accessory Distributors CC v Rattan N.O*. 2019 (3) SA 451 (SCA) at paras [22] and [23].

(a) a note defining the issues requiring determination together with references to the relief sought and the affidavits filed;

(b) supplementary heads in respect of those issues not addressed in the heads of argument already filed;

(c) the supplementary heads were to deal with paragraph 10 of the applicant's replying affidavit in the delinquency application at Caselines 005-6 to 7 and should explain why Mr Moyo is not to be limited to those issues in respect of the delinquency application;

(d) submissions were to be made in respect of the application of the principles in *Multichoice.*

[97] Given the stance adopted by Mr Moyo in the letter dated 10 November 2021 and his assertion that full argument and a total ventilation of the matter had occurred over a period of more than 12 hours of hearings where all the parties had exhausted all the issues and responded to all the questions from the bench in open court and in public, it was rather surprising when a 25 page document was received to deal with 1) those issues not addressed in the heads of argument already filed and 2) the implications of the *Multichoice* case.[10] It is also not insignificant that in respect of the contempt application, the first issue discussed in this 25 page document was the abandonment of the section 165(3) issue.

[98] We find the content of the applicant's attorney's letter particularly disquieting having regard to the subject matter at play in this hearing. As we indicated earlier, conduct of this nature could lead to a conclusion of unprofessional conduct. We intend forwarding this judgment to the Chairperson of the Legal Practice Council for an investigation. We thus leave this in the hands of the Legal Practice Council who has the legislated obligation to conduct an appropriate investigation on receipt of a complaint, which this judgment is. That which is recorded hereinafter does not constitute findings by this court but are observations to be investigated. The conduct includes:

[10] Para 1 of the supplementary submissions.

(a) The reprimand contained in paragraph 2 of the letter – the court is reprimanded for having the impertinence to request clarification on the issues which fall for determination.

(b) The recordal in paragraph 3 of the letter that the request from the court supports an inference that the outcome is predetermined and constitutes a basis for the conclusion of a reasonable perception of bias.

(c) The suggestion in paragraph 5 of the letter that the court ought to have been pacified by the 30-minute address dealing with the '*anatomy of the case*' and that the court's failure to have raised anything at that point in some way debarred the court from raising it after the hearing.

(d) The suggestion in paragraph 6 that the respondents and the court feigned confusion about the issues raised in the pleadings and that both respondents and the court (or certain members of the court) did not consider there to be any genuine dispute about whether or not issues had been abandoned or relegated to a different status. In our view, no inference should have been drawn by the legal representatives from an engagement by the court in the debate with counsel on this aspect. When propositions are put to counsel they are put to assist with crystallising the arguments.

(e) The suggestion in paragraph 6 that Judge Raulinga had ruled on the issue and that any other view was impermissible.

(f) The statement in paragraph 7.2 – There is no practice note in the contempt application filed on behalf of Mr Moyo at all.

(g) The statement in paragraph 7.2 – There is no joint practice note as foreshadowed in the delinquency practice note and no joint practice note as required in terms of paragraph 120 of the Directive, the ultimate responsibility being that of the applicant (paragraph 125 of the Directive).

(h) The accusation of contrivance against the court in paragraph 9.

(i) The rhetorical question posed in paragraph 11 – The heads of argument filed on behalf of Mr Maleka SC made it clear that he was representing the first and second respondents in the delinquency application. It was made plain in his heads of argument that '*the distinct legal existence of the Companies is a fundamental attribute of corporate personality*' and that he was representing the interests of the Companies in the delinquency application. The issues were defined in his heads as they were limited by Mr Moyo in his replying affidavit and as labelled there as 'the big five'. The fact that Mr Maleka's oral address deviated from his heads of argument simply reinforced the conclusion that there was genuine confusion as to the scope and ambit of the applicant's case.

(j) The suggestion in paragraph 12 that the failure by the court to have raised its request at the conclusion of the hearing supports the inference that the confusion about the issues is feigned – the record will show that the court sat until approximately 17h30 on the last day of the hearing and everyone was in a hurry to leave. No inference can be drawn from the court's failure to have asked about it then or at all, particularly having regard to the time of the conclusion of the argument.

(k) The suggestion in paragraph 12 that '*[t]he record will show that at the end of the hearing, the only issue raised from the Bench was a request for the respondents to circulate a schedule in respect of the legal advice defence advanced by them... .*' In section E, paragraph 68 of the applicant's supplementary submissions it is recorded that '*the Presiding Judge also requested the parties to restate the references to cases which were cited during oral argument but may not have been referred to in the various heads of argument*'.

(l) The accusation embodied in paragraph 13 that the court was re-raising the same issues and/or unjustly blaming the applicant and/or his legal representatives.

(m) The suggestion in paragraph 14 that the issues had been defined in paragraphs 7 to 13 of the letter – the contempt application was not dealt with at all. No practice note to date hereof has been filed.

(n) The suggestion in paragraph 16 that the court's request to be furnished with supplementary heads in relation to the application of the case of *Multichoice* relied upon by the respondents, was a waste of time as it was fully argued during oral argument.

(o) The approach and tone adopted in the letter of 10 November 2021.

[99] This court accordingly directs that a copy of this judgment be sent to the Chairperson of the Legal Practice Council for investigation of the conduct of the legal practitioners responsible for the drafting of the letter of 10 November 2021 and matters ancillary thereto.

ISSUES

[100] Having considered all of the above, the issues, which we hold, fall for determination are summarised hereinafter.

[101] In the contempt application we find the issues to be:

(a) Whether the section 165(3) issue in paragraph 4 of the interlocutory application seeking the introduction of further evidence in the contempt application is part of the issues in the contempt application.

(b) Whether paragraphs 6; 23.4 to 23.6; 47 to 59; 63 to 73 (including Annexures PMC 6 and PMC 8); 75 to 77; 199; 203; 257; 270.4 to 270.7; 270.10 to 270.11; and 276 of the applicant's further replying affidavit, at CL page 011-183, should be struck out;

(c) Whether by declining to allow the applicant to resume his duties, the respondents conducted themselves in contempt of the order of Judge Mashile

on 30 July 2019, and thereby committed contempt of court for non-compliance with a court order;

(d) Whether by declining to allow the applicant to resume his duties, the respondents conducted themselves in contempt of the order of Judge Mashile on 6 September 2019, and thereby committed contempt of court for non-compliance with a court order;

(e) Whether by making certain public statements, subsequent to the order of Judge Mashile, the Directors committed the offence of scandalising the court;

(f) Whether, in the event that the court holds that contempt of court is established, a further hearing on the appropriate sanction would be appropriate.

[102] In the delinquency application we find the issues to be:

(a) Whether or not Mr Moyo is to be confined to the issues formulated in paragraph 10 of his reply at Caselines 005-6-7.

(b) Depending on the finding in (a) the issues will either be those formulated in paragraph 10 of Mr Moyo's reply at Caselines 005-6-7 or all 11 grounds relied upon in this founding affidavit and grouped together as the big five in the practice note at Caselines 006-169.

Is the section 165(3) relief part of the contempt application?

[103] In Mr Moyo's notice of motion in his interlocutory application brought in terms of Rule 6(5)(e) of the Uniform Rules, Mr Moyo sought a declaration that the Directors were in breach of section 165(3) of the Constitution which relief was sought on the basis of the second termination.[11]

[104] It is significant that Judge Mashile's Order of 23 September 2019 dealing with the interlocutory application to admit further evidence, does not deal with this relief which was sought in paragraph 4 thereof. He granted an order allowing the further

[11] On 21 August 2019.

affidavit together with the second termination of employment notice and set an expedited timetable in respect of the contempt application. There is no order allowing an amendment of the relief sought by Mr Moyo in the contempt application in terms of which paragraph 4 of the interlocutory application is included as part of the relief to be sought and which should be dealt with in the contempt application. That this was not inadvertent appears from the content of paragraph 24 of Judge Mashile's judgment in which he held:

> "It is not necessary to explore this issue because the parties themselves resolved it when the applicant [Mr Moyo] stated that it (sic) was not persisting in the Court granting the declarator that it (sic) had sought in terms of section 165(3) of the Constitution." (our emphasis)

[105] Judge Mashile, under the heading 'Conclusion', stated:

> "No need exists to consider whether or not to make a declaratory [order] in terms of Section 165(3) of the Constitution."

[106] Although Mr Moyo asserts that his declaratory relief was not abandoned, it is now not open to him to pursue relief, which he told Judge Mashile that he was not persisting in. Mr Moyo has not appealed against the judgment of Judge Mashile. On the contrary, he asserts that Judge Mashile was correct.

[107] The declaratory relief based on section 165(3) of the Constitution was included as substantive relief in an interlocutory application brought in the contempt application. If it was to form part of the substantive issues in the contempt application one would have expected an amendment to the notice of motion in the contempt application to make specific reference to it or, at the very least, a clear reference to the relief and the inclusion of it, in the consolidation application of the contempt and delinquency applications. It is notably lacking.

[108] Finally, the matter was canvassed in the evidence. In paragraph 23 of the founding affidavit in the rule 6(5)(e) application Mr Moyo says the following: '*I do not seek separate substantive relief*'. In their answering affidavit in the contempt

application, following the rule 6(5)(e) application, the Directors summarised the outcome of the judgment by recording that Mr Moyo had abandoned his application for an order that the respondents had acted in breach of section 165(3) of the Constitution. Mr Moyo admitted these allegations and went on to explain that the erstwhile reliance on section 165(3) of the Constitution has been overtaken by events because the court had made a pronouncement that Judge Mashile's Part A order is executable. Mr Moyo said the following about the post-6 September 2019 scenario: '*…the matter therefore now squarely falls under section 165(5) of the Constitution, read with the provisions of the Constitution as a whole, ie including section 165(3).*'

[109] In our view it was not competent to seek substantive relief in respect of the section 165(3) issue in the interlocutory application seeking the introduction of further evidence in the contempt application as, for amongst other reasons, the court had expressly been advised in paragraph 23 of Mr Moyo's affidavit, quoted above, that no separate substantial relief was being sought. Judge Mashile did not deal with such issue as he was expressly advised by the parties not to do so. Judge Mashile did not make an order, which ring-fenced this issue to be part of the contempt application, and this issue was not kept alive beyond the interlocutory application in which judgment was granted on 23 September 2019.

[110] In a final attempt to save reliance on the section 165(3) issue, reference was made by Mr Moyo's counsel to sub-paragraph 5 of *Fakie NO*[12] where the SCA summarised the nature and import of contempt proceedings and had held that a declarator and other appropriate remedies remain available to an applicant on proof on a balance of probabilities. This may be so and no-one quarrels with this general proposition but relief cannot be re-introduced or introduced for the first time, in the absence of an agreement to do so or in the absence of the leave of the Court and an express request to the Court to do so[13] which did not occur in this instance.

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[12] *Fakie NO v CCII Systems (Pty)* (*Fakie*) *Ltd* 2006 (4) SA 326 at para 42.
[13] *Van der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC) at para 122; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (*SARFU*) 2000 (1) SA 1 (CC) at para 150 and *Betlane v Shelly Court CC* 2011 (1) SA 388 (CC) at para 29.

[111] We thus conclude that there is no basis before us on which to entertain this relief as it is not an issue before us.

Is Mr Moyo to be confined to the issues formulated in paragraph 10 of his reply in the delinquency application?

[112] What Mr Moyo failed to deal with adequately or at all in his supplementary submissions, is the content of paragraph 10 of his replying affidavit in the delinquency application in which he limited the issues to 'the big five' for shorthand and '*to distinguish them from the other several aggravating factors which appear from the pleadings*.' In the practice note filed, the issues which fall for determination are listed as the very same 'big five' ring-fenced in Mr Moyo's replying affidavit but now it is prefaced with the qualification '*without abandoning the other pleaded grounds*' which grounds had previously been relegated to '*aggravating factors*' and not substantive independent grounds.

[113] Neither a practice note nor heads of argument can resuscitate relief previously abandoned under oath in an affidavit. Mr Moyo limited the issues in his replying affidavit. It does not avail Mr Moyo to draw attention to the division of work between the three counsel acting for the respondents.

[114] The respondents met Mr Moyo's case as limited in paragraph 10 of the replying affidavit in their heads of argument, which were filed before Mr Moyo's belated main heads of argument in which heads Mr Moyo completely ignored his own abandonment. In paragraphs 15 to 17 of his heads of argument, Mr Moyo sought to rely on eleven causes of action/complaints as eleven separate grounds pleaded in the founding papers. He sought to obfuscate the issue by contending that for the sake of management and without abandoning any of the grounds such grounds were grouped into the so-called big five grounds. The respondents received no prior warning of this change of course even though Mr Moyo had already received the respondents' heads of argument when he prepared his heads of argument.

[115] The big five grounds were divided between Mr Trengove and Mr Marcus and the balance argued by Mr Maleka. The heads of argument filed on behalf of Mr

Maleka made it clear that he was representing the Old Mutual in the delinquency application. It was made plain in his heads of argument that '*the distinct legal existence of the Companies is a fundamental attribute of corporate personality*' and that he was representing the interests of the Companies in the delinquency application. The issues were defined in his heads as they were limited by Mr Moyo in his replying affidavit and as labelled there as 'the big five'. The fact that Mr Maleka's oral address deviated from his heads of argument simply reinforced the conclusion that there was genuine confusion as to the scope and ambit of the applicant's case.

[116] We accordingly find that the issues in the delinquency application were limited to those identified in paragraph 10 of Mr Moyo's replying affidavit in the delinquency application and are:

(a) Whether by suspending the applicant '*without a just cause and/or hearing as to whether he should be suspended*' the Directors were guilty of '*gross negligence, wilful misconduct or breach of trust*' within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act;

(b) Whether by terminating the applicant's employment as CEO of Old Mutual in June 2019, the Directors were guilty of '*gross negligence, wilful misconduct or breach of trust*' within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act;

(c) Whether by terminating the applicant's employment as CEO of Old Mutual in August 2019, the Directors were guilty of '*gross negligence, wilful misconduct or breach of trust*' within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act;

(d) Whether by thrice locking the applicant out of his office '*in defiance of Court orders'* the Directors were guilty of '*gross negligence, wilful misconduct or breach of trust*' within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act;

(e) Whether by associating with and defending an unwarranted attack on the judiciary, the Directors were guilty of '*gross negligence, wilful misconduct or breach of trust*' within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act and Mr Manuel of section 162(5)(c)(i);

(f) The meaning of '*aggravating factors*' within the meaning of section 162(5)(c)(iv)(aa) and the delinquency application and the relevance to the delinquency application.

CONTEMPT

Relevant General Principles

[117] The offence of contempt is a creature of the common law. The common law offence of contempt of court manifests itself in a variety of ways. The offence embraces conduct such as interference with witnesses, disobedience of court orders, failure to attend at court when required to do so, simulating court processes, disrupting court proceedings, anticipating the findings of a court in pending proceedings and scandalising the court. It is for this reason that the Constitutional Court has referred to contempt of court as "*the Proteus of the legal world*".[14] In another recent decision, the Constitutional Court has explained the rationale of the offence as follows:[15]

> "Contempt of court proceedings exist to protect the rule of law and the authority of the Judiciary. As the applicant correctly avers, "the authority of courts and obedience of their orders – the very foundation of a constitutional order founded on the rule of law – depends on public trust and respect for the courts". Any disregard for this Court's order and the judicial process requires this Court to intervene. As enunciated in *Victoria Park Ratepayers' Association*, "contempt jurisdiction, whatever the situation may have been before 27 April 1994, now also involves the vindication of the Constitution".

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[14] *S v Mamabolo (e-tv and others intervening)* (*Mamabolo*) 2001 (3) SA 409 (CC) at para 13.
[15] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (5) SA 327 (CC).

[118] Where committal is sought, contempt of court constitutes a criminal offence.[16] In this respect, all major Commonwealth jurisdictions in the world are *ad idem*.[17]

[119] Given the extraordinary nature of contempt proceedings, and due to the serious consequences of incarceration, our Courts have held that committal for contempt for non-compliance with Court orders should only be engaged as a matter of last resort.[18] This position is consistent with the position taken on the issue by Lord Omrod, in *Ansah v Ansah*:[19]

> "Such a breach or breaches of an injunction in the circumstances of such a case as this do not justify the making of a committal order, suspended or otherwise. Breach of such an order is, perhaps unfortunately, called contempt of court, the conventional remedy for which is a summons for committal. But the real purpose of bringing the matter back to the court, in most cases, is not so much to punish the disobedience, as to secure compliance with the order in the future. It will often be wiser to bring the matter before the court again for further direction before applying for committal order. Committal orders are remedies of last resort."

[120] In *Dezius*,[20] the Pretoria High Court held as follows:

> "An offender should not be deprived of his liberty except in accordance with the precepts of fundamental justice and in compliance with procedural safeguards. The public sanction of imprisonment for disobedience of a court order requires conclusive proof. It is, therefore, imperative that before a committal order is issued the court should scrutinise the facts with great care."

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[16] *Jayiya v MEC for Welfare, Eastern Cape Provincial Government and Another* 2004 (2) SA 611 (SCA) at para 18; *S v Beyers* 1968 (3) SA 70 (A) at 80A-B; *Butchart v Butchart* 1996 (2) SA 581 (W) at 586C; *Höltz v Douglas & Associates* (OFS) CC En Andere 1991 (2) SA 797 (O) at 802; *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC) at para 22, fn 51; and *Mamabolo* above fn 14 at para 20.

[17] See, for example, *Comet Products UK Ltd v. Hawkex Plastics Ltd* [1971] 1 All ER 1141 (CA) at 1143**;** *Hinch and Macquarie Broadcasting Holdings Limited v Attorney-General for the State of Victoria* (1987) 164 CLR 15 at 49; and *Videotron Ltée v Industries Microlec Produits Électroniques Inc*(1992) 96 DLR (4th) 376.

[18] *Dezius v Dezius* 2006 (6) SA 395 (T) at para 5.

[19] *Ansah v Ansah* [1977] 2 All ER 638 (CA) at 643A-C.

[20] *Dezius* above fn 18 at para 6.

[121] We are charged to scrutinise the facts. The question is, which facts and where are they to be sourced? This brings us to the striking application.

The striking application

[122] The respondents applied to strike out certain portions of the supplementary replying affidavit in which the applicant sought to introduce Mr Manuel's comments at the press conference held on 13 September 2019.

[123] The basis for this application was threefold, being that (a) a case cannot be made out in reply for the first time;[21] (b) Mr Moyo never applied for the admission of the new evidence as part of his founding affidavit; and (c) regardless of the application to strike out this court should not have regard to inadmissible evidence.

[124] In ordinary civil litigation when new matter is introduced in the replying affidavit, the overriding consideration would ordinarily be prejudice.[22] However, the litigation in question is essentially criminal in nature (and thus not ordinary) and in our view it is highly inappropriate to introduce what is effectively a "fresh charge" in reply. The applicant had previously applied for the introduction of new evidence to his contempt application. Why this procedure could not be followed again in respect of the new matter which was introduced in reply escapes us.

[125] In our view, it was for the applicant to place admissible evidence before the court and in the absence of doing so, to persuade this court why new matter should be permitted in the replying affidavit. The fact that the respondents have 'pleaded over', does not avail the applicant. It is inappropriate to introduce new allegations in the reply without the sanction of the court in circumstances where the incarceration of persons is sought.

[126] The applicant contended that it was for the respondents to apply for condonation for late filing of the application to strike out inadmissible evidence. The implication of such an argument is that in the absence of condonation being granted, the inadmissible evidence would be admissible. This proposition need merely be

[21] See the authorities quoted in footnote 13 hereof.
[22] *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) at para 28.

stated to be rejected. A court cannot have regard to inadmissible evidence.[23] For this principle to hold, a striking out application is not essential, although it can serve the purpose of highlighting inadmissible evidence. It was certainly not essential for the respondents to apply for the condonation for the late filing of the striking out application in order for the court to take cognisance of the principle that inadmissible evidence is inadmissible. We think, rather, that it was for the applicant to apply to court to allow new evidence introduced in the replying affidavit, to be received. This did not occur.

[127] The Constitutional Court has held that holding litigants to these procedural rules is not pedantry,[24] that it is an element of the rule of law. The fact that the respondents pleaded over does not avail the applicant in its argument that no prejudice exists. The respondents were obliged to do so and could not rely exclusively on a successful striking application. A factor weighing heavily against the admission of the new evidence in reply is the lack of particularity and precision in the formulation of the complaints in relation to the contempt.

[128] Mr Moyo takes the view in his heads of argument that "*it is not reasonably practicable to separate out each instance or manifestation of the crime*". He alleges further that "*any permutation of incidents of contempt of court result in between two and up to seven counts of contempt of court*", but "*at best they will be regarded as aggravation*". The solution to this self-created imprecision in Mr Moyo's pleadings is to leave it all to "*the discretion of the court*". The range between two and seven counts is considerable, and material.

[129] This approach is untenable, particularly in the context of proceedings of a criminal nature. In the context of pleading in trials, it has been said that –

[23] See *SARFU* above fn 21 at para 105.
[24] *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng and Others* (*Ubogu*) 2018 (2) SA 365 (CC) at para 57.

*"*the plaintiff is certainly not entitled to plead a jumble of facts and force the second defendant to sort them judiciously and fit them together in an attempt to determine the real basis of the claim*".*[25]

[130] Given the criminal context of the contempt proceedings, we hold the view that the same principle should apply here and we should not admit the new evidence in reply.

[131] In our view, each director is entitled to know the case against them. They should not be left to speculate about it. In the context of an ordinary criminal prosecution, the courts have emphasised this entitlement.[26] It is also necessary because in criminal law there is no scope for vicarious liability.[27] Of crucial importance in this regard is that the applicant ought not be permitted to make out a new case in reply. This is particularly so in the criminal context.

[132] Under circumstances where the applicant is seeking multiple respondents' incarceration, it is extraordinary that Mr Moyo would leave a jumble of facts in place and merely state that the court can decide.[28] The "*object of an indictment*" is to inform an alleged contemnor, in "*clear and unmistakable language what the charge is or what the charges are that he has to meet"*. The charge "*must not be framed in such a way that an accused person has to guess or puzzle out by piecing sections of the indictment or portions of sections together what the real charge is… .*"[29]

[133] The respondents clearly had no option but to define the issues in respect of the contempt application in their practice note in vague generalities (contrary to what it should be) as follows:

4.1.3 "Whether by making certain public statements, subsequent to the order of Mashile J, the directors committed the offence of scandalising the Court."

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[25] *Roberts v Construction Co Ltd v Dominion Earth Works (Pty) Ltd and Another* 1968 (3) SA 255 (A) at 263A-B.
[26] *S v Hugo* 1976 (4) SA 536 (A) at 540E-F.
[27] Save in exceptional statutory exceptions.
[28] Paragraph 5 of the applicant's additional heads of argument for contempt of court – Caselines 006-395.
[29] *R v Alexander and others* 1936 AD 445 at 457; *S v Rosenthal* 1980 (1) SA 65 (A) at 89F.

[134] The respondents and the court are called upon to guess what the charges are and to piece sections together. In addition, some pieces of the puzzle are changed and are slotted in elsewhere. The following is stated in the heads of argument for Mr Moyo:

> 18. "We can now turn to the analysis of the facts. It is worth noting that the contempt application is premised on three elements. First, the failure of Old Mutual to comply with the order of 30 July 2019. Second, Old Mutual's decision to prohibit the Applicant from resuming his employment after the Court order of 6 September 2019. Thirdly, the campaign embarked upon by Senior Executives and members of the Board of Old Mutual in the media to insult the Court and tarnish the reputation of the Applicant.
>
> 19. All of these elements are fully pleaded in the Replying Affidavit. What is not pleaded, naturally, are facts that came to light after the Replying Affidavit was filed. In particular, Mr Trevor Manuel's remarks at the press conference, amplified at Radio 702 were not pleaded simply on account of the fact that they only occurred after the Replying Affidavit was prepared and filed.
>
> 20. It is crucial to note that the remarks of Mr Manuel do not primarily constitute a new cause of action. They are a factual elaboration on an existing cause of action, which is referred to as "*certain disturbing utterances*" which "*shed light on its attitude and conduct towards the judgment*". These utterances made it clear that Old Mutual would adopt a defiant and contemptuous attitude towards the judgment. Mr Manuel's remarks were evidently incendiary and direct. But they were part of a pattern of defiance against the judgment, which pattern had been pleaded upfront in the founding papers."

[135] It is unclear whether Mr Manuel's statements are to be viewed as a new cause of action or simply as '*a factual elaboration on an existing cause of action*'. The qualification that it is not 'primarily' a new cause of action is not helpful. The question is: Is it a new of cause of action or is it not? Neither the respondents nor the court should have to guess about what the 'charges' are. It is further completely unacceptable to leave it to the court to decide whether it will found a new cause of

action or whether it will be considered as aggravation and then for this decision by the court to be kept secret from the respondents only to be revealed to the respondents in the judgment following the hearing and then to potentially follow such finding with incarceration.

[136] The applicant extended the following invitation to the court in paragraph 6 of his additional heads of argument in the contempt proceedings: '*Issues of the academic categorisation and arrangement of the offence(s) will be left to the discretion of the Court, if raised*'.

[137] In our view whether it is to be viewed as a separate cause of action or as aggravation is not a mere matter of academic classification. As the Constitutional Court observed, the principle of legal certainty is an element of the rule of law:

> "Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty, which is an element of the rule of law, one of the values on which our Constitution is founded".[30]

[138] To allow the facts in the applicant's further replying affidavit identified in the striking out application to stand, would result in the addition of more facts to an already jumbled case and place both the respondents and the court in a position where they have to sort out the facts judiciously to identify the charges. Such a process goes against the root of fairness. An accused person must know the charges against them in order to have a fair opportunity to mount their defences. The stakes could not be higher. Deprivation of liberty is the ultimate sanction which our system recognises. In such circumstances, the charges should, at a bare minimum, be clear.

[139] For all these reasons we will adjudicate the contempt application without reference to Mr Manuel's utterances at the media briefing on 13 September 2019.

Grounds 4 and 5 of the big five - The overlap between the delinquency and contempt applications

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[30] *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) at para 114.

[140] The instances of contempt relied upon in the delinquency and contempt applications overlap to a limited extent. Both applications rely on the three “lockouts” that occurred on 31 July 2019, 9 September 2019 and 25 September 2019 as establishing, on the one hand, contempt of court and on the other hand, acts of delinquency of directors justifying their removal from office.

[141] The second area of potential overlap concerns the comments made by Mr Manuel at the press conference on 13 September 2019. We have found that it is not admissible in the contempt application (we will grant an order to strike those portions of the supplementary replying affidavit). Whilst there are these overlaps, we are conscious of the fact that there are distinct evidential and substantive differences and each application must be adjudicated independently.

Acting on Legal Advice

[142] Mr Marcus addressed this feature first because, so the argument ran, he contended that each one of the lockouts was lawful. However, even if they are found to be unlawful but are a product of good faith legal advice, that would be the end of the matter. In our view, this approach is sound as the reliance on good faith legal advice may negative the inference of *mala fides.*

[143] The *Maccsand* [31] case has a striking resemblance to the case that serves before this Court presently and as such it is useful to unpack the facts which served before the Supreme Court of Appeal (‘A’). Maccsand was involved in sand mining over an area in respect of which there was a land claim. The affected community obtained an interim interdict against Maccsand from continuing with its mining operations pending finalisation of the land claim. There was an application for the variation of the interdict. It was refused. The company brought an application for leave to appeal which was opposed on the basis that the interim interdict was not appealable and the A held that although the interdict was interim, it was final in effect. The issue was whether the company was in contempt of the interim interdict. The point that was raised by the directors is exactly the same one being raised by

[31] *Maccsand CC v Macassar Land Claims Committee and Others* [2005] 2 All SA 469 (SCA).

the directors in this case, being that they lodged an appeal, which had the effect of suspending the order. The Court said at paragraph [26]:

"*Maccsand* acted on legal advice that the notice of appeal suspended the order and accordingly did not intentionally disobey the interim interdict. The advice was certainly not unreasonable… ."

[144] In this case, the respondents state in their further answering affidavit[32] the following:

> "As regards the period immediately following the order granted on 30 July 2019 ('the 30 July Order') the Respondents genuinely and in good faith believed, on the strength of legal advice given to them, that despite being couched as temporary or interim, the 30 July order had final effect in important respects, and that it was not interlocutory in the sense contemplated in section 18(2) of the Superior Courts Act. Consequently the Respondents genuinely believed, on the strength of legal advice in which they had confidence, that the Order was suspended as a matter of law.
>
> 8.1 The Respondents also believed, and were advised, when the section 18 proceedings were brought, that in the prevailing circumstances they could not reasonably be required to allocate the duties as chief executive officer ('CEO') to Mr Moyo while the Court considered these matters in urgent proceedings which the Respondents themselves had initiated to resolve them. The Respondents' attitude was clearly one of a desire to respect the Court's authority, and not to disregard its orders.
>
> 8.2 Furthermore, the Respondents respectfully submit, and they have been advised, that they were in any event entitled during this period to discharge their obligations under the 30 July order, and in turn their obligations under the contract of employment that was temporarily

[32] Para 8, CaseLines 011-124.

reinstated by that order, in a lawful manner that was least inimical to the interests of the Companies.

8.3 In this regard it is submitted, and the Respondents have been advised, that they were in any event entitled to discharge those obligations by paying Mr Moyo what was due to him under the contract, and were entitled to choose not to accept his tender of services, or to require him to work, or to place him in full executive authority, during the period of interim reinstatement. Since Mr Moyo had already been paid (and had accepted) his usual remuneration for the period ending mid-December 2019, the Companies were not in breach of their primary obligations under the contract of employment. It followed, on the legal advice given to the Respondents, that there was in any event no conduct that was in breach of the terms of the 30 July order (which temporarily reinstated the contract of employment) and there can be no contempt."

[145] In our view, and applying the *Plascon-Evans*[33] rule, this cannot be refuted as being "*fictitious or palpably uncreditworthy.*"[34] The requirement that the directors acted both deliberately and *mala fide* have not been established. Both requirements are essential. In *Fakie NO*, Cameron JA (as he then was) explained the nature of the fourth requirement for contempt as follows:

> "The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)."[35]

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[33] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C.
[34] *Fakie* above fn 12 at para 62.
[35] Id at para 9.

[146] Mr Ngcukaitobi argued that this paragraph in *Fakie* NO is not to be taken out of context and that the starting point should be the principles summarised in paragraph [42] of such judgment which provides:

> "(1) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
>
> (2) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.
>
> (3) In particular the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.
>
> (4) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt."

[147] This court is entitled to have regard to the source of the legal advice. In *S v Gibson*[36] the court rejected the contention that the accused had acted recklessly after he had acted on legal advice from a firm of attorneys described in the judgment "*as highly experienced in the field of law relating to the press*". The same holds true in this case. The source of the advice in this case is spelled out. The undisputed evidence in this regard is that the lead attorney advising the board on these questions was Mr Chris Todd who has more than 20 years' experience as a partner in the firm of attorneys that has advised the respondents throughout. He has specialised in employment law and has led the employment law practice in that firm for many years. He has advised numerous boards facing similar situations over a

[36] 1979 (4) SA 115 (D) at 131-132.

period of many years and he has had a number of reported judgments arising from two periods serving as an Acting Judge of the Labour Court. Mr Todd consulted extensively and on an ongoing basis with other senior lawyers in the firm and, from time to time, with reputed senior counsel whose views he considered in advising the respondents.[37] None of this is disputed in the replying affidavit but of course applying the *Plascon-Evans* rule their say so, unless found to be fictitious or palpably uncreditworthy, should carry the day.

[148] The threshold for rejecting legal advice as a defence is high. Under what circumstances can a court conclude that the advice was unreasonable? The applicant postulates the following test in his heads of argument in which he states that:

> "This defence cannot succeed because:
>
> 83.1
>
> 83.2 It is impossible that any properly qualified lawyer, acting professionally, could offer such incorrect advice… ."[38]

[149] This test is of course incorrect if one compares it to Justice Cameron's test quoted hereinbefore, see too *Noel Lancaster Sands (Edms) Bpk v Theron en Andere.*[39]

[150] A position advanced but not persisted with by the applicant was that it is no defence in contempt proceedings for a party to plead that he acted under legal advice. For this proposition reliance was placed on the decision of *Lepelle Industrial*

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[37] Para 73 CaseLines 011-144.
[38] CaseLInes 006-159.
[39] 1974 (3) SA 688 (T) at 692E-G:
"Unreasonabless of conduct *per se* does not mean the absence of *bona fides*. There are degrees of unreasonableness and it may well happen that a respondent's conduct was so conspicuously and blatantly unreasonable that the court would be prepared to reject as false on those grounds the respondent's statement that his conduct was *bona fide*… ." – From the headnote – text is in Afrikaans.

& Mining Suppliers CC v Streaks Ahead Investment (Pty) Ltd.[40] This case is not of assistance because legal advice in that case was not heeded.

[151] We thus conclude that by locking Mr Moyo out on three separate occasions the respondents did not defy court orders as alleged as they acted pursuant to legal advice received which version cannot be labelled either fictitious or palpably uncreditworthy.

[152] Crucially, the enquiry is not whether the advice was correct or incorrect, but whether the reliance on it was sufficient to negative an inference of *mala fides*. We find that no inference of *mala fides* can be drawn. It is not insignificant that a Full Court of this Division in the section 18(3) appeal endorsed the correctness of the advice relied upon. Under such circumstances, we find that the advice was certainly not unreasonable and the criticism in the heads of argument that '*it is impossible that any properly qualified lawyer, acting professionally, could offer such incorrect advice*', clearly misplaced.

[153] We thus conclude that each one of the lockouts was the product of good faith legal advice. In view of such finding, we need not consider the legality of the lockouts but do so nonetheless.

The Legality of the First Lockout

[154] The first lockout is linked to the first termination (23 May 2019). The second and third lockouts occurred after the second termination (21 August 2019) and accordingly the legality is dependent on the legality of the second termination.

[155] Mr Moyo contends that Judge Mashile's Part A order entitled him to be physically reinstated as the CEO of Old Mutual and that Old Mutual had the obligation to allow him to resume his duties as the CEO. Old Mutual and its directors contend that properly interpreted, the court order reinstated Mr Moyo's contract and did not order Old Mutual to do anything to ensure that the contract of employment was reinstated.

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[40] [2016] ZAGPPHC 1072.

[156] Mr Ngcukaitobi who argued this leg of the application on behalf of Mr Moyo submitted that the judgment underpinning Judge Mashile's Part A order makes it clear that Mr Moyo should be allowed to resume his duties. He drew this court's attention to a Constitutional Court judgment, which recently referred to the "modern approach" which applies to the interpretation of court orders. This approach prescribed that interpretation should not be undertaken in:

> "… [D]iscrete stages but as a unitary exercise in which the court seeks to ascertain the meaning of a provision in the light of the document as a whole and in the context of admissible background material. This principle applies to the interpretation of court orders, as decisions of this Court make plain."[41]

[157] We were also referred to the principle that, in interpreting a court's order, regard could be had to the court's subsequent judgment on an application for leave to appeal:

> "… A court order is made for particular reasons and for particular purposes, and although these may be discerned from the order itself, greater light is shed on them by the judgment."[42]

[158] Mr Ngcukaitobi argued that it is, however, not necessary to consider the subsequent judgment as the court had made it clear what it had in mind when it granted the reinstatement order:

"SUITABILITY OF REINSTATEMENT

65. In this regard, I need to point out that it is trite that each case must be assessed on its own merits. The Respondents contended that specific performance was not the most suitable in this situation especially because, if reinstated, the Applicant and the Board will have to work together to advance the interests of the Respondents. I do not think that this contention has a firm ground and I say so because if either party does not work to promote the interest of the Respondents, it

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[41] *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance and Others* [2021] ZACC 30; 2022 (1) BCLR 1 (CC) at para 12.
[42] Id at para 13.

will be immediately obvious. That could attract numerous forms of redress. In the case of the Applicant, it might in fact lead to justifiable dismissal."

[159] The respondents contend that Judge Mashile's Part A order reinstated Mr Moyo's contract of employment and that the words "*is temporarily reinstated*" which is in the present tense, supports such an interpretation. Mr Moyo contends that Judge Mashile's Part A order is clear and unambiguous as it reinstates Mr Moyo. The words "*reinstated in his position*" is supportive of this interpretation, so the argument goes. This construction is reinforced by the content of paragraph 3 of Judge Mashile's Part A order in that the respondents are interdicted from appointing any other person into the position of CEO of Old Mutual. It was argued that the only sensible interpretation of such order is that the contract was reinstated and Mr Moyo was entitled and obliged to take back the reins of the company.

[160] The dispute between the parties, according to Mr Ngcukaitobi, is thus not whether or not the contract of employment was to be reinstated, but whether or not Mr Moyo was entitled and obliged to resume his duties.

[161] Mr Ngcukaitobi made two points in respect of the quoted paragraph 65 of the judgment arguing that it envisages the parties working together and that if they do not work together, there would be consequences. But his most forceful point was that such paragraph clearly envisaged actual physical return to the workplace.

[162] Finally, Mr Ngcukaitobi referred to the leave to appeal judgment and drew particular attention to paragraphs 20 and 21 where Judge Mashile had quite squarely addressed Mr Moyo's predicament having been "*effectually physically prohibited and evicted from his office"*. Judge Mashile had addressed the issue of irreparable harm in the context of Mr Moyo having to stay at home regardless of whether or not he was paid for doing so. This, he argued, unambiguously, pointed to an intention that Mr Moyo was, in terms of the court order, entitled to be actually, physically, re-instated.

[163] In our view, a finding of what Judge Mashile's Part A order actually meant, can only take the matter so far. He may well have intended for Mr Moyo to be

actually and physically re-instated. In our view, the real questions are a) whether his order is reasonably capable of two interpretations; and b) even if the order is not capable of two constructions, was it reasonable to have relied on advice that although the order was interim, it was final in effect and that the filing of a notice of application for leave to appeal would suspend the order? The question posed in b) has been answered.[43] We deal with a) hereinafter.

[164] We will, for purposes of this judgement, assume that Judge Mashile intended that Mr Moyo be actually and physically re-instated and we will also assume that he was wrong in ordering that (which we have to do as we are bound by the Appeal Court's pronouncements on this front).

[165] The only question which then falls for determination is whether Judge Mashile's Part A order can reasonably be construed to mean that physical re-instatement is not necessary?

[166] In the proceedings before Mashile J, Mr Moyo unequivocally abandoned any reliance on the Labour Relations Act. His cause of action was purely contractual.[44] This is crucial because at common law, and in a purely contractual setting, reinstatement means reinstatement of the contract but there is no obligation on the employer to provide the employee with actual work.[45] Mr McLeod in the respondents' answering affidavit says the following:[46]

> "7.4 It is submitted that Old Mutual is not obliged, either in terms of the judgment or as a general matter of law, to receive Mr Moyo into active service or to require or allow him to carry out any of the functions contemplated by his employment contract. While Mr Moyo may be obliged to tender his services, Old Mutual is not obliged to accept that tender or to make use of his services.

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[43] Under the rubric 'Acting on Legal Advice'.
[44] *Old Mutual Limited and Others v Moyo and Another* [2020] ZAGPJHC 1 at paras 51 and 59.
[45] *Consolidated Frame Cotton Corporation Ltd v President of the Industrial Court and Others; Consolidated Woolwashing and Processing Mills Ltd v President of the Industrial Court and Others* 1986 (3) SA 786 (A) at 798 – 799. See too *Solidarity and Another v Public Health and Welfare Sectoral Bargaining Council and Others* 2014 (5) SA 59 (SCA) at para 11; *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* 2009 (1) SA 390 (CC) at para 54.
[46] Caselines 001-86 to 87.

Old Mutual's obligation is restricted to remunerating Mr Moyo as a *quid pro quo* for his tendering his services.

7.5 As a matter of fact (and this Mr Moyo has omitted to state in his affidavit), he is being paid by Old Mutual. Having given Mr Moyo six months' notice of the termination of his contract, Old Mutual has paid him the equivalent of six months' salary in advance. Mr Moyo has accepted that payment, and has never tendered to reimburse Old Mutual in that amount – his statement is wholly at variance with his claim to have rejected Old Mutual's alleged repudiation of his contract. In a nutshell, Mr Moyo wants to have his cake and eat it too."

[167] Mr Moyo's subsequent conduct was at variance with his professed understanding of Judge Mashile's Part A order. If he were entitled to be re-instated and to perform his duties one would have expected him to tender return of the 6-month notice payment he had received in advance. He did not. He thus approbated and reprobated as the saying goes. This is relevant for current purposes insofar as it lends credence to the interpretation given to the order by the respondents.

[168] Mr Moyo relied very heavily on the judgment of *NUMSA v Hendor.*[47] Having regard to the unequivocal abandonment of any reliance on the Labour Relations Act, the common law position in a purely contractual setting which is supported by two SCA judgments and a Constitutional Court judgment.[48] It cannot be concluded, and we do not conclude, that an alternative interpretation of Judge Mashile's Part A order was unreasonable.

[169] Much was made of the legal position advanced by Mr Maenetje SC who represented Old Mutual in the urgent hearing on 18 and 19 July 2019. It was argued that the legal position he put forward in open court is at variance with the legal advice which Old Mutual now suggests it received. It is thus important to set out the

[47] *National Union of Metalworkers of South Africa and Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd* [2017] ZACC 9; [2017] 6 BLLR 539 (CC) at 22 and 23.
[48] Id at fn 42.

facts relating to this exchange and we quote from Mr Moyo's replying affidavit in the striking application:

> "102 Argument proceeded on 18 July 2019 until approximately 1.00 pm. At approximately 2.00 pm, when the matter resumed, the judge suggested to my senior counsel that the parties should explore a settlement. In doing so, the judge said "*the main thing you are here is because you think procedure is not followed. Am I right*?" Mr Mpofu confirmed that that was one of the issues.
>
> 103. After a further exchange with the judge, Mr Mpofu explained: "*If, for argument sake, remember even if it is the judgment, if your lordship reinstates him, let us say, all we were saying is that then Old Mutual will still, will have three options. One, they will say okay welcome back and then continue working. Right. The second option is where ...they can come back and say okay now we are going to rightfully and properly invoke clause 24.1.1."*
>
> 104. In response, the Honourable judge stated: "*no but the secret is that he is first reinstated."* Mr Mpofu confirmed that he will first be reinstated.
>
> 105. Mr Mpofu further made it clear that the catch is that I [Mr Moyo] would still reserve the rights to argue that even a so-called no-fault dismissal is actually a ruse, in other words to still rely on the PDA ground even if the contractual ground could no longer be sustained as postulated by the Honourable judge.
>
> 106. Mr Maenetje then responded. It is crucial to note his response because it has been deliberately excluded by Old Mutual in its answering affidavit, a matter relevant to the scale of costs. Mr Maenetje stated: '*I will take the court's invitations to my client but there is just one variation where we do not fully agree with our learned friend where he submits that the option to give a six months' notice is available even if this court were to reinstate by a court order, that is, it is one of, okay because they, once they ...*"
>
> 107. The court then intervened.

108. Mr Maenetje continued: "*Ja, because once the court reinstates by a court order in terms of the notice of motion, that will be reinstatement pending the outcome of Part B, so the option to get six months' notice in between would be in conflict with the court order."*

109. Mr Maenetje further emphasised his position that in the absence of a court order, then Old Mutual would not be entitled to terminate the contract unless the parties agree, and the agreement is made an order of court.

110. As if this was not enough, later in the proceedings, Mr Maenetje stated as follows: "*And in substantiating that argument my learned friend says if you reinstate him nothing will bar Old Mutual from giving him a notice of termination under section, Clause 24.1.1, to terminate his contract because they are entitled to do so.*

But the first problem with that submission is that the form of relief that is sought in Part A would in fact prevent Old Mutual from exercising that termination right until Part B is determined because at paragraph 2 of Part A for relief that is sought is that pending a hearing and determination of the relief set out in Part B hereunder this court hereby grants an order temporarily reinstating the applicant.

So the applicant is temporarily reinstated until the outcome of Part B. Old Mutual cannot go back exercising the same right which is the subject matter of this litigation and give him notice on the first day of the reinstatement it will be acting completely in conflict with the court order because the reinstatement will be by a court order, that is what operates, not the contract, the court order says you are going back until Part B is determined." (emphasis that of Mr Moyo)

[170] It is important to recognise that this exchange occurred *before* Judge Mashile's Part A order was granted.

[171] Once judgment was delivered, paragraph 65 dealt expressly with the position if the parties were not to work together and contemplated a '*justifiable dismissal*'.

[172] Three constructions of Judge Mashile's Part A order appear to have crystallised:

(a) Mr Maenetje's submissions to the court being that once there was an order in terms of Part A, that position could not be changed until Part B of the application were heard which construction was articulated prior to the order being granted and during a debate in court ('Construction 1').

(b) Mr Moyo's position, which was that he was to be re-instated as CEO and thereafter any contractual rights available to either Mr Moyo or Old Mutual could be exercised, which position was articulated in correspondence and in this court ('Construction 2').

(c) The respondents' position which was that Judge Mashile's Part A order simply reinstated Mr Moyo's contract of employment at common law and that Old Mutual was not obliged to make use of Mr Moyo's services, a position also articulated in correspondence and in this court ('Construction 3').

[173] The fact that Construction 1 is at variance with Construction 3 is totally irrelevant. No-one, not even Mr Moyo, argued that it was the correct construction of what Judge Mashile's Part A order ultimately meant. It was a view expressed prior to the order being made. Further, counsel's submissions to a court cannot be elevated to advice to their client. In our view, such a contention misconceives the function of an advocate in advancing submissions to a court. Advocates advance arguments[49]. This does not necessarily reflect their legal advice to their clients.

[174] It was also argued, most strenuously, that the defence of legal advice had not been invoked properly. Relying on *HEG Consulting Enterprises (Pty) Ltd v Siegwart*,[50] it was submitted that the defence requires a proper setting out of the circumstances under which the advice was given. Relying on *S v Abrahams*,[51] it was

[49] Advocates have a host of ethical obligations to adhere to on this front including to not mislead the Court. That is, however, not in issue here. What is in issue is whether the argument advanced to Court constituted legal advice.
[50] 2000 (1) SA 507 (C) at 522B.
[51] 1983 (1) SA 137 (A) at 146E-H. Mr Moyo also emphasised the *dicta* in *R v Meischke's (Pty) Ltd and Another* 1948 (3) SA 704 at 711.

argued that the respondents were obliged to satisfy the court that the advice was given on a full and true statement of the facts. All of which, so the argument ran, was not done.

[175] The undisputed evidence in this regard is that the lead attorney advising the board on these questions was Mr Todd who has advised the respondents throughout. In that capacity he would have read every piece of correspondence that came in, would have been involved in the settling of responses, taking of instructions, briefing of counsel and drafting and settling of affidavits. We fail to comprehend how it can be suggested that he did not have the full statement of facts available to him. The circumstances under which the advice was given is plain for all to see. This is not a situation where advice is sought from a legal practitioner and the 'accused' then goes off to implement it elsewhere and when charged with a criminal offence he puts up the defence of legal advice. It is clear why a court would, under such circumstances, want to scrutinise the full set of facts and circumstances which were presented to the legal practitioner and to compare that to what the accused is charged with doing so as to ascertain whether that on which the accused alleges he sought advice, corresponds with the conduct the legal practitioner approved.

[176] The situation under consideration is totally different. This court has all the affidavits, court orders and pieces of correspondence necessary to determine that question. This court knows exactly on what facts Mr Todd advised Old Mutual and the directors - 1) the interpretation of Judge Mashile's Part A order and judgment (and everything filed before and after that order); and 2) whether the filing of an application for leave to appeal would suspend the operation of such order, whatever its meaning.

[177] After the conclusion of the hearing, this court requested Mr Marcus to provide a schedule incorporating all references to legal advice. We are most indebted to him and his junior for providing all such references as they appear in the delinquency application, the contempt application, the striking application and the rule 6(5)(e) answering affidavit. The references were most usefully categorised under 4 rubrics being '*Acting on legal advice generally*'; '*Legal advice on the effect of noting an*

appeal'; '*Legal advice on requirements of reinstatement*'; and '*Advice on the legality and effect of the second termination*'.[52]

[178] Having considered all of the aforegoing, including the references in the schedule, we conclude that as regards the period immediately following Judge Mashile's Part A order, the respondents genuinely and in good faith believed, on the strength of legal advice given to them: a) that despite being couched as temporary, such order had final effect and that by reason of that characteristic the order was suspended as a matter of law; b) that when the section 18(1) application was brought, the respondents could not reasonably have been required to allocate the duties of CEO to Mr Moyo while the court considered such matters in urgent proceedings which the respondents themselves had initiated and in which they had sought confirmation that their understanding was correct and if not, for the suspension of Judge Mashile's Part A order; and c) that they were entitled under Judge Mashile's Part A order to discharge their obligations under the employment contract that was temporarily reinstated by paying Mr Moyo what was due to him under the contract and were entitled to choose not to accept his tender of services or to require him to work, or to place him in full executive authority during the period of interim reinstatement.

[179] As regards the period following the second termination of employment notice, we conclude that the respondents genuinely and in good faith believed on the strength of legal advice given to them that Mr Moyo's contract of employment was lawfully terminated by the second termination of employment notice on the basis of, amongst other reasons, what was specifically contemplated by the judgment of Mashile J.

[180] We also find that the applicant does not pass the test formulated in the *Noel Lancaster Sands* matter, which is even if the conduct is to be held to be unreasonable, it must also be shown not to be *bona fide*. Obtained as it was from legal representatives of experience and expertise and from members of the bar who have the advantage of being independent, the legal advice was *bona fide* accepted.

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[52] This document was uploaded onto Caselines at 006-484.

We thus find that there was no unlawfulness and thus there was no contempt, alternatively we find that reliance on the legal advice negatives *mala fides*.

The legality of the second and third lockouts

[181] These issues turn on the legality of the second termination. The second termination was competent in law. As a matter of law there is no difficulty in issuing a second termination even where a first termination is under contestation.[53] The law does not require a party in such a position to remain supine until the contest in relation to the first termination is over. A second, potentially better, termination notice is competent.

[182] The *Multichoice* judgment and the principles distilled therein, requires some discussion. In *Multichoice*, the appellant terminated the services of the respondent on a first occasion. It was subsequently ordered to reinstate the respondent on an interim basis, pending the determination of final relief, in due course. The appellant however decided to terminate the respondent's services on a second occasion, well before the determination of final relief. It did so on the basis that evidence of fraud on the part of the respondent had come to light in the interim. The respondent then launched an application against the appellant in the High Court for contempt for non-compliance with the order of the court granted against the appellant on an interim basis, in relation to the first termination. The respondent was successful before Phatudi J. The order of Phatudi J was, however, overturned on appeal. The reason the appeal succeeded was because the order in respect of which the respondent sought to hold the appellant in contempt, pertained to the first termination as opposed to the second, and the second termination was made on the basis of new facts that the appellant had discovered after the date of the court order.

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[53] See *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A). See too *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at para 28; *Government of RSA v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA) at para 9; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at para 166; *Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers* 2004 (1) SA 538 (SCA) at para 15; *Multichoice Support Services (Pty) Ltd v Calvin Electronics t/a Batavia Trading and Another* [2021] ZASCA 143 at paras 22 and 23, the effect of which is that a court order (especially one granted erroneously) cannot preclude a party exercising its contractual rights. This possibility was foreshadowed in Judge Mashile's judgment at para 65 when he held, "*... if either party does not work to promote the interest of the respondents, it will be immediately obvious. That could attract numerous forms of redress. In the case of the applicant, it might in fact lead to justifiable dismissal.*"

[183] The distinction between the current facts and the facts in the *Mutichoice* case relied upon by Mr Moyo is that after the first order in *Multichoice*, the appellant had restored the respondent's access to its systems. It was after that restoration of access that the fraud was discovered. The SCA held that the appellant was entitled to exercise its contractual rights and that the termination following the second termination was sound.

[184] Mr Moyo contended that the respondents could only refuse to take him back into service after they had succeeded in their appeal before the Appeal Court. They argue that before then, it was always contemptuous to refuse to comply with Judge Mashile's Part A order which meant that the respondents were obliged to accept his services.

[185] The respondents contended that *Multichoice* was on all fours with this case. This is so, the argument ran, because a) it was authority for the proposition that the respondents in the present matter could exercise its contractual rights in accordance with clause 24.1.1 of the contract of employment after Judge Mashiles's Part A order (i.e. in future) which is what they did (as submitted by Mr Marcus in the supplementary heads of argument); and b) the Appeal Court's order setting aside Judge Mashile's Part A order had the effect that it was deemed never to have been made (as submitted by Mr Maleka in the supplementary submissions).

[186] The legal position in respect of b) above extracted from *Multichoice* and as formulated by Mr Maleka in Old Mutual's supplementary submissions which we summarise, is the following: Judge Mashile's Part A order is the foundation of everything that follows.[54] If this interim reinstatement order is held to be wrong in law by a court, then the 6 September 2019 judgment is not legally sustainable. This is so, the argument ran, because *Multichoice* held that orders granted in consequence of legally untenable orders, have no independent existence. The Appeal Court held that Judge Mashile's Part A order ought not to have been granted.[55] The consequence of the Appeal Court's finding was summarised as follows by Lamont J in a subsequent judgment dealing with Mr Moyo's urgent application to revive the

[54] *Multichoice* above fn 53 at para 12.
[55] At para 104.

interim reinstatement order pending his application for leave to appeal to the Supreme Court of Appeal:

> "The consequence of the appeal court order is that there is no interim order interdicting any conduct on the part of the first respondent and that there is deemed never to have been any such order by reason of the fact that the appeal court order is the original order."[56]

Mr Maleka thus submitted in his supplementary heads of argument that the aforegoing principle/s applied to the current facts results in Judge Mashile's Part A order '*[being] deemed never to have been any order by reason of the fact that the appeal court order is the original order*', Judge Mashile's Part A order '*is null and void and subsequent orders based thereon are legally untenable*.'[57]

[187] We don't agree that such an extensive interpretation as suggested by Mr Maleka is entirely correct. We don't agree that a court must ignore transgressions of orders when they were of full force and effect just because they subsequently are found by a higher court to be legally untenable, nor that such transgressions are immediately erased upon delivery of a judgment setting aside the initial order. That might well then constitute a transgression of the *Tasima*[58] principle as argued by Mr Mpofu during the hearing. As correctly pointed out by Mr Marcus in his supplementary heads of argument, nothing in the *Multichoice* judgment so much as begins to suggest that court orders need not be complied with or that they may permissibly be ignored.

[188] What was dealt with in the authorities cited by Mr Maleka on this issue was the revival of interim orders, which were not subsequently confirmed by the filing of an application for leave to appeal. In *MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd*,[59] Harms, JA (speaking on behalf of a full unanimous Court) held as follows:

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[56] *Moyo v Old Mutual Limited and others* [2020] JOL 46822 (GJ) at para 15.
[57] Para 11 of Old Mutual's supplementary submissions.
[58] *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at paras 185-187.
[59] 2000 (4) SA 746 (SCA) at para 6.

“It is convenient at the outset to say something about the judgment of Selikowitz J. The *ratio* of the decision was based on *SAB Lines (Pty) Ltd v Cape Tex Engineering Works (Pty) Ltd* 1968 (2) SA 535 (C), where Corbett J had held that the granting of i*nterim* relief as an adjunct to a rule *nisi* is to provide protection to a litigant pending a full investigation of the matter by the court of first instance**. Once that interim order is discharged, it cannot be revived by the noting of an appeal.** This approach was and still is generally accepted as correct. Dissenting views were, however, expressed in *Du Randt v Du Randt* 1992 (3) SA 281 (E) and *Interkaap Ferreira Busdiens (Pty) Ltd v Chairman*, *National Transport Commission, and Others* 1997 (4) SA 687 (T). The essence of these judgments was that Corbett J had failed to have regard to the common-law rule as received by our Courts that an appeal suspends the execution - **or, in the words of Rule 49(11), the operation and execution - of an order** (cf *Reid and Another v Godart and Another* 1938 AD 511). Unfortunately, the criticism was based upon a misunderstanding of the concept of suspension of execution. For instance, an order of absolution from the instance or dismissal of a claim or application is not suspended pending an appeal, simply because there is nothing that can operate or upon which execution can be levied. **Where an interim order is not confirmed, irrespective of the wording used, the application is effectively dismissed and there is likewise nothing that can be suspended. An interim order has no independent existence but is conditional upon confirmation by the same Court (albeit not the same Judge) in the same proceedings after having heard the other side** (*Chrome Circuit Audiotronics (Pty) Ltd v Recoton European Holdings Inc and Another* 2000 (2) SA 188 (W) at 190B - C). **Any other conclusion gives rise to an unacceptable anomaly:** If an applicant applies for an *interim* order with notice and the application is dismissed, he has **no** order pending the appeal; on the other hand, the applicant who applies without notice and obtains an *ex parte* order coupled with a rule *nisi* and whose application is eventually dismissed, has an order pending the appeal.” (emphasis provided)

[189] It is the conditionality of the interim order on the final decision that is the reason why the noting of an appeal does not revive the interim order once the final decision is made and is subjected to appeal. The interim order has, for purposes of determining the position of the parties pending appeal, been '*erased*' by the final order. In *National Director of Public Prosecutions v Rautenbach*,[60] Nugent JA referred to the *MV Snow Delta* matter with approval and restated the underlying principle being that a litigant:

> "… who secures such an order [*ex parte*] is not better positioned when the order is reconsidered on the return day… It follows that when an appeal is sought to be brought against the discharge of such an order there is nothing to revive for it is as if no order were made in the first place."

[190] We therefore conclude that the parties were obliged, as submitted on behalf of Mr Moyo, to comply with Judge Mashile's Part A order (albeit that it was subsequently held to be incorrect) until the Appeal Court judgment set it aside and as Mr Marcus argued, subject to the lawfulness of the second termination or the respondents' successful reliance on legal advice pertaining to the effect of the noting of an appeal in respect of Judge Mashile's Part A order i.e. the advice relied upon in respect of whether such order was final in effect or not.

[191] We conclude that the second termination was lawful but even if such finding is incorrect, the legal advice given in respect thereof was reasonable. The applicant argued that the Court's finding on the Protected Disclosures Act 26 of 2000 as amended ('the PDA') precluded a second termination. This is unsustainable for three reasons, the first being that Judge Mashile's Part A order (judgment) envisaged a second termination. Secondly, to read the judgment as precluding a second termination would constitute a strained interpretation as the order is an interim one and it envisages a second termination in its express terms. If that were the interpretation, it would mean the order should be construed to be a final and perpetual interdict. And then finally, the Appeal Court in the section 18 appeal had held that the PDA had nothing to do with the interim interdict.

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[60] 2005 (4) SA 603 (SCA) at para 12.

The Original Seven Statements

[192] The contempt application was introduced by way of a counter application which identified seven statements and no others. The founding affidavit does not attempt to identify what species of contempt is relied upon.

[193] First statement - statement by Mr Baloyi. It is said that eNCA quoted Mr Paul Baloyi, one of the board members, speaking on behalf of the board as having said that:

> "We are [at] liberty to proceed and if we need to and we are going to get a new CEO. We are allowed to do that under the current circumstances. We are proceeding as an organisation, we will get a new CEO in spite of the judgment that has happened because in terms of the law and as advised following the appeal, we are allowed to proceed to get a new CEO."

[194] This statement is quoted and nothing more is said.

[195] Second statement - the interview given by Mr Baloyi to CNBC. A full transcript of the interview is annexed to the founding affidavit but the founding affidavit does not identify any basis on which the content of such transcript constitutes contempt.

[196] Third statement - the article quoting Ms Moholi in City Press on 8 August 2019. This has fallen away as the applicant is no longer proceeding against Ms Moholi.

[197] Fourth statement - a single sentence in a City Press article is relied upon. This too is a statement made by Ms Moholi against whom the applicant is no longer proceeding, but this similarly does not identify the basis of contempt, Ms Moholi having stated that the loss of faith in Mr Moyo was his own doing.

[198] Fifth statement - this is an article in the Business Maverick. Mr Moyo does not quote a particular passage, which he relies upon and the complaint seems to be one of repeating arguments that had been rejected by the court. This article deals with the appeal and reflects Old Mutual's stance in the appeal. Mr Moyo seems to

contend that it is objectionable to repeat the arguments that were rejected by the court of first instance in the context of an appeal. As the appeal was pending at such stage, we see nothing improper in doing so.

[199] Sixth statement - the letter to stakeholders. The complaint concerns a statement that "*business will continue as usual*" and the failure to mention the application for leave to appeal. Why this is contemptuous is not indicated in the founding affidavit.

[200] Seventh statement - the article in City Press on 11 August 2019. The complaint appears to be that Old Mutual repeated its "*narrative that I [Mr Moyo] am guilty of a conflict of interest*" which is injurious to his reputation and which is allegedly in conflict with the findings of the court. This is Old Mutual's stance in the dispute. It appears that Mr Moyo conflates two issues, such issues being that he feels aggrieved by the criticisms and the portrayal of him as a violator of corporate governance principles and he feels aggrieved by the fact that the respondents should air their views publicly. Thus he complains about the injury to his reputation that he is portrayed as the violator of corporate governance principles. That has nothing to do with contempt. If that is his complaint, he has remedies. He seems to conflate that with a presentation of an opposing view in interim litigation, which he characterises as contempt. In our view, the expression of opposing views in contested interim litigation does not constitute contempt and does not form the basis of a contempt application.

Mr Manuel's comments for the Delinquency Application

[201] It should be remembered that we have found that Mr Manuel's comments features squarely before the court in relation to the delinquency application but not for purposes of the contempt application where we have found that such allegations fall to be struck.

[202] However, we deal with it under the main rubric of 'Contempt' in the event of it being found that we ought not to have struck the new matter from the replying

affidavit and because it might form part of number 5 of the big five grounds in the delinquency application.

[203] It was conceded that the leading case in respect of this issue is *S v Mamabolo.*[61] The facts briefly in that case were the following. Mr Mamabolo was the spokesperson for the Department of Correctional Services. He believed that the leader of the Afrikaner Weerstandsbeweging (AWB), Mr Eugene Terreblanche had been wrongly released on bail by Justice Els and issued a media statement voicing that disagreement and was called to appear before Justice Els where he was found guilty of contempt of court by scandalising.

[204] The Constitutional Court had to give consideration to the scope of the crime of scandalising the court and stressed in paragraph 24 of the judgment:

> "In the second place it is important to keep in mind that it is not the self-esteem, feelings or dignity of any judicial officer, or even the reputation, status or standing of a particular court that is sought to be protected, **but the moral authority of the judicial process**… ." (emphasis provided)

[205] The purpose of the continued offence of contempt by scandalising is to protect the administration of justice. The test is a high one and it is to be found in paragraph 45 of the judgment:

> "In any event and moreover, now that we do have the benefit of a constitutional environment in which all law is to be interpreted and applied, there can be little doubt that the test for scandalising, namely that one has to ask what the likely consequence of the utterance was, will not lightly result in a finding that the crime of scandalising the court has been committed. Having regard to the founding constitutional values of human dignity, freedom and equality, and more pertinently the emphasis on accountability, responsiveness and openness in government, the scope for a conviction on this particular charge must be narrow indeed if the right to freedom of expression is afforded its appropriate protection. The threshold for a conviction on a charge of scandalising the court

[61] *Mamabolo* above fn 14.

is now even higher than before the superimposition of constitutional values on common law principles; and prosecutions are likely to be instituted only in clear cases of impeachment of judicial integrity. It is a public injury, not a private delict; and its sole aim is to preserve the capacity of the judiciary to fulfil its role under the Constitution. Scandalising the court is not concerned with the self-esteem, or even the reputation, of judges as individuals, although that does not mean that conduct or language targeting specific individual judicial officers is immune. Ultimately the test is whether the offending conduct, viewed contextually, really was likely to damage the administration of justice." (footnotes omitted)

[206] The Court further provided that when applying the test, owing to the fact that the variety of circumstances that could arise is infinite, each case would have to be judged in the context of its own peculiar circumstances: what was said or done; what its meaning and import were or were likely to have been understood to be; who the author was; when and where it happened; to whom it was directed; at whom or what was it aimed; what triggered the action; what the underlying motivating factors were; who witnessed it; what effect, if any, it had on such audience; and what the consequences were or were likely to have been.[62]

[207] It is also worth noting some of the observations of Sachs J in his concurring judgment. Significantly he held:

"It is easy to guarantee freedom of speech when it is relatively innocuous. The time when it requires constitutional protection is precisely when it hurts. The justification for punishing mere speech, however unfair, inaccurate or offensive it may be, when it does not directly threaten to disrupt, pressurize or prejudice ongoing litigation, must be compelling indeed.[63]"

[208] It is important to note that the Constitutional Court found that the scope for conviction on a charge of this nature would be narrow. It is useful to bear in mind some of the criticism concerning *Mamabolo* when applying the test. It serves as a

[62] Id at para 46.
[63] Id at para 67.

reminder that, despite the Constitutional Court determining that there is still a necessity for this crime in our constitutional democracy, a narrow approach should be adopted when weighing the possibility of conviction against the constitutional values of accountability and openness.[64]

[209] Dario Milo *et al* observe in an academic commentary:

> "… Kriegler J and Sachs J's decisions must be welcomed for their recognition that citizens have the right to engage in robust criticism of the judiciary, and for striking a more appropriate balance between freedom of expression and the administration of justice than had previously been the case under the common law. But in our opinion both judgments should have taken matters further. The crime of scandalising constitutes a severe restriction on free speech, precisely because speech concerning the judiciary is a quintessential illustration of political speech. As has been argued above, political speech rightly receives extensive protection in our democracy. The crime of scandalising is in principle analogous to the crime of sedition; just as this crime is wholly incompatible with a commitment to freedom of expression, so too is the very existence of a crime of scandalising. Although Kriegler J's reinterpretation of the crime, and his repeated observations that it is now to be narrowly construed, provide solace, the crime nevertheless remains in force, and the vagaries of its *actus reus* will inevitably portend an undesirable chilling effect on freedom of expression. Thus, even the strict threshold test set out in the North American jurisprudence and effectively adopted by Sachs J, does not go far enough in protecting freedom of speech in this context. South Africa's history is replete with examples of how the sanction of contempt was employed by the apartheid state to stifle academic and media criticism. The very existence of the crime of scandalising played a role in maintaining the hegemony of apartheid. This history should give pause to the proposition endorsed in *Mamabolo* that the sanction is necessary, even if only in egregious cases. In any event, the fear that the administration of justice will be threatened by overly robust and ill-considered criticism is probably exaggerated. In the words of Cory JA of the Ontario Court of Appeal, 'the courts are bound to be the subject of comment and criticism. Not all will be sweetly

[64] This is ultimately the conclusion reached and emphasised by the Court in *Mamabolo*.

reasoned. . .But the courts are not fragile flowers that will wither in the heat of controversy.'"[65]

[210] There have only been a handful of convictions for scandalising the court post-*Mamabolo*. Amongst the most notable is *S v Bresler & Another*[66] which serves as a helpful example of the degree of egregiousness a statement should accord with in order to satisfy the test. In *Bresler* the accused had mounted a vehement racist attack on the Magistrate (who was a coloured man) after his daughter was convicted of a traffic offence. The accused stated that the Magistrate was unqualified, insane and incompetent. He went on to state that the Magistrate, whose appointment was a product of affirmative action, applied "bush law". He demanded that any Judicial Officer presiding over his daughter's appeal should undergo one of the four notorious race detector tests to confirm they were white. As directed in *Mamabolo*, Satchwell J considered the context within which the accused carried out his actions.[67] In finding the accused guilty of scandalising the Court, Satchwell J concluded:

> "Your publications certainly 'target a particular judicial officer, . . . [in] such an unwarranted and substantial a character as seriously and unjustifiably to impede that judicial officer in being able to carry on with his or her judicial functions with appropriate dignity and respect' (*per* Sachs J in para [75] of *Mamabolo*). In addition Mr Bresler, you have insulted every officer of every court, whatever our colour, whatever the pigmentation of our skin, whatever our ethnic origin or cultural background. You have vilified every member of the magistracy and the Judiciary, whether appointed before or after the 1996 Constitution. You have maligned all the courts of this country and those who serve in them. You have attacked the very basis of the administration of justice and the right of all members of this society to trust therein and rely thereupon. Your assault upon the basis of appointment of all judicial officers, the competence and skill of a group of judicial officers and indeed the sanity of one individual magistrate coupled with your conclusions as to the resulting state of anarchy and chaos call upon South Africans and others who seek

[65] S Woolman, M Bishop (Ed), D Milo, G Penfold, A Stein (authors), *Constitutional Law of South Africa* (CLOSA), Jutastat e-Publications, 2nd Edition, Chapter 42.9(c)(iv)(aa), pages 132-133.
[66] 2002 (2) SACR 18 (C).
[67] *Mamabolo* above fn 14 at para 46.

> justice in our courts to abandon all faith therein and hope thereof. You have challenged a constitutional dispensation which relies upon the independence, impartiality, dignity and effectiveness of the court You have sought to undermine one of the foundations of democracy of this country."[68]

[211] Mr Bresler's comments not only reflected adversely on the integrity of the judicial process and its officers but, when viewed contextually, was likely to bring the administration of justice into disrepute, these utterances fall into the narrow category of egregious cases where the crime could be committed.

[212] Comparisons were drawn between this case and the case of Mr Zuma.[69] In our view these cases are very different. The 21-page letter which Mr Zuma wrote to the Constitutional Court was made available to this Court. This letter was essentially the foundation for Justice Khampepe's findings in relation to the egregious attacks on the legal system and on the administration of justice. Mr Zuma had adopted a boycott strategy. He refused to participate in the first two constitutional cases dealing with legality. He didn't even put up submissions on the issue of sanction when he was invited to do so. What he did do was direct a 21-page letter to the Chief Justice. He told the court, that he had been told, that the production of his letter in response to a directive by the court to file an affidavit, was unprecedented. He thus addressed the letter against legal advice. He accused the Constitutional Court of improper and unlawful motives and the "*request for submissions was nothing but a stratagem to clothe its decision with some legitimacy [the Constitutional Court].*" Mr Zuma accused the Constitutional Court of pre-judgment and he accused every single Judge of the Constitutional Court of being disobedient to the Constitution itself and their oaths of office. Mr Zuma also accused the Constitutional Court of advancing a political motive.

[213] In our view, the facts at hand are markedly different to the facts, which presented themselves before the Constitutional Court in the matter of Mr Zuma. In reply Mr Ngcukaitobi was at pains to explain that the only reason a comparison was

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[68] *Bresler* above fn 66 at 36I–37D.
[69] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (5) SA 327 (CC).

drawn was because of the parallels in non-compliance and the seniority of the speaker, Mr Manuel being a former Minister of Finance.

[214] Mr Moyo seeks to focus attention on a single statement made by Mr Manuel at the media conference of 13 September 2019. Mr Manuel said the following:

> "... We are duty bound to appeal that kind of judgment, because if you take a board and its responsibility and accountability, and you get that overturned by a single individual who happens to wear a robe, I think you have a bit of a difficulty."

[215] This statement cannot be detached from its context. Mr Moyo claims that Mr Manuel stated, supposedly in exclamation of Old Mutual's supposed apparent defiance of the court order of Judge Mashile:

> "We cannot allow a situation where the decision of 14 board members can be overturned by a single individual just because he is wearing a robe."

[216] Mr Moyo presented this as a direct quotation of Mr Manuel's actual words. Reference to the relevant part of the transcription of the media conference indicates that a journalist had asked Mr Manuel whether all the court cases between Old Mutual and Mr Moyo had to be settled before Old Mutual could appoint another CEO. Mr Manuel answered this question as follows:

> "It's rather a strange situation. I'm saying the [Companies] Act is abundantly clear on the responsibilities of directors. And one of the responsibilities that a board has is to appoint the [chief] executive and the judge takes that responsibility away from us, and it's an odd thing in the context of company law ... We are duty bound to appeal that kind of judgment because if you take a board and its responsibility and accountability and you get that overturned by a single individual who happens to wear a robe, I think you have a bit of a difficulty. We must put that matter up on appeal; but until then, I think we are unfortunately hamstrung by the judgment because it will be kind of in your

face to proceed in the face of this. We have been very careful to be compliant with the judgment, but we also are very clear about our rights ..."

[217] What is readily apparent is that Mr Manuel did not say what Mr Moyo claimed he had said. In our view, the context demonstrates that Mr Manuel's statement did not imply disrespect for the Judiciary. Quite the opposite. Mr Manuel in fact prefaced his statement that the respondents had to respect Judge Mashile's judgment despite their disagreement with it and that in their view it was contrary to their obligations under the Companies Act.

[218] Earlier in the press conference Mr Manuel said, amongst other things, the following:

"And as you would be aware, Judge Brian Mashile, the Honourable, handed down judgment on the 29th of July. We ... applied for leave to appeal on the same day. And one week ago, today, he granted that leave to appeal. So his judgment is subject to appeal, not ignored, it's subject to appeal… .

And I've heard people say 'but we are ignoring the courts and we have no respect for the rule of law.' We have respect for the rule of law and the rights that it creates for parties in a matter and that's what we are doing… .

And that victory last Friday in being granted leave to appeal is fundamental to us because we believe that we are afforded an opportunity to put the record straight…

One thing we are abundantly clear about is that we've got to see the legal process through to its conclusion… .

I think we look at the appeal opportunity with a great deal of confidence… .

... I think that unanimously the Board would be of the view that, that judgment is so bad for the company and company law that we have an interest in ensuring that it is overturned on appeal. That is not something we can walk away from. It's a corporate responsibility we all have as the stakeholders in Old Mutual...

> [T]hat judgment creates a massive headache in the corporate governance space… .
>
> We have an interest in ensuring that it is overturned on appeal. We can't stop that process... We didn't want to go to court. We were taken to court and we must defend the interests that we are required to represent, as a fiduciary responsibility to Old Mutual."

[219] Mr Ngcukaitobi conceded quite readily that courts should be robust about criticism. He submitted that the ultimate question in this case is whether when one reads the statements of Mr Manuel, does one get the impression that this is *bona fide* criticism or does one get the impression that it is an intentional insult to the dignity and the reputation of the courts? Mr Ngcukaitobi submitted that one should be conscious of the fact that Mr Manuel made the statement that Judge Mashile was a man in a robe with the knowledge that Mr Manuel fully appreciates that this robe is not worn by accident - that it is worn by qualification, experience and examination before the Judicial Services Commission and that Judges do their work by virtue of the Constitution of this country. He argued that the only plausible inference to be drawn from the statement that he is 'a man with a robe', is that it was intended to be pejorative in the context of why Mr Manuel was explaining the judgment will not be implemented. He emphasised that Mr Manuel is not an ordinary litigant; that he is the chairperson of one of the largest listed companies in the country; he is a former minister in the Presidency; he is a former Minister of Finance.

[220] Mr Ngcukaitobi argued that the two apologies which followed the statement do not impact on the finding of contempt but if anything, are mitigatory. He asked whether one could ascribe to this a legitimate judicial question, one which posits that the judgment is wrong, one which embraces a criticism that the Judge misinterpreted the law and an intention to ask an Appeal Court to find differently, or does one read this as being intentionally pejorative, as an intentional insult and as an attempt to undermine the integrity of Judge Mashile and, by extension, the integrity of the Judiciary? Mr Ngcukaitobi argued that these types of comments should not be tolerated and that no context can justify these utterances. This, he submitted, is particularly so in the climate of today where Judges are under enormous pressure. In

his very compelling argument he submitted that words matter; that every time the judiciary tolerates insults, a layer of judicial protection is removed. Of course, as general propositions these submissions cannot be faulted.

[221] In our view however, the passages highlighted hereinbefore, including the one on which Mr Moyo relies, demonstrate that Mr Manuel was of the view that the judgment of Judge Mashile was wrong; far from ignoring the judgment, it was the subject of a pending appeal which he hoped would (and, in due course, in fact did), correct the errors in the judgment of Judge Mashile. Mr Manuel and the board had respect for the rule of law and were placing their faith in the pending appeal. Mr Manuel and the board ensured compliance with the judgment of Judge Mashile but were exercising their right to have it overturned.

[222] In our view, the specific remark which Mr Manuel made may have been worded injudiciously and was certainly inappropriately made, but its context demonstrates that it was not intended as an affront or an indication that the respondents did not intend to abide by Judge Mashile's order, rather they were putting their faith in the appeal process. This is a far cry from what Mr Zuma's 21-page letter conveyed, a complete rejection of the Court's authority combined with an accusation of having hidden 'political' motives. There is no hint in Mr Manuel's comment that Mashile J was anything more than humanly fallible and that he had indeed made a mistake which would be rectified on appeal.

[223] After Mr Manuel's answer, a reporter asked him to withdraw the use of "*an individual who happens to wear a robe*" in reference to the court. Mr Manuel agreed and withdrew the statement. On 17 September 2019, Mr Manuel issued a formal apology for the remark. That apology is unreserved. Mr Manuel stated:

> "My unguarded observation, although withdrawn, has understandably caused disquiet, for which I apologise unreservedly, to the Honourable Judge and to my fellow South Africans. It was never my intention to show disrespect to the Learned Judge of his judgment. I accept that my language was wholly inappropriate to express my disagreement with the decision and sincerely regret the manner in which I did so. My respect of the judiciary is unshaken

> and rooted in our sound legal process where all voices are heard with remedies available to address differences of legal position. I support the board of Old Mutual's efforts to make full use of the appeal process available to Old Mutual to state its case before the full court of the Gauteng Local Division of the High Court. I remain fully committed to the integrity of the judiciary, and to the constitutional value of the independence of the judiciary."

[224] It cannot be said that Mr Manuel's comment, whilst distasteful, not adequately respectfully phrased and smacked of arrogance and discourtesy, went far enough to attain the level of seriousness required to convict on the offence of scandalising the court. The subsequent apologies reflected an acknowledgement that he had overstepped the mark, but we find that the crime of scandalising the court has not been committed. In the context of all that has been described hereinbefore, it is unlikely to have threatened the judicial integrity and to have brought the administration of justice into disrepute. When one considers the cases where conviction did result, the utterances in question implied a lack of impartiality, bias or even corruption on the part of the Judge or Judiciary with the language used being highly offensive and racist. With his comment, Mr Manuel seems to be implying that a Judge is simply an individual and, despite being a Judge, is not infallible. One could argue that it falls within the ambit of robust, sometimes harsh criticism that the Judiciary is quite capable of withstanding, as described by Sachs J in *Mamabolo*.

[225] Importantly, it is necessary, as directed by the court in *Mamabolo*, to consider the consequences of the offending statement. In this instance, Mr Manuel experienced much backlash with many publications considering his comment to be highly disrespectful. Furthermore, Mr Manuel has since retracted the comment and issued an unqualified apology to both the Judge and fellow South Africans. Thus the consequences suggest that the public's perception of the Judiciary (which the crime of scandalising seeks to protect) is very much intact with many members of the public lambasting Mr Manuel. Given the events that unfolded since the statement was made, it cannot be said that the administration of justice was brought into disrepute or that the integrity of the Judiciary was impeached.

[226] In our view, the implication is that Mr Manuel was not insulting Judge Mashile (which is not the test in terms of *Mamabolo*), and was not bringing the administration of justice into disrepute or undermining the integrity of the courts (which is the test). He was not indicating that the respondents were in any way intending to evade Judge Mashile's order, they were going to appeal it. There is no reasonable basis on which to deduce that Mr Manuel intended to scandalise the court or to act contemptuously.

[227] In our view, this conduct meets neither the threshold of contempt nor the threshold of delinquency.[70] An "*unfortunate fall from grace*"[71] does not qualify.

[228] Comparing the facts of this case to those in *Mamabolo*, it is clear that, just like Mr Mamabolo, Mr Manuel considered the judgment appealable. Unlike Mr Mamabolo, Mr Manuel made clear his respect for the judicial process, unlike Mr Mamabolo who got the law wrong, Mr Manuel was subsequently proved right by a Full Court of this Division and, unlike Mr Mamabolo, Mr Manuel apologised.

Liability of every director

[229] The question, which falls for determination is how one holds every director liable for the utterances of Mr Manuel. It was not competent to do so for a number of reasons, including that the comment was retracted by Mr Manuel, unreservedly, and he apologised, secondly, only four other directors apart from Mr Manuel were even present at the press conference and there is no factual or legal basis pleaded to establish collective liability. The reliance on the doctrine of common purpose by Mr Mpofu during argument is unsustainable as this was neither pleaded nor proven. The doctrine of common purpose does not absolve Mr Moyo from showing liability or proving liability in respect of each and every individual.[72]

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[70] Delinquency is dealt with hereinafter.
[71] *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA) at para 143.
[72] *S v Thebus* 2003 (6) SA 505 (CC) at para 49.

[230] Mr Ngcukaitobi disavowed any reliance on the doctrine of common purpose during his address in reply. He relied on a principle distilled from *S v Oliviera*[73] and argued that a director of a company who, with knowledge of an order against the company, is instrumental in causing such order to be disobeyed, is equally guilty of contempt of court.

[231] Having found no contempt, we do not consider it necessary to explore this feature further.

DIRECTORS - DELINQUENCY

[232] Mr Trengove argued that even if we were to find the directors guilty of contempt of court as alleged, their conduct would still not constitute a ground for a finding of delinquency. He argued that the one did not follow the other as was suggested by Mr Mpofo because the grounds in section 162(5) of the Companies Act are all confined to breaches of fiduciary duties owed to the company. A delinquency application is a remedy for directors who have failed in their fiduciary duties owed to the company.

[233] The directors of a company owe it fiduciary duties at common law. They include a duty to act in the best interests of the company.[74] Those duties have now been codified in section 76 of the Companies Act. The relevant duties are those imposed by section 76(3) as follows:

> "Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director —
>
> (a) in good faith and for a proper purpose;
>
> (b) in the best interests of the company; and

[73] 1993 (2) SACR 59 (A) at 65I-J. Reliance was also placed on *Minister of Water Affairs & Forestry v Stilfontein Gold Mining Co Ltd and Others* 2006 (5) SA 333 (W) at para 18.

[74] *Da Silva and Others v CH Chemicals* 2008 (6) SA 620 (SCA) at para 18.

(c) with the degree of care, skill and diligence that may reasonably be expected of a person —

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director."

[234] Mr Moyo asks for the Directors to be declared delinquent in terms of section 162(5)(c) of the Companies Act. Mr Moyo's case against the Directors falls under section 162(5)(c)(iv)(aa) which reads as follows:

"A Court must make an order declaring a person to be a delinquent director if the person —

(c) while a director —

(iv) acted in a manner —

(aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company."

[235] The crucial question is whether Mr Moyo has established that, by suspending and terminating his employment, the Directors had acted in a manner that amounted to "*gross negligence, wilful misconduct or breach of trust*". The question is also not whether they did so in breach of duties owed to Mr Moyo. The only relevant question is whether they did so in breach of the duties they owed to Old Mutual. The Supreme Court of Appeal made this point in *Gihwala*:

"Its aim [that is, the aim of section 162(5)(c)] is to ensure that those who invest in companies, big or small, are protected against directors who engage in serious misconduct of the type described in these sections. That

is conduct that breaches the bond of trust that shareholders have in the people they appoint to the board of directors. Directors who show themselves unworthy of that trust are declared delinquent and excluded from the office of director. It protects those who deal with companies by seeking to ensure that the management of those companies is in fit hands. And it is required in the public interest that those who enjoy the benefits of incorporation and limited liability should not abuse their position."[75]

[236] The SCA also said in *Gihwala* that section 162(5)(c) applies only when a director has been guilty of "*serious misconduct*". It explained that the requirement of "*gross negligence*" must be understood "*as the equivalent of recklessness, when dealing with the conduct of those responsible for the administration of companies*".[76]

[237] The High Court reiterated in *Lewis Group*[77] that the section required dishonesty, wilful misconduct or gross negligence and added that *"ordinary negligence, poor business decision-making or misguided reliance by a director on incorrect professional advice will not be enough*".[78]

[238] What is immediately apparent is that section 76 of the Companies Act does not demand perfection. It does not demand that directors act flawlessly in all respects. There is recognition in the section that directors are human and that humans can make mistakes even when they act in good faith, with reasonable care and in what they believe to be in the best interests of the company. Section 76(5) of the Companies Act provides expressly that directors are entitled to rely on a variety of sources of advice and information including legal counsel.

[239] Also important to note is that one is actually dealing with four standards of director's conduct, and in order of strictness they are: 1) lawful conduct (flawless); 2) unlawful conduct committed in good faith and despite reasonable care (by way of example, the director who followed incorrect advice); 3) unlawful and negligent conduct; and 4) unlawful conduct committed wilfully or recklessly.

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[75] *Gihwala* above fn 71 at para 144.
[76] Id.
[77] *Lewis Group Ltd v Woollam* 2017 (2) SA 547 (WCC).
[78] Id at para 18. See too *Organisation Undoing Tax Abuse NPC v Myeni* and Another [2019] ZAGPPHC 957 at paras 11-16.

[240] It is only the 4th standard which would bring a director into the grasp of section 162(5)(c)(iv)(aa).

[241] In terms of section 66(1) of the Companies Act, the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company. The primary way in which a board discharges this responsibility, is through the CEO of the company responsible for the implementation of the Board's policies and directions. It follows that it is always essential for the wellbeing of a company that the special relationship between its board and its CEO be one of trust and confidence.

[242] Trust and confidence between the chairperson and the CEO are critical to the proper functioning of the board. When that trust is broken down between the chair and the CEO, or between the board as a whole and the CEO, the board becomes dysfunctional, particularly in the case of a major listed financial services company where, as in this case, the publicity afforded the dispute between board and CEO is corrosive of confidence in the management of the company. It is a situation which requires to be brought to an end as soon as reasonably possible, and decisions made under such pressure by both the CEO and the board are likely to be less than perfect.

[243] The architecture of the governance of a company provides that the board does not implement its own decisions, and instead a company's management implements the decisions of the board. It is the CEO who leads the management team that implements the decisions of the board. The board, therefore, is only able to lead effectively in circumstances where it has a relationship of trust and confidence in the CEO.

[244] This special relationship between the board and the CEO was emphasised in *Moyane*[79] when the court was considering whether it would be appropriate to reinstate the Commissioner of SARS:

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[79] *Moyane v Ramaphosa* and Others [2018] ZAGPPHC 835; [2019] 1 All SA 718 (GP).

> "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. The President has lost all confidence in the applicant and justifiably so… ."[80]

[245] This special relationship of trust and confidence between Mr Moyo as the CEO of Old Mutual and its board was recognised in the section 18(3) appeal judgment, where the court stated that:

> "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."[81]

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[80] Id at para 36. See too *Gama v Transnet Ltd & Others* [2010] JOL 24972 (GSJ) at para 44.
[81] *Old Mutual Limited & Others v Peter Moyo and Another* [2020] ZAGPJHC 1 at para 93.

[246] Ms Mukaddam, a technical advisor and senior programme facilitator of the Institute of Directors in Southern Africa, with much experience in the field of corporate governance, emphasises the importance of the relationship between the board and the CEO.[82] She concludes that the relationship of trust between the board and the CEO "*is absolutely fundamental to the proper functioning of a company — all the more so in the case of a major listed financial services company*".[83]

[247] Of fundamental importance to remember is that the directors get appointed by the shareholders and it is the directors who appoint the CEO. If the relationship between the board and the CEO breaks down, it is the CEO who should go. The directors can at any time be removed by the shareholders in terms of section 71 of the Companies Act but once the relationship has broken down between the board and the CEO, the board is not only entitled but also obliged to terminate the CEO's appointment.

[248] In this case, it is common cause that the relationship between the board and Mr Moyo broke down. The reasons for the breakdown, from a continuation as a CEO of Old Mutual's perspective and considering the interests of the company, thus become irrelevant. Mr Moyo had to leave.

[249] Applying the *Plascon-Evans* rule we are driven to conclude that Mr Moyo was guilty of breaching his fiduciary duties - a conclusion reached by the board, which they say in their papers and they support it with a description of the circumstances and the process followed which led to this conclusion. This application is thus adjudicated on the basis of the correctness of that conclusion i.e. that Mr Moyo had breached his fiduciary duties.

[250] The question which now falls for determination is whether the suspension and subsequent terminations were lawful and even if not, whether the Directors deliberately or recklessly breached their fiduciary duties as directors in suspending or terminating Mr Moyo's employ.

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[82] Mukaddam affidavit 004-15 at paras 39 to 42.
[83] Mukaddam affidavit 004-15 at para 41.

[251] Mr Moyo forced the board's hand by telling others that it had decided to part company with him. He created the risk of a public leak of the information. The Board concluded that decisive action was required to avoid asymmetry of information in the market and damage to Old Mutual's reputation if it did not announce the decision to part ways with Mr Moyo before its annual general meeting scheduled for the following day.

[252] Mr Moyo was not entitled to a hearing, at common law or in contract, before the board decided to suspend him. Mr Moyo did not plead that his contract of employment implied such a requirement. In the absence of such an implied term, one contracting party is not obliged to afford a hearing to the other before exercising its contractual rights to the detriment of the other.[84]

The first termination of Mr Moyo's contract (17 June 2019)

[253] Mr Moyo's only complaint arising from the first termination of his contract of employment is that the board did not afford him a hearing "*despite having accused me of misconduct, gross misconduct and the like*". The section 18(3) Appeal Court however held that Old Mutual was fully entitled to terminate Mr Moyo's contract of employment in terms of clause 24.1.1 without any disciplinary inquiry.[85] In our view, we are bound to follow that judgment because its conclusion is *res judicata*, because its judgment is a binding precedent and because its conclusion was correct.

[254] While the board did not hold a formal disciplinary inquiry into Mr Moyo's misconduct, it did afford him an ample hearing. The RPC, NomCom, the Ad Hoc Committee and the board itself extensively engaged with Mr Moyo and afforded him every opportunity to state his case. The board certainly observed all the requirements of a fair hearing in accordance with the fundamental principles of fairness. Mr Moyo himself has never contended otherwise. His complaint has only been that the board had failed to convene a formal disciplinary inquiry.

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[84] *Bredenkamp and Others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) paras 29-30, 50 and 53.
[85] *Old Mutual v Moyo* above fn 81 at paras 62 and 83.

[255] The board, in any event, terminated Mr Moyo's contract of employment only after it had concluded, in good faith and on reasonable grounds, that he had been guilty of egregious misconduct and could no longer be trusted to serve the best interests of Old Mutual - a) Mr Moyo's participation in the decisions of NMT Capital to pay dividends to the ordinary shareholders in amounts of R10m and R105m was in breach of the Preference Share Subscription Agreement, the Shareholders' Agreement, his contract of employment and his common law and statutory duties to act in the best interests of Old Mutual; b) he had compounded his misconduct by failing to report his conflict of interest to Old Mutual for resolution by its Chair in accordance with his contract of employment; and c) when Mr Moyo was called to account for his misconduct, his response was cavalier and unapologetic.

[256] Having come to the conclusion, reasonably and in good faith, that they could no longer trust Mr Moyo to serve the best interests of Old Mutual, the board was bound to terminate his employment in the performance of their duty to act in the best interests of Old Mutual.

[257] It can accordingly not be suggested that the board's decision to terminate Mr Moyo's employment, without a formal disciplinary inquiry, constituted "*gross negligence, wilful misconduct or breach of trust*" within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act.

The second termination of Mr Moyo's contract (21 August 2019)

[258] Mr Moyo's complaint is that the board terminated his contract again on 21 August 2019. By the time the board did so, the parties were agreed that their relationship had irretrievably broken down because Mr Moyo had embarked on an aggressive media campaign against the Directors. He had impugned their integrity, ability and suitability to hold office as directors of Old Mutual. He made it plain that there was no scope for cooperation between them and that there was no room for him and them in Old Mutual.

[259] It is the prerogative of Old Mutual's shareholders to appoint its directors. The shareholders had, in the exercise of their prerogative, appointed the Directors with

whom Mr Moyo confessed he could no longer cooperate. This sentiment is certainly mutual in that the Directors also concluded, in our view both reasonably and in good faith, that they could no longer trust Mr Moyo to act in the best interests of Old Mutual. The Directors, as shareholder representatives entrusted with protecting the company's interests, were in the circumstances not only entitled, but indeed obliged, to terminate his appointment as CEO in the discharge of their fiduciary duties to act in the best interests of Old Mutual.

[260] There is accordingly no basis upon which to characterise the Directors' conduct as "*gross negligence, wilful misconduct or breach of trust*" within the meaning of section 162(5)(c)(iv)(aa) of the Companies Act.

AGGRAVATING FACTORS

[261] This court will not countenance the applicant's belated attempts to resuscitate abandoned causes of action or complaints. Those complaints not falling within 'the big five' will be dealt with in this section. What remains unclear is what is meant by 'aggravating factors' in the context of the delinquency application.

[262] Mr Moyo's legal representatives, evidently on his instructions, did not respond meaningfully to this court's directive in this regard. An enormous amount of judicial time and effort has been poured into trying to distil what is legitimately in issue and what is not. The court is also conscious of the enormous amount of time that goes into preparing heads of argument which time is wasted when non-issues are addressed.

[263] It appeared to this court that Mr Maleka was adapting to the moving goal posts and deviated from his heads of argument during his oral address to deal with what was not addressed in his heads of argument (the issues were defined in such heads as they were limited by Mr Moyo in his replying affidavit and as labelled there as 'the big five'). In our view he did so not because he consented to the resuscitation of the aggravating factors as substantive grounds or self-standing causes of action but simply to cover all bases to ensure that whatever construction the court ultimately gave to the pleadings, including the retraction in the replying affidavit, his

clients' interests, that is the first and second respondent's interests, were protected and covered, i.e. that submissions had been made on all topics. We thus do not agree with the inference drawn by Mr Baloyi in paragraph 11 of his 10 November 2021 letter that the topics addressed by Mr Maleka in some way evidences a questionable confusion as to the scope and ambit of the applicant's case. But not much turns on this because, in the absence of agreement between the parties on what the issues are, it is to the pleadings that a court must look and they reveal that Mr Moyo used the replying affidavit as a tool to confine his causes of action in the delinquency proceedings to the big five.

[264] Notwithstanding this, and should we be found to have erred in this respect, we deal with the balance of the complaints hereinafter.

[265] We remain unclear as to what, in the context of the delinquency application and the principles applicable, 'aggravating factors' are intended to convey. As mentioned, we deal with them as substantive grounds.

The Triple Conflict

[266] Mr Moyo's thesis is that it is unlawful for a director to find himself with a conflict of interest. That, of course, is incorrect, almost Utopian. The question is, how he deals with such a conflict. Section 75 of the Companies Act regulates in detail how directors must act when they find themselves in such a predicament. Section 75(5) requires the director to *disclose* the conflict to the board and he must then *withdraw* from the meeting. There is no evidence whatsoever that Mr Manuel acted in breach of these duties. The undisputed evidence of Old Mutual is that he meticulously complied. The conflict complained of arose from the following circumstances: Mr Manuel was the non-executive chair of Rothschild who acted as the advisor to Old Mutual plc (Old Mutual's English holding company) and he was on both Old Mutual's board and Old Mutual plc's board. There was a process of managed separation and in the course of this separation, decisions had to be taken which dealt with conflicting interests.

[267] When Mr Manuel was appointed as a director of Old Mutual, Old Mutual knew that Mr Manuel was a non-executive chair of Rothschild which fact was made plain in the pre-listing statement signed by Mr Moyo himself and all other Directors at the time who warranted the truth of that statement. Old Mutual appointed Mr Manuel and two other directors on Old Mutual plc and ensured that when there were conflicts, Mr Manuel would not participate in the decisions of Old Mutual. Those decisions were taken by a special committee on which Mr Moyo himself served. The specific decision of which Mr Moyo complains where Old Mutual assumed certain of the obligations of Old Mutual plc, was not taken in a physical meeting. The Board's involvement was limited to the passing of a solvency and liquidity test after the decision had been taken by the special committee which was done by 'round robin' resolution in terms that expressly recorded the recusal of Mr Manuel and the other two directors from any decision-making role in that process.

[268] We find nothing in the conduct, which transgresses section 162(5) of the Companies Act.

Legal Fees

[269] During 2017, Old Mutual, at its own initiative, decided to manage and pay the legal fees incurred in two matters to which Mr Manuel was party and Old Mutual itself was not. Old Mutual decided to pay the fees because the matters affected Old Mutual's interests. Old Mutual wanted to ensure the litigation was conducted in a manner that best protected its brand and reputation. Mr Moyo alleges that legal fees paid by Old Mutual in respect of such litigation was not properly treated in the Annual Financial Statements ('AFS'). Mr Moyo had suggested the legal assistance and had participated in the board meeting which had approved this. His complaint is thus not the fact that Old Mutual paid these legal fees but rather whether they ought to have been mentioned as a special item in the AFS. The question which then falls for determination is whether proper auditing practices require such disclosure. Mr Moyo does not make a case that this is a requirement. However, it is undisputed that Old Mutual had consulted its auditors as to the proper treatment of this expense and the auditors had advised that it need not be mentioned. Mr Moyo had made representations to the board on which the board relied and was entitled to in terms of

section 76(5)(a) of the Companies Act, because at that stage there was no reason to believe that the advices of Mr Moyo did not merit confidence. Significantly, Mr Moyo signed off on these AFS's.

[270] Mr Mpofu argued that the triple conflict and legal fees complaints are not self-standing delinquency grounds but that Mr Moyo was entitled to protection under the PDA because Old Mutual had terminated Mr Moyo's employ as retribution for these instances of misconduct by Mr Manuel. The facts (applying *Plascon-Evans*) do not reveal any wrongdoing. Mr Manuel did not make disclosure as all these facts were known to all, there is no causal connection between the termination and the alleged disclosure[86] but in any event, the question before us is not whether Mr Moyo should be entitled to protection under the PDA, but rather whether the Directors were delinquent. We find that they were not.

Reputational Damage to Old Mutual

[271] Mr Moyo's complaint in this regard is confined to Mr Manuel exclusively (limited by Mr Mpofu during argument) and alleges a contravention of section 162(5)(c)(ii) of the Companies Act.

[272] Mr Maleka argued that section 162(5)(c)(ii) should be read with section 76(2)(a) or (b) of the Companies Act focusing particularly on the issue of causation and that the important element was that which requires a director to '*knowingly cause harm*'.

[273] Mr Maleka submitted, and we agree, that there is no credible evidence beyond the media statements that depict harm. In respect of the media statements, it was Mr Moyo who started the media campaign and he is thus the author of the harm insofar as there was harm.

[274] Mr Moyo also alleged that Old Mutual lost approximately R20 billion. The Directors went to great lengths in their papers to dispel this. The undisputed

[86] Mr Moyo made the disclosure on 14 June 2019 ('OM 48'– 003-440, a letter drafted by Fluxman's Attorneys, his erstwhile attorneys, but not sent to Old Mutual) after the board had made the decision to suspend Mr Moyo which occurred on 23 May 2019.

evidence is that on 12 March 2019, the share price was R20.90 and on 6 November 2019, the share price was R20.89. The share trading results are reflected in the papers at the different stages of this dispute. We need not delve too deeply into these matters because on the common cause facts, there exists no evidence that Mr Manuel caused harm to the share price of Old Mutual, less so that he did so knowingly.

[275] We thus find that there is no transgression of the Companies Act.

Strategy to delay and protract the litigation

[276] On the occasion of a press conference, Mr Manuel was asked by a journalist about the possibility of protracted litigation in respect of the overall dispute between Old Mutual and Mr Moyo. Mr Manuel responded that Mr Moyo would run out of money.

[277] Mr Moyo contended that this remark betrayed Old Mutual's ulterior strategy which was to deliberately protract and delay the litigation in the hope that Mr Moyo would run out of money and abandon his rights ('the strategy'). Mr Moyo contended that the strategy had no place amongst honest directors who are acting ethically and as fiduciaries.

[278] It should be born in mind that this comment was made after Judge Mashile's Part A order and after the appeal process had been embarked upon. Mr Manuel was clearly communicating that litigation is costly. Mr Moyo was the one who was on the offensive and litigation for an individual is an expensive exercise, that is the simple point which was made. This does not establish delinquency.

Conclusion on the aggravating factors

[279] Assuming these grounds to be substantive grounds, we find that the Directors implemented their obligations to fulfil their fiduciary duties. Measured against Mr Moyo's own actions, he participated in most of the decisions, which now form the subject of his complaints. Perhaps appreciating this, he appears to have attempted

to distance himself from these decisions as grounds for delinquency, hence their relegation to ‘aggravating factors’.

[280] We find the conduct of the Directors not only to be lawful, but also not delinquent.

CONCLUSION

[281] Having found that none of the conduct complained of constitutes contempt of court, it is unnecessary to decide whether the Directors would have been entitled to a further hearing on ‘the appropriate sanction’. It was our understanding that the parties were in agreement that there would be no objection to such a further hearing if contempt had been found.

[282] The striking application is granted to excise those paragraphs from the contempt application dealing with the utterances of Mr Manuel at the press conference on 13 September 2019.

[283] In the result, both the contempt and delinquency applications fall to be dismissed.

[284] A copy of this judgment will be sent to the Chairperson of the Legal Practice Council and their attention drawn specifically to paragraphs [74] to [99] hereof. A copy of this judgment will also be e-mailed to Mr Baloyi at Mabuza Attorneys as the firm withdrew as attorneys of record for Mr Moyo on 8 April 2022.

ORDER

[285] The court accordingly grants the following orders:

> (a) Paragraphs 23.5; 63.10; 64; 65; 66; 67; 68; 69; 72; 73, Annexure PMC 6; Annexure PMC 8; 199.2; 257; 270.4; 270.7; 270.10 to 270.11 of the applicant’s further replying affidavit in the contempt application, at CL page 011-183, are struck out. The applicant (Mr Moyo) is ordered to pay the

costs of such application including the costs of two counsel where so employed.

(b) The delinquency application is dismissed with costs including the costs of two counsel where so employed.

(c) The contempt application is dismissed with costs including the costs of two counsel where so employed.

Joseph Raulinga
Judge of the High Court
Gauteng Division, Johannesburg

Mpostoli Twala
Judge of the High Court
Gauteng Division, Johannesburg

Ingrid Opperman
Judge of the High Court
Gauteng Division, Johannesburg

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Instructed by: Bowmans Attorneys

Date of hearing: 3 and 4 November 2021

Further correspondence and supplementary heads of argument: 5 November 2021, 10 November 2021, 12 November 2021 and 19 November 2021,

Date of Judgment: 16 May 2022