

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JA114/22

In the matter between:

RFS ADMINISTRATORS

Appellant

and

SEAN LINDO SAMONS

First Respondent

MARRINET DE FORTIER

Second Respondent

MARIE JANSEN VAN RENSBURG

Third Respondent

**NATIONAL PENSION FUND FOR MUNICIPAL
WORKERS
Respondent**

Fourth

NATIONAL FUND FOR MUNICIPAL WORKERS

Fifth Respondent

Heard: 14 November 2023

Delivered: 11 April 2024

Coram: Savage JA, Smith et Malindi AJJA

Summary: Claim in terms of s 77(3) of the Basic Conditions of Employment Act 75 of 1997 for contractual damages, alternatively disgorgement of profits – whether respondents were employees as defined in terms s 1 of the Act – respondents received or were entitled to receive remuneration from employer – Held: employees fell within definition of ‘employee’.

Claimant for disgorgement of profits must establish fiduciary relationship and that profits were earned secretly – employer aware of payments – Held: profits therefore not secret and employer not entitled to disgorgement.

Contractual damages – no causal connection between additional payments to employees and damages suffered by employer – claim accordingly dismissed with costs.

JUDGMENT

SMITH AJA

Introduction

- [1] The appellant, RFS Administrators (Pty) Ltd (RFS), instituted proceedings in the Labour Court against the respondents in terms of s 77(3) of the Basic Conditions of Employment Act¹ (BCEA), claiming contractual damages, alternatively disgorgement of profits. On 30 August 2022, the Labour Court (Moshoana J) delivered its judgment dismissing the action with costs. RFA appeals against that judgment with the leave of this Court.
- [2] RFS is a pension funds administrator and at all material times administered the funds of the fourth respondent, the National Pension Fund for Municipal Workers (NPFMW) and the fifth respondent, the National Fund for Municipal Workers (NFMW). I refer to these respondents collectively as ‘the Funds’.
- [3] RFS performed the services in terms of Administration Agreements which provided, *inter alia*, that it would render the services of a Principal Officer of the Funds in terms of s 8 of the Pension Funds Act². Initially, Mr Chris Du Plooy, RFS’s Chief Executive Officer (CEO), acted as the Principal Officer of the Funds until 2007, when the first respondent, Mr Sean Lindo Samons, assumed the function in respect of the NPFMW on behalf of RFS. The latter remained responsible for his remuneration.

¹ Act 75 of 1997.

² Act 24 of 1956.

- [4] Mr Samons was employed by RFS Holdings during February 2001 in terms of an oral contract, first in its marketing department and thereafter in its legal services. When RFS was registered in 2003, he continued his employment with the new entity in the same capacity.
- [5] The second respondent, Ms Marinett De Fortier, was employed by RFS in terms of an oral contract on 1 January 2009. In May 2016, she was seconded to the Funds as personal assistant to Mr Samons in his capacity as Principal Officer.
- [6] The third respondent, Ms Marie Jansen Van Rensburg, was employed by RFS in terms of an oral contract on 1 November 2000, and during 2001, she was also seconded to the Funds where she performed the functions of a fund secretary.
- [7] RFS did not seek any relief against the NPFWM or the NFMW and they were consequently not involved in the proceedings before the Labour Court, nor were they involved in the appeal. I shall therefore refer to Mr Samons, Ms De Fortier and Ms Van Rensburg collectively as 'the respondents'.
- [8] In the proceedings before the Labour Court, Mr Du Plooy and Mr Lیشهlese Gabriel Mphahlele, RFS's Chief Financial Officer, testified on behalf of RFS. The respondents also testified and closed their case without calling any other witnesses.
- [9] The dispute between the parties concerns payments which the respondents received from the Funds over and above their usual remuneration during the 2015/2016 financial year. The respondents contend that at the material times they were no longer in the employ of RFS but had been employed by the Funds. They were accordingly contractually entitled to the payments. RFS, on the other hand, contend that they had merely been seconded to the Funds and were performing the statutory function of a Principal Officer on its behalf. The payments were accordingly in breach of the respondents' fiduciary duties, alternative constituted secret profits which should be disgorged.

- [10] The issues which fall for decision on appeal are accordingly whether the respondents were in the employ of RFS when they received the additional payments from the Funds, and if so, whether RFS is entitled to disgorgement of profits or contractual damages.
- [11] Because my findings are based mainly on facts which are either common cause or undisputed, it is not necessary for me to provide a comprehensive summary of the evidence.

Factual background

- [12] Mr Samons's attempts to extricate himself from his contractual relationship with RFS started as early as July 2011, when he wrote to the Executive Committee of the NPFMW, recording the latter's request that he should be directly employed by the fund in order to eliminate concerns regarding his independence. He stated that he had agreed to the proposal on the condition that his conditions of service remain the same and attached a draft employment agreement for the fund's consideration. It is common cause that RFS was unaware of these developments.
- [13] At a meeting of RFS's Executive Committee on 3 August 2011, Mr Samons reported that the Funds' trustees "*are adamant that the Principal Officer should be employed by the fund and not by the administrator as is currently the case. The reason is independence. The salary administration will be done by RFS*".
- [14] However, Mr Du Plooy testified that after the meeting, Mr Samons told him that he could not resign from RFS because the Funds were not prepared to match his salary. That assertion was not disputed by Mr Samons in his testimony. He said that Mr Samons never tendered his resignation pursuant to his declaration of intent at the meeting. Mr Samons, on the other hand, asserted that on 3 August 2011, he gave oral notice of his resignation from RFS with effect from 31 August 2011.

[15] On 25 August 2011, Mr Samons and the NPFMW purported to conclude an employment contract in terms of which he was appointed as the fund's 'Principal Executive Officer', with effect from 1 September 2011.

[16] The Administration Agreements between RFS Holdings and the Funds terminated on 31 August 2011, and on 25 August 2011, RFS concluded a new Administration Agreement with the NFMW. The effective date of the agreement was 1 September 2011.

[17] Clause 4.11 thereof reads as follows.

'The ADMINISTRATOR will as part of this agreement and fees referred to in terms of clause 6.2, remunerate the Principal Officer, the FUND Secretary and Personal Assistant to the Principal Officer, The persons as above shall be appointed by the FUND with the approval of the ADMINISTRATOR and the UFND shall notify the REGISTRAR of the Appointment of the Principal Officer.'

[18] RFS concluded a similar agreement with the NFMW, except that it did not contain a clause similar to clause 4.11 above. That agreement also commenced on 1 September 2011.

[19] Mr Samons purportedly also concluded an employment contract with the NPFMW in terms of which he was appointed as Principal Executive Officer of that fund with effect from 1 September 2011. However, between 7 September 2011 and 28 October 2011, he attended various meetings of the RFS Executive Committee but did not raise the issue of his ostensible employment with the Funds at any of those meetings.

[20] On 29 September 2011, Mr Samons resigned as Principal Officer of the RFS Umbrella Fund, the RFS Pension Fund and the Extra Dimension Umbrella Fund, citing his full-time statutory responsibilities to the Funds as the reason for the resignations.

[21] On 6 May 2013, Mr Corne Botha, RFS's Chief Operating Officer, wrote to Ms De Fortier informing her that she was being transferred to the NFMW as the personal assistant to the Principal Officer. That letter also stated that she would be representing RFS in that capacity. Mr Samons also confirmed that arrangement in a letter to Ms De Fortier on 24 May 2013, and stated that she was "*an employee of RFS and the matter had been dealt with as an internal transfer*".

[22] On 14 April 2014, the respondents signed RFS's Human Resources Policy and a document titled 'Addendum to the Policy'. The Addendum provided, *inter alia*:

'The conditions contained in this addendum supersedes the conditions contained in the RFS Administrators (Pty) Ltd HR Policy and is specific to the employee seconded to the office of the Principal Officer for National Fund for Municipal Workers (NFMW).'

[23] On 19 May 2015, the Board of the NPFMW adopted a resolution to make additional payments to the respondents. On the same day, Mr Samons communicated with Mr Mphahlele and Ms Anelie Heyneke, a clerk in RFS's finance department, providing details regarding the additional payments due to Ms De Fortier, Ms Van Rensburg and himself.

[24] On 10 June 2015, the trustees of the NFMW resolved to pay performance bonuses to the staff of the Principal Officer, namely the respondents. Mr Samons again wrote to Ms Heyneke on 17 June 2015 instructing her to pay him the sum of R198 000 in respect of services rendered for the period 1 July 2014 to 30 June 2015.

[25] On 19 June 2015, Mr Samons wrote to Mr Du Plooy, thanking him for their increases and the bonus paid by the Funds. Mr Du Plooy replied that he was concerned about whether the Funds were allowed to approve the increase and expressed the view that the issue should be investigated further. Mr Samons did not respond to that email but wrote to Mr Du Plooy on 19 June

2015, confirming that the Funds' compliance officer was busy formulating an agreement relating to the payment of further bonuses.

[26] On 3 July 2015, Mr Samons again wrote to Ms Heyneke informing her that the NFMW resolved on 10 June 2015 to remunerate the office of the Principal Officer 'for excellent service delivery'.

[27] The contested bonuses and additional salaries were paid to the respondents during the 2015/2016 financial year. They contended that those payments were not made in secret but that RFS had full knowledge thereof and had in fact processed the payments. Mr Du Plooy asserted that he was unaware of the payments and only the staff in RFS's financial department knew about it.

[28] Ms De Fortier and Ms Van Rensburg tendered their written resignations as RFS employees on 29 January 2016. Those letters unambiguously gave formal notice of their resignations from the employment of RFS. According to them, the reason for the resignations was that the relationship between the Funds and RFS had become strained and they consequently "*no longer wanted to have anything to do with RFS*".

[29] On 19 February 2016, the NFMW held a special board meeting where it was resolved that "*the entering of employment agreements between the Fund and Ms Jansen Van Rensburg and Ms M de Fortier be approved*" subject, *inter alia*, to the condition that their remuneration will be on the same basis "*as their current employment with RFS Administrators*".

The pleadings

[30] In its statement of case, RFS averred that at all material times, it employed and paid the respondents' salaries and that they had been seconded to the Funds where they jointly performed the functions of the Principal Officer on behalf of RFS.

[31] RFS further asserted that the respondents' employment contracts, *inter alia*, provided that they were not allowed to earn any additional remuneration or

bonuses from the Funds; alternatively, that they were obliged to declare any interest in another organisation that could potentially offer a financial benefit to them. They also owed RFS a fiduciary duty to declare any additional income from the Funds.

[32] RFS contended further that the additional remuneration and bonuses which the respondents received from the Funds during 2015/2016, constituted profits earned in breach of its HR policy, alternatively secret profits earned at RFS's expense.

[33] RFS asserted two claims against Samons, the first being in respect of salaries the Funds paid him from 2013 to 2016 in the sum of R492 000, and the second being in respect of 'meeting allowances' in the sum of R317 965.75.

[34] The claims against Ms De Fortier and Ms Van Rensburg are in respect of remuneration paid to them by the NPFMW for the 2014/2015 financial year in the sums of R78 356.84 and R104 602.65, respectively.

[35] In their statement of defence, the respondents averred that although they were in RFS's employ and on secondment to the Funds until 2011, at the time they received the impugned payments, namely during 2015/2016, their contracts with RFS had already terminated. For this assertion, they relied on clause 4.11 of the administration agreement, which they contended effectively terminated their employment with RFS with effect from 2011.

[36] They furthermore denied that the additional payments constituted damages suffered by RFA or secret profits, since RFS had been aware of the payments at all material times and had processed them.

Findings by the Labour Court

[37] The Labour Court found that since the position of the Principal Officer is governed by statute, when the respondents commenced working for the Funds, they served only the interests of the latter and consequently ceased to be employed by RFS. It was not disputed that Mr Samons and Ms Van

Rensburg, with effect from 1 September 2011, and Ms Fortier with effect from 1 June 2013, ceased to perform services for RFS's benefit. They had thus repudiated their oral contracts of employment and Mr Du Plooy accepted the repudiation on behalf of RFS since he did not insist on specific performance.

[38] Regarding the resignation letters penned by Ms De Fortier and Ms Van Rensburg, the Court found that they had no legal effect and were *pro non scripto*. The Court reasoned that at the time they submitted those letters, they were already performing functions exclusively for the Funds and were consequently no longer in RFS's employ.

[39] The Labour Court further found that RFS failed to establish the terms of the oral contracts of employment. It held that RFS's reliance on an admission by the respondents' counsel to the effect that the terms of the contracts were not in dispute was misplaced. The respondents were not bound by that legal concession and the admission had, in any event, not been recorded in a pre-trial minute.

[40] Moreover, the Court concluded that the respondents did in any event not fall within the ambit of the definition of employees in terms of s 1 of the BCEA. That section defines an 'employee' as:

- '(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer.'

[41] The Court reasoned that when the respondents commenced performing the statutory functions of a Principal Officer for the benefit of the Funds in terms of clause 4.11 of the Administration Agreement, they received or were entitled to receive remuneration from the Funds. They therefore no longer fell within the definition of employees for the purposes of the BCEA. The fact that RFS

administered the payment of their remuneration was inconsequential since they had in effect been remunerated by the Funds. In seconding the respondents to the Funds, RFS was thus merely acting as a labour broker.

- [42] The Court furthermore held that since there was no privity of contract between RFS and the respondents when they earned the extra income from the Funds, there could not have been any contractual injunction against them receiving the money. RFS consequently failed to establish that they owed it a fiduciary duty and the extra income did in any event not constitute profit that would have accrued to RFS if it had not been earned by the respondents. The remedy of disgorgement was accordingly not available to RFS.

Were the respondents employed by RFS at the material time?

- [43] It was common cause that despite their respective secondments to the Funds, the respondents remained in the employ of RFS, in the case of Mr Samons and Ms Van Rensburg, at least until 1 September 2011 and in the case of Ms De Fortier, at least until June 2013.
- [44] The respondents also admitted that they were, at various stages during their employment with RFS, seconded to the Funds and had remained in the employ of the former. This was so because, in terms of the Administration Agreements, RFS was contracted to provide management services to the Funds, which included acting as the Funds' Principal Officer. The respondents, having been seconded to the Funds by RFS, thus performed those services for the benefit of RFS.
- [45] There can therefore be little doubt that, at least for the aforesaid periods, the respondents were employees for the purposes of the BCEA since they worked for RFS and had received or were entitled to receive remuneration from RFS.
- [46] That arrangement did not change with Mr Samons' appointment as Principal Officer. Mr Samons himself was of that view. During his testimony, he was confronted with a letter wherein he stated that he had been in the employ of the Funds since 2007 although his employment agreement had been with

RFS. He also confirmed that when he was initially seconded to the Funds, he was working for the benefit of RFS, while performing the functions of a Principal Officer. This reasoning also applies to Ms De Fortier and Ms Van Rensburg, since they were both seconded to provide support to Mr Samons.

[47] As mentioned above, in the letter which Mr Samons wrote to Ms De Fortier confirming her transfer, he stated that she was “*an employee of the RFS*”. RFS also wrote to her on 6 May 2013, stating that “*the position you will be taking up is of vital importance to us as you will represent RFS in the close environment of our main client*”.

[48] The Labour Court found that the respondents did not fall within the definition of employees in terms of the BCEA, because “*the uncontested evidence implies that the employees received or were entitled to receive remuneration from the Funds*”. That finding was apparently underpinned by the finding that clause 4.11 of the administration agreement makes it clear that “*the fees encapsulate the remuneration of the employee. The respondents therefore ceased being employed by RFS when they commenced working for the Funds in terms of their secondments*”.

[49] In making that finding the Labour Court, with respect, lost sight of the fact that it was not disputed that the respondents remained employees of RFS despite their secondments, at least until 2011. Mr Du Plooy confirmed in his testimony that he was also remunerated by RFS when he was performing the duties of Principal Officer.

[50] It was also not disputed that the administration fee included the payment for the services rendered by RFS in connection with the functions of the Principal Officer. Clause 6.1 of the agreement provided that:

‘The FUND must pay the fees to the Administrator for the Standard Administrative and Accounting Services as set out in this agreement.’

And clause 6.2 provides that:

'Fees for the Standard Administrative and Accounting Services shall be an amount equal to 1.20% (ONE comma TWO ZERO PERCENT) of the total monthly salaries of all the members to the FUND, inclusive of VAT thereon.'

- [51] The Administration Agreement furthermore provides that its purpose is to regulate the services which RFS agreed to provide to the NFMW. It was therefore a typical service level agreement in terms of which RFS would earn a fee for its services, which included making available RFS employees to provide the functions of the Principal Officer. Those employees would have to look at RFS for their remuneration and had no contractual claims against the Funds.
- [52] It was also common cause that there was no need to replicate the provisions of clause 4.11 in the Administration Agreement between RFS and the NPFMW because it was a 'closed fund' which did not allow any new members. Its administrative costs were covered by fees paid for the services RFS rendered to the NFMW.
- [53] In my view, the respondents' contention that on a proper interpretation of clause 4.11, they were entitled to receive their remuneration from the Funds is opportunistic. The 2009 agreement included an identical clause, yet they accepted that they had remained in the RFS employment despite their secondments and that they were entitled to receive their remuneration from that entity.
- [54] In any event, the uncontested evidence established on a preponderance of probabilities, that the respondents were in the employ of RFS at the material times. Mr Samons remained a member of RFS's pension fund to which only employees of RFS were entitled to belong. The respondents' salaries were determined by RFS and bonuses were paid at its discretion. It was also not disputed that during 2015 the Funds were not aware of Mr Samons's conditions of employment, including his remuneration. It is inconceivable that

an employer would have no knowledge of its employees' conditions of service and remuneration.

[55] In addition, although Mr Samons claimed that he declared his intention to resign at the RFS ExCo meeting during August 2011, it is common cause that he never submitted a letter of resignation. In my view, it is improbable that a senior employee in Mr Samons's position would not have tendered a written resignation. Moreover, it is manifest that Mr Samons regarded himself as being employed by RFS beyond 2011. He signed RFS's HR Policy during 2014. It is also common cause that he submitted a memorandum to RFS during 2015 seeking clarity on his employment status. The contents of that document are fundamentally irreconcilable with his assertion that his employment with RFS terminated in 2011 by virtue of clause 4.11 of the Administration Agreement.

[56] Ms De Nortier and Ms Van Rensburg both gave written notices of their resignations with effect from the dates stipulated therein.

[57] Ms De Fortier's letter was addressed to Mr Du Plooy and reads as follows:

'Please accept this as formal notice of my resignation from the employment of RFS Administrators.

My last date as employee of RFS Administrators will thus be 29 February 2016.'

[58] Ms Van Rensburg submitted her resignation letter to Mr Du Plooy on 29 January 2016. The relevant part of that letter reads as follows:

'Geagte Chris

Ek doen hiermee my bedanking uit die diens van RFS Administrators in met laaste dag van diens aan RFS Administrators op 29 February 2016'

- [59] In my view, there can hardly be a more unequivocal recognition of an extant contractual relationship and declaration of an intention to terminate it with effect from a stipulated date. It was therefore not surprising that during their testimonies they were both unable to explain why it was necessary for them to resign during 2016 if their employment with RFS had terminated during 2011. Significantly, the NFMW board, in a resolution adopted on 19 February 2016, still regarded Ms De Fortier and Ms Van Rensburg as being in the employ of RFS at that time and therefore approved their employment with the fund on the same basis “*as their current employment with RFS Administrators*”.
- [60] The evidence thus compels the ineluctable inference that the respondents were still in RFS’s employ when they received the impugned payments from the Funds.
- [61] This finding does, however, not mean that RFS’s claim must succeed. This is so because RFS still had to prove, on a balance of probabilities, that the payments either constituted contractual damages or secret profits to be disgorged to it. I now turn to deal with those issues.

RFS’s claim for disgorgement of profits

- [62] In order to succeed with its claim for disgorgement of profits, RFS was required to establish that there was a fiduciary relationship between it and the respondents; that in breach of that obligation, the respondents placed themselves in a position where their duties and personal interests were in conflict; and that the profits were made in secret and as a consequence of untoward conduct by the respondents.
- [63] An employee, when rendering his or her services, must always act in the best interests of the employer and is not entitled to use his or her employment relationship with the employer, without the employer’s permission, to make a profit or earn a commission for his or her own account.³

³ *Robinson v Randfontein Estates Gold Mining and Company Ltd* 1921 AD 168 at 177 - 8.

[64] In *Phillips v Fieldstone Africa (Pty) Ltd and Another*⁴, the Supreme Court of Appeal held that the rule is a strict one which allows little room for exceptions and “*the defences open to a fiduciary who breaches his trust are very limited: only the free consent of the principal after full disclosure will suffice*”.

[65] Although my finding that the respondents were still employed by RFS when they received the payments means that they owed RFS a fiduciary duty, the common cause facts established that those payments were not made secretly. In fact, the evidence showed on a balance of probabilities that the additional payments were made with RFS’s full knowledge and acquiescence.

[66] Mr Samons had advised RFS of the payments immediately after the Funds’ Board of Trustees approved them. He also advised Mr Du Plooy, in his capacity as CEO, and provided Mr Mphahlele and Ms Heyneke with full details of the payments.

[67] Mr Mphahlele also confirmed in his testimony that the payments were processed in terms of RFS’s usual procedures, that the requisite supporting documents had been provided, and that he had approved the payments. In those circumstances, Mr Du Plooy’s contention that the payments were made in secret because he, in his capacity as CEO was unaware of them, rings hollow.

[68] The Labour Court therefore correctly found that there was no element of secrecy or untoward conduct on the part of the respondents in the way the additional payments were made. RFS’s claim for disgorgement of profits can therefore not succeed.

The claim for contractual damages

[69] Regarding the claim for contractual damages, counsel for the respondents correctly submitted that RFS failed to establish which terms of their contracts had allegedly been breached. In his testimony, Mr Du Plooy initially suggested that in terms of the secondment agreement under which Mr Samons was

⁴ 2004 (3) SA 465 (SCA). See also *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A).

seconded to the Funds during 2007, he was precluded from earning any additional income while on secondment to the Funds, and if he did, he was contractually obligated to pay it over to RFS.

[70] However, under cross-examination, Mr Du Plooy was unable to provide any factual basis for that assertion and was constrained to rely on the suggestion that it was '*basic good manners*'. Mr Du Plooy's attempts to found those contractual provisions in RFS's HR policy also came to nought.

[71] In any event, in my view, RFS has failed to establish any causal connection between the alleged breach of the contracts and the damages it allegedly suffered as a consequence thereof. The monies were paid to the respondents directly from funds paid into the RFS bank account by the Funds and were earmarked for payment to the respondents. The money was thus specifically transferred to enable RFS to pay the respondents in accordance with the resolution adopted by the Funds. RFS's claim for contractual damages must therefore also fail.

Costs

[72] Regarding the question of costs, I am of the view that the Labour Court's order should not be disturbed. In instituting the proceedings against the first, second and third respondents, RFS was pursuing a purely financial interest and there is therefore no reason why it should not be liable for their costs.

[73] In the result, I make the following order:

Order

1. The appeal is dismissed with costs including the costs of senior counsel.

SMITH AJA

Savage JA and Malindi AJA concur.

APPEARANCES:

For Appellant:

Adv E S J Van Graan SC, Adv T J
Odendaal

Instructed by J F Mare Attorneys

For First, Second and Third Respondents:

Adv T Van Der Walt SC

Instructed by Nysschen Attorneys

LABOUR APPEAL COURT