



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1788/09

In the matter between:

DOUGLAS SOUTHGATE

Applicant

and

BLUE IQ INVESTMENT HOLDINGS

Respondent

Heard: 08 November 2011

Delivered: 4 May 2012

Summary: Contractual damages.

JUDGMENT

AC BASSON J.

Introduction

1] The applicant in this matter is Mr Douglas Southgate (hereinafter referred to as the 'applicant'). The respondent, Blue IQ Investment Holdings (Pty) Ltd, was established in terms of the provisions of the Blue IQ investment Holding

(Pty) Ltd Act.¹ The respondent is listed as a Provincial Public Entity under Schedule 3 (c) of the Public Finance Management Act² ('the PFMA').

Brief exposition of the facts

- 2] The applicant commenced his employment with the respondent on 16 January 2007 in terms of a fixed term contract. (I will refer to this contract as 'the first contract'.) The contract was signed by the applicant and the then Chief Executive Officer, Ms Nomhle Canca (hereinafter referred to as 'the CEO' or 'Canca'). This contract contained a non-variation (except in writing)/entrenchment clause³ together with a non-waiver and estoppel clause. (I will return to this clause in more detail hereinbelow.)
- 3] This contract was subsequently converted into a one year fixed-term contract running from 1 May 2007 to 14 February 2008 at which point a new agreement would have been negotiated which would have regulated the applicant's contractual relationship with the respondent for the period 14 February 2008 to 15 February 2009. (I will refer to this contract as 'the second contract'). In terms of the second contract, the applicant was employed as a 'Special Projects Programme Manager'. This contract was again signed by the applicant and Canca on behalf of the respondent. This second contract contained similar entrenchment clauses under clause 13. His salary under the first contract was R 100 000.00 per month on a total cost to company basis and R 1 680 000.00 under the second contract to be paid in 12 equal monthly instalments.
- 4] In essence, it was the case for the applicant that, prior to the expiry of the second contract, he and Canca commenced negotiations directed at the conclusion of a new fixed-term contract of employment. According to the applicant, these negotiations between him and Canca did in fact culminate in the conclusion of a new fixed term contract of employment. (I will refer to this

¹ 5 of 2003 (Gauteng Provincial Legislature – hereinafter referred to as 'the respondent').

² Act 1 of 1999.

³ Clause 13.2 reads as follows: 'No amendment of this agreement or any consensual cancellation thereof or any part thereof shall be binding on the parties unless reduced to a written document and signed by them'.

contract as 'the third contract'). At all material times during the negotiations of the third contract, the applicant acted personally and the respondent was represented by Canca (in her capacity as the Chief Executive Officer of the respondent). According to the applicant he was to be engaged in a new position as the 'Group Programme Coordinator' for a three year period commencing on 16 October 2008 and expiring on 15 October 2011. Further, according to the applicant, he and Canca reached agreement on the main features of the agreement: (i) The second contract would terminate with effect from 15 October 2008 and will be replaced by the third contract; (ii) The third contract would commence on 16 October 2008 and would endure for a period of three years; (iii) The applicant would assume the position of Group Programme Coordinator; (iv) The applicant would receive the same remuneration package as he had received under the second contract; and (iv) His monthly salary would be subject to the timings of the respondent's normal salary review process. He further testified that he in fact had started to work in this new capacity (in terms of the third contract) in October 2008 until he received a notice of termination of the employment contract under the second contract. In this notice no reference was made to the third contract which, according to the applicant, had been concluded with Canca (see further hereunder).

- [5] The applicant explained that under the first and second contracts he performed duties under the B-link (a project within Blue IQ) under the bigger project called Blue Umbrella. The third contract was also under B-link. However, since the B-link projects were taken over by Gauteng Shared Services Company he had fewer responsibilities. Canca then began to give him responsibilities under Phase 2 of Blue Umbrella. According to him, the role envisaged for him under phase 2 was to take on new projects and grow them as part of a strategic goal for the respondent. As already pointed out, the applicant in fact started to work in this new capacity in October 2008.
- [6] On 23 October 2008, Canca sent a job description ('Blue Umbrella PCO') to the applicant. This document set out the tasks and outputs for the position of Blue Umbrella Programme Coordination Officer as well as the skills and

qualifications required for the (new) position. The document further sets out the project period as well as the remuneration package. On 24 October 2008, the applicant sent the document back to Canca and informed her that he had changed the KPMG document significantly 'to mirror the role that I have been playing with the Blue Umbrella Programme'. On 30 October 2008, he again sent a document to Canca to which he attached the KPI document 'as discussed' as well as the Group Programme Coordinator job profile. In this e-mail the applicant informed Canca that he will get Mr. John Mulaudzi (the respondent's Group Legal Advisor) to draw up the employment contract which will be similar to the one that was completed for Mr Davis Cook. It would then be easy for Mulaudzi to cut and paste from Cook's contract.

- [7] In an e-mail dated 4 November 2008, Canca informed the applicant that she had discussed the draft contract with John and that 'he is in the process of finalizing it. I expect to present it to you tomorrow (Wednesday)'. On 5 November, the applicant e-mailed Mulaudzi and informed him that he could not find an electronic copy of the contract. He told Mulaudzi that he should ask Brian for a copy of the contract.
- [8] Mr Happy Molefe (from Human Resources) e-mailed the applicant (and copied the e-mail to Davis Cook) regarding his job profiles. In this e-mail, he informed the applicant that he has attached the two profiles for final check and that he will forward it to Canca once the applicant has checked them. The applicant reverted back to Molefe and informed him of certain changes to the job profile document. From this document it appears that the applicant would have the job title of Group Programme Coordinator: Blue IQ and would be placed on the job level as an executive. One of the key outcomes of his position would be to manage existing programmes as allocated by the CEO.
- [9] On 7 November 2008, the applicant e-mailed Canca and asked her where his contract was because he had an appointment with his tax consultant and would want to discuss the contract with him. Canca responded to the e-mail on 12 November 2008 and informed the applicant that the 'draft contract is with John [Mulaudzi] and he is out of the office today, I hope to get it from him

tomorrow'. She attached the applicant's revised job profile for approval.

- [10] On 14 November 2008, the applicant finally informed Canca (and Happy Molefe) that he had looked through the job profile and that he was now in agreement with the contents thereof.
- [11] On 14 November 2009, Canca was suspended and has not return to the employ of the respondent. She therefore ceased to act as the respondent's CEO and was replaced by Mr Jameel Chand ('Chand') who assumed the position of Acting Chief Executive Officer of the respondent. It was common cause that Chand was at some stage provided with a copy of the applicant's proposed revised job profile.
- [12] As a result of Canca's departure, the contract orally concluded between herself (on behalf of the respondent) and the applicant was not reduced to writing and signed.
- [13] On 12 December 2008, there was a Board meeting at which the applicant was discussed. It is recorded in the minutes that the applicant contract 'expires at the end of February 2009. Prior to her departure, the former CEO was in the process of negotiating a contract with DS [Douglas Southgate], which contract has not been signed....'
- [14] When the applicant approached Chand and Mulaudzi about his contract, Chand and Mulaudzi asked him to produce a written contract entered into between himself and Canca. He was unable to do so as the agreement between him and Canca was never reduced to writing.
- [15] The Board again met on 30 January 2009 during which questions were raised about the integrity of the applicant. During this meeting it was pertinently raised that, if there were any discussions between the applicant and Canca, it should be in writing and that there was no proof of the terms of the contract in the absence of any written contract.

Correspondence terminating the employment relationship

- [16] On 10 February 2009, the applicant received an e-mail from Mulaudzi informing him that his employment with the respondent would terminate on 15 February 2009 being the date of termination of the second agreement. The letter attached to this e-mail is dated 6 February 2009 and signed by Chand.
- [17] On 19 February 2009, Chand confirmed to the applicant that they have considered the correspondence and documentation in respect of the applicant's employment relationship and has arrived at the conclusion that the employment contract has terminated on 15 February 2009 (as per the second contract).

Evidence regarding the contract

- [18] Only Canca and the applicant were present during the negotiations pertaining to the terms of the third contract. Both testified regarding the negotiation process with reference to the e-mails that were exchanged between them as well as what they intended to agree upon. Both were *ad idem* that they intended that the second contract would be replaced by the third contract and that they in fact did reach agreement on the material terms of the contract of employment. Both also testified that they were *ad idem* that it was not a material requirement for the conclusion of the contract that it had to be reduced to writing before the employment relationship came into force. Both also confirmed that the applicant had in fact commenced in his new position in October 2009.

Evidence of the applicant

- [19] The applicant confirmed that he and Canca discussed the possibility that he would take up a different role within the organisation and that these discussions commenced mid June 2008. He accepted that his first contract could only be changed in writing and that the second contract was extended in writing. He also acknowledged that he was familiar with clause 13.2

contained in the second contract. He confirmed that he and Canca had reached an agreement on his position (which was to be different from the one he had fulfilled under the second contract) and that the (third) contract would be for a three year period. In respect of remuneration they agreed that his current package would remain the same (as it was under the second contract) but that his salary would be subject to the normal review period. He confirmed that he in fact started working in the new position early in October 2008. In this new capacity he was required to take over the so-called A1-racing. He was also involved in the so-called West Rand Water project. It was also agreed that he had to formulate the Key Performance Indicators ('KPI's') and formulate the job profile for his new position. The applicant confirmed that he did in fact prepare the KPI's for the new position and that he then requested Mulaudzi to draw up the employment contract. The applicant also confirmed that he and Canca ultimately reached agreement on the job profile.

[20] The applicant (and Canca) was adamant that it was never contemplated between him and Canca that, until a written contract had been signed, that there would be no agreement. In fact, according to the applicant there was no urgency with regard to the contract and that the only reason why the contract was to be recorded in writing was to make sure that the good governance side of Blue IQ would be in place. As far as he was concerned he was already employed in the new position as he in fact had already started to do the job. He testified that he was not concerned about the fact that he was not given a written contract and that it had not been signed. It was only later when he was informed that the second contract was terminated that he started to become worried. According to the applicant, the old contract immediately terminated once he and Canca had entered into a new contract.

[21] In essence, therefore, it was the applicant's evidence that although he expected that a written contract would be drafted at a later stage, it was purely in terms of good governance that there had to be a written contract. At no stage, however, was it contemplated between him and Canca that the employment relationship would only come into being once the written contract was signed. In respect of the job profile, the applicant explained that it was a

work in progress and that it could only be finalised once he had taken up employment. In fact, according to him there was a tacit agreement in respect of what the job profile would be. There was, according to him no disagreement and a number of the changes were in fact just cosmetic. As far as he was concerned he and Canca had completed their negotiations and a contract had consequently come into being.

- [22] In respect of Canca's authority to conclude the contract, the applicant testified that he understood and still believed that the CEO was capable of creating any kind of line position. He also testified that he was not aware of what was happening at Board level and that Canca dealt with the Board.

Evidence of Canca

- [23] Canca confirmed that, once the B-link contract was taken over by Gauteng, she had started to look for a new role for the applicant and contemplated that he would report directly to her (in her capacity as the CEO). She confirmed that she had reached an agreement with the applicant in respect of his position, his remuneration and the duration of the contract (a three year contract). She also confirmed that the applicant did in fact start performing the functions under the new job description. She confirmed that a job profile had to be drawn up as this was a new role in Blue IQ. According to her, she and the applicant definitely reached consensus on the terms of the contract and that the detail of the deliverables would have been incorporated in the KPI's.

- [24] She testified that she had expected Mulaudzi to settle the applicant's contract and that she had in fact instructed him that a contract needed to be put in place as soon as was reasonably possible. She confirmed that whilst the recordal of the contract was important as that was the natural conclusion of all the discussion, it was, however, not contemplated between her and the applicant that a binding contract of employment would only come into existence once the contract had been signed. Canca emphasised that a binding contract came into being once she had agreed what needed to be done by the person (the applicant) that was supposed to deliver. She

confirmed that the applicant had in fact already begun scoping the projects.

- [25] In respect of her authority to create the position of Programme Coordinator she gave uncontested evidence that it was not a requirement that the Board had to approve the position as the post was pre-approved at the remuneration committee level and as such the idea had already been taken through the Board. She further also gave undisputed evidence that the hiring of individuals was her prerogative.

Evidence on behalf of the respondent

- [26] Waja gave evidence to the effect that Canca did not have the authority to create the position of Group Programme Coordinator and employ the applicant in that position without the approval of the Board. He confirmed that it was the practice at the respondent that contracts had to be reduced to writing in order to avoid disputes about the terms of the contract. Chand acknowledged that there were negotiations between the applicant and Canca about a further contract. He, however, testified that these negotiations were never finalised because they were not reduced into a written employment contract. He and Mulaudzi had made it clear to the applicant during two meetings that without a written contract, the termination of the second contract stands and that there consequently was no employment relationship between the respondent and the applicant. Mulaudzi conceded that he was instructed to draft a contract between the applicant and the respondent by Canca. However, according to him, no further details had been given to him nor was he given a template contract to consider.

Facts in dispute

- [27] The following facts were in dispute:

27.1 Whether the applicant and Canca had concluded a valid and binding

fixed-term contract which replaced the second existing fixed term contract that was due to terminate on 15 February 2009.

- 27.2 Whether the respondent reneged on the terms of a binding contract (concluded with Canca) by terminating the applicant's employment on the strength of the original termination date contemplated by the second contract.
- 27.3 Whether in the negotiations between the applicant and Canca agreement was reached on all the material terms of the contract and whether it was specifically required that the contract be reduced in writing before it became effective and binding.
- 27.4 Whether at any stage prior to the termination of the applicant's employment, he in fact assumed the position of Group Programme Coordinator.
- 27.5 Whether the applicant as a consequence of the termination of his employment suffered damages and the extent thereof.

The applicant's case

- [28] The crux of the applicant's claim is a purely contractual claim. He alleged that there was a premature breach or repudiation of a three year fixed term contract.
- [29] In respect of Canca's authority to enter into a contract on behalf of the respondent, the applicant submitted that Canca did in fact have the necessary authority to enter into such a contract. The applicant further argued that even if Canca was required to consult the respondent's Board before appointing the applicant to the position of Group Program Coordinator, the failure to so consult did not invalidate the contract concluded between the applicant and the respondent. In the alternative it was pleaded that, to the extent that the applicant did in fact occupy a managerial position in respect of which Canca

had to consult the Board, the applicant was not aware of any deficiency or irregularity in relation to Canca's authority and/or the conclusion of the third contract of employment and therefore the applicant was entitled to assume that both Canca and the respondent had complied with any prescribed internal rule, regulation or formality. It was therefore pleaded that the applicant was entitled to assume that Canca had the necessary power to conclude a contract of employment and therefore the respondent is precluded from relying upon any alleged failure to comply with any prescribed internal rule, regulation or formality.

The respondent's case

[30] The respondent disputed the applicant's claim on the following grounds:

- 30.1 Although the respondent admitted that there were negotiations regarding a new contract of employment between the applicant and Canca, such negotiations were not concluded and therefore no new contract of employment was entered into as there was no meeting of minds on the essential term and conditions of employment being negotiated.
- 30.2 The parties contemplated reducing their verbal negotiations to writing. Because there was no written and signed contract between the parties there existed no contractual relationship between them. The respondent argued that a contract would only have come into existence once it had been reduced to writing and signed by the parties. This was the understanding as envisaged in numerous e-mail exchanges between the parties from about 24 October 2008 until 12 November 2008. The respondent further submitted that it was standard practice for employment contracts to be reduced to writing and signed by both the employer and the employee parties.
- 30.3 Canca lacked authority to unilaterally create the position of Group Programme Coordinator and to employ a person in such a position

without first obtaining the approval of the respondent's Board of Directors in both instances. In this regard, Canca failed to comply with both the Act creating the respondent and the respondent's delegations of authority. Because the position of Group Programme Coordinator impacted on the organisational structure it had to be approved by the Board.

- 30.4 The parties could not cancel, amend or novate the second contract and enter into a new contract (the third contract) as they were bound to follow the formalities set out in the entrenchment clause (clause 13) of the second contract.⁴

Was there an agreement on the material terms of the employment contract?

- [34] Only Canca and the applicant were involved in the negotiations regarding the agreement. There is, accordingly no evidence before this Court to refute their evidence regarding what was agreed upon in respect of the third contract. In essence it was the evidence of Canca and the applicant that the contract was for the position of Group Programme Coordinator and that the contract was to be for a period of three years. Both Canca and the applicant confirmed that his remuneration would have been the same as that which he had earned at the time (in terms of the second contract). They further agreed that the applicant would start in the new position as early as October 2008. Both Canca and the applicant also confirmed that the applicant did in fact commence working in the new position in October 2008.

- [35] Wallis⁵ points out as follows regarding the formation of an employment contract:

'The contract of employment requires no special formalities for its formation

4 On 26 November 2010, the respondent filed a notice of amendment in terms of which the respondent pleaded the circumstances in terms of which this defence was being invoked. The amendment was not opposed.

5 *Labour and Employment Law* (1995, 1st ed Butterworths) at page 2-21.

and it accordingly arises from nothing more than the agreement between the parties on its material terms, namely, the services to be rendered and the remuneration to be paid as well as such other terms as they may regard as necessary to incorporate in their agreement. These terms may be agreed upon express, impliedly or tacitly.' [Footnote omitted]

It is required that the parties reach broad consensus on the *essentialia* of the contract: In this regard Wallis⁶ continues as follows:

'Although the actual negotiations between prospective employer and prospective employee may, as we have seen, be extremely limited, they are nonetheless critical to the question whether any contract at all comes into existence. The terms there offered by the employer and accepted by the employee must be sufficient to encompass the essentials of a contract of employment. It is necessary in a contract of employment, like any other contract, that agreement should be reached on all material terms and that the agreement should be sufficiently clear to be enforceable.

It is not necessary that there be agreement on every single detail concerning the conditions of employment. A contract may be concluded on the basis that the parties will subsequently enter into discussions and agree upon subordinate terms. It has been held that this requires the parties to enter into discussions on the outstanding matters and make proposals which are neither unreasonable nor inconsistent with that which has already been agreed. Provided the parties have reached agreement on all essential elements of a contract of employment and intend that the contract to commence and be implemented prior to and without agreement having been reached on these subordinate matters the contract will be enforceable on those terms which have been agreed. In that case the contract can stand without agreement having been reached on the subordinate matters. Where, however, the parties have only reached agreement in principle and intend that there be agreement on other terms for the agreement to be complete there is no binding contract. An agreement to reach agreement on these matters at a future stage will be unenforceable.'⁷ [Footnote omitted and my emphasis]

⁶ *Labour and Employment Law* First edition at pages 2-22.

⁷ Wallis *Labour and Employment Law* at page 2-22.

- [36] Mr Malindi submitted that because Canca and the applicant did not reach agreement on the KPI's / Job profile of the position - which is a material term of an employment contract – the contract therefore did not come into being. In this regard he referred the Court to the decision in *Lambons (Edms) Beperk v BMW (Suid Africa) Edms) Beperk*.⁸
- [37] Although it is correct that the evidence confirm that Canca had not seen the final KPI's/Job profile of the applicant before she left the respondent's employ, it is clear from the e-mail to Canca and Happy Molefe dated 14 November 2008 (the day Canca left the respondent), that at that stage, the parties have in fact reached agreement on the contents of the job profile.
- [38] However, even if it can be concluded that they did not reach agreement on this aspect, I am, in any event, not persuaded that a final agreement on the KPI's/Job profile was a material term of the contract. As already pointed out, it is not a pre-requisite for the validity of a contract of employment that there has to be agreement on every detail of the contract. In fact, parties may even agree on a later stage what the exact nature of the employee's job would be. In the present case, I am on the evidence satisfied that the applicant and Canca were *ad idem* that they had reached agreement on the material terms of the employment contract. The evidence as well as the e-mails confirm that Canca and the applicant were *ad idem* about their intention to create an employment relationship and that it was their intention that the applicant would render his employment in the capacity as a Group Programme Coordinator. Pursuant to their agreement the applicant did in fact commenced working in the new position that was contemplated by the negotiations between Canca. They had further reached agreement that the contract would be for a three year period and that it would be on the same salary level as that what was agreed upon in terms of the second agreement. The fact that Canca and the applicant may have still been in the process of finalising the KPI's of the applicant's position did not in my view prevent the contract of employment from coming into existence. There certainly was no evidence before this Court to suggest that it was ever contemplated between Canca and the applicant

⁸ [1997] 3 ALL SA 327 (A).

that the contract would only come into being once they have reached agreement on the KPI's.

- [39] In passing it can only be pointed out that even where parties have not agreed on the specific amount of remuneration to be paid to the employee, the contract of employment can still be concluded provided that the parties have intended that the employee will be paid. In those circumstances, the employee will be entitled to a 'reasonable wage'. See in this regard *Middleton v Carr*.⁹

'In other cases, also frequently described as *quantum meruit* claims, there is not a contract complete in all its terms which has failed or been only partly fulfilled, but a contract in which the express terms are insufficient to fix the remuneration of the party who is to do the work, whether he be a *conductor operis* or a *locator operarum*. In such cases, of which the present is an example, the matter is approached rather from the angle of implication, in fact or in law, of a term fixing the remuneration. In such cases before an amount of money can be awarded the Court has to be satisfied both that an agreement to remunerate fairly or reasonably for the services is to be implied and that the rate or amount of fair or reasonable remuneration can be sufficiently certainly fixed on the evidence.'

- [40] Wallis¹⁰ likewise confirms that the existence of a contract of employment may even be inferred from the parties' conduct. It is also not necessary that the parties need to agree on every detail of the contract as is suggested by the respondent (with reference to the fact that the parties have not agreed on the KPI's of the applicant). Moreover, even where the parties have not agreed on the amount of remuneration, the contract of employment can still come into being provided that it was intended that the employee be remunerated. In such circumstances, the employee will be entitled to a 'reasonable wage' as remuneration.¹¹ See in this regard: *Chamotte (Pty) Ltd v Carl Coetzee (Pty)*

⁹ 1949 (2) AD 274 at page 386.

¹⁰ *Labour and Employment Law* at pages 2-21 at para 12.

¹¹ See *Angath v Muchkunal's Estate* 1954 (4) SA 283 (NPD) at 284 C – F: 'As I see the case at the present stage, it is not one of vagueness. The contract, as I have said, is not in its language vague in any respect - rather it is silent in certain respects. From what was said by Schreiner, J.A., in *Middleton v Carr*, [1949 \(2\) SA 374 \(AD\)](#) at p. 386, it seems to me clear that the Law can imply what is necessary in order to supply the unexpressed terms in a case such as the present, so that reasonable

Ltd.¹²

'The contract, however, does not provide for the extent of the increase should the parties fail to arrive at "a negotiated increase". There is certainly authority for the view that where there is an agreement to do work for remuneration and the latter is not specified (expressly or tacitly), the law itself provides that it should be reasonable (cf. Wessels, *Law of Contract*, 2nd ed., para. 3498; *De Zwaan v Nourse*, *supra*; *Middleton v Carr*, *supra*; *Angath v Muckunlal's Estate*, [at p. 284 A - H]), but in the present case it is unnecessary to rely on such a rule or to consider its general validity or its application to the contract. Applying well recognised tests (cf. *Mullin (Pty.) Ltd v Benade Ltd.*, [1952 \(1\) SA 211 \(AD\)](#) at pp. 214C - 215A; *S.A. Mutual Society v Cape Town Chamber of Commerce*, [1962 \(1\) SA 598 \(AD\)](#)), it seems, in any event, clear enough that the contract implies that if the parties do not agree on the increase in remuneration, the plaintiff will in any case be entitled to a reasonable remuneration for the additional work.'

[41] I am furthermore also not persuaded that the *Lambons*-case is support for the contention that Canca and the applicant did not reach agreement on material terms. In that matter the respondent (BMW) had made a verbal offer over the telephone in terms of which the applicant (Lamdons) would be a dealer in motor vehicles manufactured by BMW. The Court concluded on the facts that the parties have not entered into a binding and enforceable contract as they have not reached an agreement on material terms of the contract. They have not reached agreement on the purchase price and on area of business.

[42] In conclusion therefore: Whilst I do accept that if parties have not reached agreement on a material term of the contract that a contract will not come into existence, the evidence in the present matter shows that the parties have indeed reached agreement on the material terms of the employment

remuneration may be awarded. From *Fluxman v Brittain*, 1941 AD 273, it seems to me it is possible to imply that the plaintiff, if he is entitled to remuneration, is not obliged to leave it after the termination of his employment or, at any rate, beyond a reasonable time after the termination of his employment. On the evidence up to now I am unable to say that a reasonable man could not do what is necessary in regard to implying the unexpressed terms. Consequently it seems to me that the plaintiff has made out a *prima facie* case for reasonable remuneration.'

12 1973 (1) SA 644 (A).

contract.¹³ The evidence in my view clearly shows that Canca and the applicant have contemplated that the agreement would come into being once they have agreed on the nature of the job, the remuneration and the period of the contract. They did not contemplate that an agreement on the KPI's/Job Profile was a material term of the contract. In the present matter the parties have, in my view reached agreement on the material terms required for the conclusion of a contract of employment. This conclusion is supported by the e-mails that were exchanged between the parties. In an e-mail dated 4 November 2008, Canca stated that she had discussed the draft contract with John and that he was in the process of finalising the contract. Yet at that time Canca and the applicant were still busy finalising the KIP's/Job Profile. Nowhere in these e-mails it is contemplated that the contract will only be concluded once the parties have reached agreement on the KPI's/Job profile. Moreover, as already pointed out, as of 14th of November 2008, the parties have, if regard is had to the e-mail dated 14 November 2008, in fact reached agreement on the contents of the KPI's/Job profile.

Must the contract be in writing?

General principles

[43] Having concluded on the facts that Canca and the applicant have reached an

¹³ See in this regard *CGEE Alsthom Equipments et Entreprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) 81 at page 92 A—F where Corbett JA held as follows: 'There is no doubt that, where in the course of negotiating a contract the parties reach an agreement by offer and acceptance, the fact that there are still a number of outstanding matters material to the contract upon which the parties have not yet agreed may well prevent the agreement from having contractual force. A good example of this kind of situation is provided by the case of *OK Bazaars v Bloch* (*supra*) (see also *Pitout v North Cape Livestock Co-operative Ltd* (*supra*)). Where the law denies such an agreement contractual force it is because the evidence shows that the parties contemplated that *consensus* on the outstanding matters would have to be reached before a binding contract could come into existence (see *Pitout's* case *supra* at 851B--C). The existence of such outstanding matters does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement. If, however, the parties should fail to reach agreement on the outstanding matters, then the original contract would stand. (See generally Christie *The Law of Contract in South Africa* at 27--8.) Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances (see *Pitout's* case *supra* at 851D--G). I did not understand counsel to dispute the correctness of these general propositions.'

agreement on the material terms of the employment contract, it now needs to be determined whether it was a requirement that the third contract had to be in writing in order to be binding between the applicant and the respondent.

- [44] It is accepted that, except where the parties agree that the contract concluded between them shall be in writing, an employment contract need not be reduced to writing.¹⁴ See in this regard *Goldblatt v Freemantle*:¹⁵

‘Subject to certain exceptions, mostly statutory,¹⁶ any contract may be verbally entered into; writing is not essential to contractual validity’.¹⁷

- [45] Mr Wade relied on this *dictum* for his argument that a mutual undertaking to have an oral agreement reduced to writing and signed was insufficient to discharge the burden and show that the oral agreement was not intended to be binding. In support of his argument Mr Wade referred to the decision in *Shaik and Others v Pillay and Others* and argued that the *onus* of establishing that the recordal in writing was essential to the validity of the contract rests squarely on the respondent.¹⁸

‘Parties negotiating a contract may bind themselves to the observance of certain formalities in the framing of the contract. Thus, they may agree that there will be no binding transaction between them until the agreed terms have been set out in a written document signed by both of them. Until this has been done, the contract has no legal effect. See Grotius *Inleiding* 3.14.26; Voet *Commentarius* 5.1.73; *Goldblatt v Fremantle* 1920 AD 123 129; *Woods v Walters* 1921 AD 303 305; *Mitchell v Knox-Gore* 1935 NPD 490 508; *Schlinkmann v Van der Walt* 1947 (2) SA 900 (E) 909; *SA Sentrale Ko-op Graanmpy Bpk v Shifren* 1964 (4) SA 760 (A) 766. Cf *First National Bank Ltd v Avtjoglou* 2000 (1) SA 989 (C) 995 - 996.

There is a second possibility where the parties may intend their contract to be

14 Wallis *supra* at 2-21.

15 1920 AD 123 at 128.

16 Most notably in respect of contracts dealing with the alienation of land.

17 In fact a contract can even exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See *Timoney and King v King* 1920 AD 133 at 141.

18 2008 (3) SA 59 (N) at paras 27-31.

put into writing merely to facilitate the proof of its terms. Voet 5.1.73; *Woods v Walters* (supra); *De Bruin v Brink* 1925 OPD 68; *Electric Process Engraving and Stereo Co v Irwin* 1940 AD 220 229 - 230; *Cole v Stuart* 1940 AD 399 408; *SOS-Kinderdorf International v Effie Lentin Architects* [1991 \(3\) SA 574 \(Nm\)](#) 580.

There were never direct discussions between buyers and sellers in this case. So this is not a case where the parties come to an oral agreement after a written document has been mentioned in the course of their negotiations, which document is, however, never drawn up. In such a case the contract becomes binding immediately, even though it is not reduced to writing. The oral agreement may oblige the parties to produce and sign a written memorial of the transaction, see eg *Amoils and Others v Amoils* 1924 WLD 88 95.

*I accept that even in the absence of clear proof that the parties intended their contract should be contained in a written document, it is presumed that the oral agreement is binding.*¹⁹ Grotius 3.14.26; *Goldblatt v Fremantle* (supra); *Woods v Walters* (supra); *De Bruin v Brink* (supra); *Electric Process Engraving and Stereo Co v Irwin* (supra), *Cole v Stuart* (supra); *Schlinkmann v Van der Walt* (supra) 909 - 911.

I also accept that if a party alleges that it was agreed that no binding contract would be created without writing, the onus of proving the existence of such an agreement rests on him or her. See in this regard *Goldblatt v Fremantle* (supra); *Woods v Walters* (supra); *De Bruin v Brink* (supra); *Cole v Stuart* (supra) 408; *Electric Process Engraving and Stereo Co v Irwin* (supra) 230.'

See also *Woods v Walters*²⁰ where Innes, CJ stated as follows:

'It follows of course that where the parties are shown to have been *ad idem* as to the material conditions of the contract, the onus of proving an agreement that legal validity should be postponed until the due execution of a written document lies upon the party who alleges it.'

[46] In this regard both Canca and the applicant led unchallenged evidence to the

¹⁹ My emphasis.

²⁰ 1921 AD 303.at 305. Referred to with approval by the Court in *Shaik* (supra).

fact that a recordal in writing was *not* a pre-condition for the third contract to be valid although it was contemplated that the contract be reduced to writing from a good corporate governance perspective.

- [47] The respondent relied on the fact that the applicant and the respondent had entered into a fixed term contract of employment for the period 15 February 2008 to 15 February 2009 (the second contract) which contained a non-variation (except in writing) clause. The second contract was to terminate automatically on 15th February 2009 unless lawfully terminated an earlier date for any reason. More in particular the respondent relied on clause 3.2 which states as follows:

‘3.2 The parties specifically agree that the company cannot offer employment to the executive on any other basis as to the duration of this agreement than on the basis recorded in this clause and this agreement or any action done hereunder does not give rise to permanent employment or any expectation of renewal or permanent whatsoever.’

Clause 3.3 of the contract further provides that:

‘3.3The parties undertake to sign a performance agreement by no later than 30 days after the signature of this agreement.’

- [48] Mr. Malindi submitted that clause 3 could not leave any doubt, especially in the mind of the applicant, that the duration of his contract of employment was subject to the following: Firstly, that the contract was for one year only and secondly, that the contract would automatic expiry upon the expiry date. Thirdly, no expectation (reasonable or legitimate) could arise on the part of the applicant that anything done in terms of this contract that permanent employment or renewal may result and lastly that the contract is subject to a suspensive condition that the contract is dependent on the signing of a performance agreement within 30 days after the signature of the contract.

- [49] In addition to the above, Mr. Malindi submitted that the parties bound themselves to clause 13.2 (the non-variation clause) which provided as

follows:

‘13.2 No amendment of this agreement or any consensual cancellation thereof or any part thereof shall be binding on the parties unless reduced to a written document and signed by them.’

[50] Furthermore, the respondent declared that no relaxation or indulgence that may be shown to the applicant shall be deemed to be a waiver of its rights or lead to it being stopped from exercising its rights. The clause reads as follows:

‘13.4 No relaxation or indulgence which the company may show to the executive shall in any way prejudice the company or be deemed to be a waiver of its rights hereunder nor shall such relaxation or indulgence preclude or estop the company from exercising its rights in terms of this agreement in respect of any further breach.’

[51] Lastly, the contract contains a clause which provides as follows:

‘13.5 This agreement constitutes the whole agreement between the parties and no warranties or representations whether express or implied have been given or made by the company to the executive.’

[52] In light of the foregoing, Mr. Malindi therefore submitted that there could not have been any doubt in the applicant’s mind firstly, that the contract could only be amended by reducing such amendment to writing and that such amendment had to be signed by both the applicant and respondent. Secondly, that any agreement to cancel this agreement had to be done in writing and such consensual cancellation had to be signed by both applicant and respondent.. Lastly that the respondent did not, and ought not to have been deemed to have waived its rights. In support of this contention the Court was referred to the matter in *SA Sentrale Ko-Op Graanmaatskappy Bpk v Shifren en Andere*²¹ where the written contract between the parties provided that ‘... any variations in the terms of this agreement as may be agreed upon between the parties shall be in writing otherwise the same shall be of no force

21 1964 (40 SA 760 (A).

or effect'.²² The Court held that the contract could not be altered verbally and that to hold otherwise would be tantamount to deviating from the elementary and basic general principle that contracts entered into freely and seriously between parties authorised to enter into such contracts are in the public interest to enforce.²³ In *Brisley v Drotsky*,²⁴ the Court held that the principle laid down in the *Shifren*- case, namely that a term in a written contract that all amendments to the contract have to comply with specified formalities, was still binding.²⁵ The Court further held that the principles of *bona fides*, namely that the entrenchment clause ought not be enforced because it would in the circumstances be unreasonable, unfair and in conflict with the principles of *bona fides*, cannot be successfully invoked.²⁶ The High Court in *Nyandeni*

22 Ibid at 764 A.

23 Ibid at 766-767.

24 2002 (4) SA 1 (SCA).

25 Ibid at paras 6-10.

26 Ibid at paras 11-34. The Court in *Shifren* held as follows: '[23] 'n Ander waarde onderliggend aan die kontraktereg is deur Rabie HR in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* [1984 \(4\) SA 874 \(A\)](#) op 893I-894A onderstreep toe hy daarop gewys het dat 'dit in die openbare belang is dat persone hulle moet hou aan ooreenkomste wat hulle aangegaan het. In laasgenoemde verband het Steyn HR in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en H Andere* [1964 \(4\) SA 760 \(A\)](#) op 767A, gewag gemaak van - "die elementêre en grondliggende algemene beginsel dat kontrakte wat vrylik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word".'

[24] Die taak van howe in die algemeen en van hierdie Hof in besonder is om hierdie grondliggende waardes wat soms met mekaar in botsing kom teen mekaar op te weeg en om by geleentheid, wanneer dit nodig blyk te wees, geleidelik en met verdrag aanpassings te maak. Of A soos Lord Simon of Glaisdale dit stel in *Miliangos v George Frank (Textiles) Ltd*:

'(J)udicial advance should be gradual. . . . (O)ne step is enough. . . It is, I concede, a less spectacular method of progression than somersaults and cartwheels; but it is the one best suited to the capacity and resources of a Judge.'

Om eensklaps aan Regters 'n diskresie te verleen om kontraktuele beginsels te verontagsaam wanneer hulle dit as onredelik of onbillik beskou is in stryd met hierdie werkswyse. Die gevolg sal immers wees dat die beginsel van *pacta sunt servanda* grotendeels verontagsaam sal word omdat die afdwingbaarheid van kontraktuele bepalings sal afhang van wat 'n bepaalde Regter in die omstandighede as redelik en billik beskou. Die maatstaf is dan nie meer die reg nie maar die Regter. Vanuit die hoek van die kontrakterende partye gesien, sal hulle nie kan handel op die algemene verwagting dat wanneer daar 'n dispuut tussen hulle ontstaan hulle kontrak ooreenkomstig die terme daarvan afgedwing sal word nie. Hulle sal moet wag en sien of die individuele Regter die bepalings as redelik en billik beskou. Dat so 'n algemene benadering nie aan die behoeftes van die handelsverkeer sal voldoen nie, spreek eintlik vanself. 'n Hof kan nie skuiling soek in die skaduwee van die Grondwet om vandaar beginsels aan te val en omver te werp nie; wel in die lig van die Grondwet kan en moet die reg aangepas word. In hierdie konteks is vaagweg na konstitusionele waardes verwys sonder om spesifiek te wees. 'n Vrye regterlike diskresie is nie so 'n waarde nie en ons is ook nie in staat 'to discern any societal value which is imperilled' deur die handhawing van *Shifren* en die weiering om 'n 'special equity theory' in die kontraktereg in te voer nie.

[25] Wat verskansingsklousules in die besonder betref, is, soos reeds ten dele aangedui, dit duidelik dat die uiteindelijke beslissing in die *Shifren*-saak juis die resultaat is van 'n opweging van verskillende geldige oorwegings. So het die Hof byvoorbeeld die vraag gestel of daar enigiets verkeerd is of onaanvaarbaar is in die oorwegings wat die verskansingsklousule ten grondslag lê. Hierop gee Steyn HR die volgende antwoord (op 766H):

'Hul [dit is die kontrakterende partye se] klaarblyklike doel met so 'n bepaling is om te waak teen die geskille en bewysmoeilikhede wat by mondelinge ooreenkomste kan ontstaan. Om albei daarteen te

*Local Municipality v Hlazo*²⁷ also uphold the *Shifren*-principle as being good law.²⁸

[53] As I understand Mr. Malindi's argument, the respondent can therefore seek refuge in clause 13.2 of the second argument to support its argument that the employment contract can therefore only be amended by reducing such amendment in writing. Likewise the agreement can only be cancelled if it is done in writing (even where the cancelation was consensual). I have no quarrel with the respondent insofar as the second contract is concerned. The legal authorities are clear: the purpose of a 'non-variation clause except in

beskerm kom hulle uitdruklik ooreen dat mondelinge wysigende ooreenkomste . . . al word hulle animo contrahendi aangegaan, tussen hul van nul en gener waarde sal wees.'

[26] Dit staan dus vas dat 'n verskansingsklousule op sigself nie ongeldig is nie ten spyte daarvan dat 'n beroep daarop noodwendig sal neerkom op 'n weiering om uitvoering te gee aan 'n mondelinge ooreenkoms wat animo contrahendi aangegaan is. Wat beklemtoning uit die aanhaling verdien, is dat die verskansingsklousule beide partye beskerm - en dit was hulle vrye keuse. Die potensiele ongelykheid van die partye in hulle bedingingsmag of finansiële vermoë en die beskerming van swakkere kontraktante kom dus glad nie hier ter sprake nie' ...

Cameron AR observes as follows: '[90] The appellant's attack invites us to reconsider that decision.

We are obliged to do so in the light of the Constitution and of our 'general obligation', which is not purely discretionary, to develop the common law in the light of fundamental constitutional values. For the reasons the joint judgment gives, I do not consider that the attack can or should succeed. The *Shifren* decision represented a doctrinal and policy choice which, on balance, was sound. Apart from the fact of precedent and weighty considerations of commercial reliance and social certainty, that choice in itself remains sound four decades later. Constitutional considerations of equality do not detract from it. On the contrary, they seem to me to enhance it. As the joint judgment observes (para [7]), it is fallacious to suggest that insistence on only written alterations to a contractual regimen necessarily protects the strong at the expense of the weak. In many situations the reverse is likely to be true. And where a contracting party, strong or weak, seeks to invoke the writing-only requirement in deceit or to attain fraud, the courts will not permit it to do so.'

27 2010 (4) SA 261 (ECM).

28 At paragraphs [43] – [44] the Court held as follows: [43] The judgment in *Shifren* convincingly deals with policy considerations such as the need to avoid disputes, evidential difficulties often associated with oral agreements, the need for certainty and clarity in the commercial environment, and the infringement of the right to contractual freedom to allow a departure from the elementary principle of *pacta sunt servanda*. The principle in *Shifren* has consistently been reaffirmed by the Supreme Court of Appeal and remains good law (*Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* [1975 \(3\) SA 273 \(T\)](#) at 277A - E; *Brisley v Drotosky* [2002 \(4\) SA 1 \(SCA\)](#) ([2002] 3 All SA 363; 2002 (12) BCLR 1229) in paras 6 - 10; *Kovaks Investments 724 (Pty) Ltd v FC Marais* (SCA case No 232/08, 20 August 2009, as yet unreported).

[44] Of course, in the absence of an entrenchment (non-variation) clause, the contracting parties are free to informally or verbally cancel or vary the terms of their written contract. This proposition was accepted in *Shifren* (at 766C - G) and is supported by subsequent authority such as *Academy of Learning (Pty) Ltd v Hancock and Others* [2001 \(1\) SA 941 \(C\)](#) at 954B - E.'

writing' clearly implies that any variation to the agreement may be invalid unless the variation was to be reduced to writing. An oral agreement which purportedly varies the contract will there be ignored. Similarly it is required that a cancellation of the contract should be in writing.

[54] I have considered this argument. I am, however, not persuaded that the non-variation clause contained in the second contract has the effect of rendering the third contract invalid simply on the basis that it (the third contract) was not reduced to writing. The purpose of a non-variation clause (except in writing) is to protect the parties to the agreement by preventing one of the contracting parties (for example the employer) from, for example, vary the salary that was agreed upon in the employment contract.

[55] Clause 13.2 of the second contract is, in my view, valid only in respect of the second contract. This clause cannot be used to prevent the parties (in this case the applicant and Canca contracting in her capacity as the CEO on behalf of the respondent) from concluding a third or further contract. In the present case, the applicant and Canca did not negotiate the amendment of the second contract. They had negotiated the terms of another (third) contract in terms of which the applicant was appointed to a *different* position and for a *longer* period. Clause 13.2 of the second contract is therefore in my view irrelevant *vis à vis* the third contract. Moreover, nothing in the second contract prevents the parties from entering into a new contract. Lastly, the two parties to the contract were *ad idem* that they did not contemplate that it was a requirement that the new contract had to be reduced to writing. Canca contracted on behalf of the respondent. She was the CEO at the time and she concluded the contract on behalf of the respondent and she concluded the third contract on the basis that it was not a material requirement that the contract had to be in writing.

[56] Lastly, even if I am wrong in my finding that the third contract need not have been in writing in order to be binding, I have taken note of the fact that the applicant will then not have been employed simply because the respondent had not drafted his contract in time. Had Mulaudzi drafted the contract when

he was asked to do so by Canca, the contract would have been reduced to writing. I can also not ignore the fact that the applicant had in fact commenced in the new position in October only to be informed four months later that he did not have a written (third) contract and therefore the second contract came to an end by fluxion of time.

- [57] Lastly, I have also considered the fact that had it not been for the fact that Canca had been suspended and ceased to act as the respondent's CEO, the contract of employment as negotiated between the applicant and Canca would have been reduced to writing. In light of these factors, I am in conclusion of the view that the third contract came into being despite the fact that it was not in writing.

Canca's authority

- [58] The respondent pleaded that Canca did not have the necessary authority to create the position of Group Programme Coordinator without first obtaining the approval of the respondent's Board of Directors. The respondent's argument in this regard is as follows:

58.1 The position of Group Programme Coordinator had financial implications and impacted on the respondent's organisational structure. Consequently the Board's approval was needed.

58.2 Because the Board was responsible for its organisational structure, the Board therefore had to approve the appointment of the applicant. If regard is had to the 'Delegation of Authority and Approval Framework' (hereinafter referred to as 'the delegations') Canca had to consult the Board when appointing a management member. The respondent accepted that because the applicant was appointed to a management position reporting directly to Canca (the CEO), the board had to be consulted before appointing the applicant to the position. In this regard clause 4.6 of the delegations (effective date 23 September 2008) states as follows:

‘4.6 Powers & duties of the CEO

The CEO has the following duties and powers:

- to appoint, determine the conditions of employment of and dismiss the staff of Blue IQ, including members of staff on management level; where the management members are reporting to the CEO the Board must be consulted’.

‘Delegation’ is defined as follows:

‘Delegation entails that a subordinate is officially entrusted with specified authority to execute responsibilities bestowed upon him/her allowing him/her to take action and make decisions that will be legally binding which may be beneficial and which might present a risk to Blue IQ’.

‘Department’ is defined as follows:

‘Means a main functional Unit within Blue IQ, tasked with specific functions which are related to the achievement of that Unit’s objectives, i.e Finance, Marketing and Communications ect.’

‘Executive manager’ is defined as follows:

‘Means a manager who is responsible for the management of Blue IQ Department.’

‘Senior manager’ is defined as follows:

‘Means a manager who exercises direct managerial control over specific human resources utilized in a Department or Section in the achievement of that Department or Section’s objectives.’

[59] In terms of the delegations, the Member of the Executive Council (‘the MEC’) appoints the CEO on the recommendation of the Board. If regard is had to paragraph 3.2 of the delegations, no express power is given to the Board to employ employees at any other level. However, if regard is had to paragraph

4.6 of the delegations, the CEO is specifically granted the power to appoint employees. In the case of management members that report to the CEO, the Board must be consulted. In terms of the 'Master Delegations of Authority in Blue IQ' (referred to as 'the Master'), the CEO has the power to determine departmental structures (clause 5.1.3) and has the power to implement systems for financial management, risk management, internal control systems etc (clause 5.3). Under 'Human Resource Matters' (clause 5.32) the CEO is given the power to create vacancies.

What was the position of the applicant?

[60] It was submitted on behalf of the applicant that the position of Group Programme Coordinator was in fact not a management position and that Canca therefore had a free hand in appointing the applicant. The applicant was therefore not an executive or senior manager as defined in the delegations and consequently the CEO was empowered to appoint him in terms of her delegated powers. The respondent was, however, of the view that the applicant was a managerial employee hence the Board was required to give its approval whenever a manager was appointed. Canca's unchallenged evidence was that the applicant was not a manager. Waja was called to confirm whether the applicant was a 'manager' yet had no idea what the applicant did.

[61] I am on the evidence not persuaded that the applicant was in fact a senior manager as defined in the delegations. In fact, it was never put to Canca that the applicant was a senior manager and that she therefore had to consult the Board. What was put to Canca was that the new position was an important position and that the Board had to approve the position. Canca's unchallenged response was that the approval of the Board was not necessary as the position was pre-approved at the remuneration committee level. In the event, I am of the view that Canca had the necessary authority to appoint him to the designated position.

Application of the Turquand rule²⁹

- [62] If I am wrong in concluding that Canca did in fact have the necessary powers in terms of the respondent's delegations to appoint the applicant and in fact had to consult with the Board before appointing him, I am nonetheless of the view that by operation of the *Turquand*-rule that the applicant was entitled to assume in good faith that Canca had the necessary authority to appoint him and conclude the employment contract on behalf of the respondent. (See in this regard *Royal British Bank v Turquand*.³⁰) This rule was defined in *Morris v Kanssen*³¹ to mean that 'persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to enquire whether acts of internal management have been irregular.'³²
- [63] This rule may apply firstly, 'where a person or persons purporting to transact for the company under an authority conferred by its constitution (in other words, purporting to transact as an organ of the company) would have had that actual authority if the necessary internal formalities had been complied with. When it applies, it entitles the third party to assume that those formalities have been complied with'³³ Secondly the rule will not apply where the person dealing with the company knew that the formalities had not been complied with. Thirdly, the rule will also only apply where the person acting on behalf of the company acts within his usual authority. Fourthly, the rule will not apply where the person who deals with the company ought to have known of the irregularity.³⁴ See further in general: *FPW Engineering Solution (Pty) Ltd v Technicon Pretoria and Others*³⁵

29 Section 20 (7) of the Companies Act, No 71 of 2008 provides as follows: 'A person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.'

30 (1856) 6 E & B 427; 119 ER 886.

31 1946 AC 459 474; 1946 1 All ER 586 592 (HL) at 592.

32 As quoted in LAWSA vol 4 Part 2: Companies paragraph 184 at page 332.

33 LAWSA at page 331.

34 LAWSA at page 331- 332.

35 [2004] 1 ALL SA 204 (T).

'As is well known, the *Turquand Rule* protects bona fide third parties against the defence by a corporate body that it had not complied with the internal requisites for a valid contract and was, accordingly, not liable. I do not believe that the *Rule* would protect a bona fide third party against an omission to obtain the Minister's approval. The *Rule* applies to cases where there was an omission in complying with a requirement of *internal* management. The Minister's approval is not an internal matter, but a matter external to the running of the Technikon. That some balancing must, in any case, take place when even internal matters are evaluated for their importance against the application of the *Rule*, emerges from the recent instructive judgment of Cleaver J in *Farren v Sun Service SA Photo Trip Management (Pty) Ltd* [[2003] 2 All SA 406 (C)], where the learned judge held that since a company cannot be held liable for a sale of its sole asset by a director, unless the approval of its shareholders is given in terms of section 228 of the Companies Act, the *Turquand Rule* could not save the transaction. This was so since the approval by shareholders was, in the court's opinion, regarded as of particular importance by the Legislature. I agree with the balancing approach applied in the said judgment and, with respect, with the result thereof. In the light of my approach to the Minister's approval it is, however, not necessary to delve deeper into the application of the *Rule* in this respect. . . .

'I might add that if I am wrong in my conclusion as to the ambit of the Council's approval as to detail, such as the mode of payment by way of promissory notes, the *Turquand Rule* would protect FPW. Engelbrecht was authorized to sign contracts and, accordingly, the *Rule* could be operative. The *Rule* is also applicable in regard to corporate entities such as Technikons. An omission in the approval of Council as to the mode of payment amounts to an omission in internal management, which would not have the weight of the absence of the shareholders' resolution in *Farren's* case or the absence of the Minister's approval in terms of section 40(3)(b) of the Act. In any case, I am satisfied that the Technikon Council validly resolved, in terms of section 40(3)(a) of the Act, that there could be "embarked" upon this kind of project. The *Turquand Rule*, accordingly, does not need to be resorted to, except possibly in the alternative.³⁶ [Footnote omitted]

36 *FPW Engineering Solution (Pty) Ltd v Technicon Pretoria and Others* at 217-218 paras 37-38.

[64] If the respondent's version is to be accepted that the applicant was to be appointed as a managerial employee, Canca therefore had to consult with the Board before appointing him. This requirement is plainly a matter of internal formality or procedure in that Canca had to discuss the matter with the Board in order to ascertain its view on the proposed appointment. Clearly the ultimate decision to appoint or not remained with her.

[65] I am persuaded that in the present case the applicant is entitled to rely on the *Turquand* Rule for the following reasons: Firstly, Canca would have had the authority to appoint the applicant if the necessary internal formalities (namely the requirement to consult) had been complied with. Secondly, there is no evidence before this Court to suggest that the applicant knew that the formalities had not been complied with. Thirdly, there is no evidence before this Court to suggest that the applicant ought to have known that Canca had acted beyond the scope of her duties when she negotiated and concluded the contract of employment with him. Lastly, there is further no evidence before this Court to suggest that the applicant by virtue of his position within the respondent ought to have known of an irregularity in appointing him. In the event I am of the view that even if the applicant was appointed at a management level requiring Canca first to consult with the Board prior to effecting the appointment of the applicant, the respondent is not entitled to rely on this deficiency with a view to challenging the validity of the contract.

[66] In the event, it is concluded that the respondent unlawfully repudiated and/or breached the third contract by failing to give proper effect to the third contract concluded between the applicant and Canca on behalf of the respondent.

Damages

[67] As a result of the repudiation and/or breach of contract, the applicant suffered damages. In terms of section 77(3) of the Basic Conditions of Employment Act, 75 of 1997 the Labour Court has the requisite jurisdiction to determine the applicant's cause of action.

- [68] In respect of the amount of damages, the applicant has prepared a document which addresses three scenarios. At the outset I must point out that the evidence of the applicant in respect of the damages that he had suffered was not disputed. The first scenario projected what the applicant would have earned at his ordinary salary assuming a 5% increase for the rest of the contract period including bonuses. The second scenario projected no increase but a bonus and the third scenario projected no increase and no bonus.
- [69] In the statement of claim, the applicant claims damages as a consequence of the respondent's unlawful repudiation. In terms of the first scenario the applicant would have earned R 6.216.500.00. The applicant has, however, also provided the Court with a schedule of so-called Seychelles earnings that he earned post termination. According to this calculation, the applicant earned R 640 000.00. The damages suffered by the applicant are accordingly calculated as follows: R 6 216 500.00 minus R 640 000.00 = R 5 576.500.00.
- [70] In respect of costs, I can find no reason why costs should not follow the result. Although the applicant sought a costs order on a scale as between attorney and own client I can find no reason why I should grant order on such scale.

Order

- [71] In the event the following order is made:
1. The respondent is ordered to pay the applicant contractual damages in the amount of R 5 576.500.00
 2. The respondent is ordered to pay the applicant's costs on a scale as between party and party.

AC BASSON J

Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT : Advocate R. Wade

Instructed by : Webber Wentzel Attorneys

FOR THE RESPONDENT : Advocate G. Malindi SC

Instructed by : Mkhabela Huntley Adekeye Incorporated

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