

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 39617/2019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES:NO
(3)	REVISED YES
	
.....	12 June 2025
SIGNATURE	DATE

In the matter between :

LULAWAY HOLDINGS (PTY) LTD

Plaintiff

and

EKURHULENI METROPOLITAN MUNICIPALITY

Defendant

JUDGMENT

WANLESS J

“We are not our best intentions. We are what we do”

Amy Dickinson

Introduction

[1] This matter is a classic example of parties entering into an agreement with the best intentions. Those intentions were to benefit the youth of this country's society. Despite these good intentions the matter has ended up before this Court with Lulaway Holdings (Pty) Limited (*"the Plaintiff"*) seeking payment of the sum of R 36 000 000.00 from the Ekurhuleni Metropolitan Municipality (*"the Defendant"*).

[2] The parties are no strangers to one another. In 2014 they had entered into a similar agreement (*"the 2014 agreement"*). That agreement, as is the case pertaining to the present agreement which is the subject matter of the dispute between the parties, was one with the best intentions, namely to assist youths to gain employment. To all intents and purposes, the operation of the earlier agreement created no difficulties between the parties. Certainly, it would appear that neither party has complained of same.

Pleadings

[3] The *"pleadings"* in this matter consist of the Plaintiff's Amended Particulars of Claim (*"the POC"*); the Defendant's Plea (*"the Plea"*); the Plaintiff's request for Further Particulars (*"the Further Particulars"*) and the Defendant's response thereto (*"the response to the Further Particulars"*). These will be referred to, where applicable, later in this judgment.

The Plaintiff's pleaded case

[4] The Plaintiff's pleaded case is as follows:-

4.1 On the 3rd of October 2018 the parties concluded a written agreement (*"the agreement"*).

4.2 The material and express terms of the agreement are the following:

4.2.1 the object of the agreement would be to empower and benefit communities residing within the Defendant's jurisdiction through public benefit activities and to develop and operationalize the Ekurhuleni-Lulaway Youth Placement and Development Programme ("*the Programme*");

4.2.2 the Programme included the activating of joint recruitment and placement programmes of Ekurhuleni youth;

4.2.3 the Programme included securing placement opportunities for Ekurhuleni youth at no cost to the Defendant;

4.2.4 the Plaintiff would be obliged, *inter alia*, to provide youth placement, expertise and co-funding for the Programme over a period of three years;

4.2.5 the Defendant would be obliged, *inter alia*, to effect stipends to Ekurhuleni youth that were placed within external organizations as part of the Programme;

4.2.6 it was agreed that the partnership did not amount to a service provider and/or service procurer relationship since no funds were expected to exchange hands between the Defendant and the Plaintiff;

4.2.7 the Plaintiff and Defendant would display the highest degree of good faith and reasonableness towards each other in all matters pertaining to the Programme;

4.2.8 the Plaintiff and Defendant would use their best endeavours to ensure that the objectives of the Programme were reached.

4.3 In addition to the express terms the Plaintiff also pleaded that:

4.3.1 the Defendant would not compensate the Plaintiff for the Plaintiff complying with its obligations in terms of the agreement;

4.3.2 the Plaintiff would be compensated by those corporate entities at which it would arrange placement opportunities for Ekurhuleni youth;

4.3.3 it was in the contemplation of the parties that:-

4.3.3.1 if the Defendant failed to comply with its obligations under and in terms of the agreement the Plaintiff would not be able to place Ekurhuleni youth with the corporate entities;

4.3.3.2 if the Plaintiff could not place Ekurhuleni youth with the corporate entities the Plaintiff would not be compensated for such placement by the corporate entities and the Plaintiff would thus suffer damages;

4.3.3.3 in the event of the above circumstances the Defendant would be liable for any damages suffered by the Plaintiff in the form of lost compensation to be received from the corporate entities.

4.4 The Plaintiff complied with its obligations.

4.5 The Defendant, however, breached and repudiated the agreement in the following manner:-

4.5.1 by Mr Chauke (*an employee of the Defendant*) advising the Plaintiff that the Defendant would no longer be accepting security companies as host employers;

4.5.2 by Mr Ramogale (*another employee of the Defendant*) failing to attend numerous meetings and inductions with relevant businesses with whom the youth would be placed, derailing the Programme and resulting in lost work opportunities;

4.5.3 by failing to communicate with the Plaintiff effectively and meaningfully, with numerous of the Plaintiff's correspondence to the Defendant going unanswered.

4.6 The Defendant's conduct constituted both a breach and repudiation of clauses 3.3.1, 4.2, 4.3, 6.1, 16.2.3, and 16.2.4 of the agreement, which repudiation the Plaintiff accepted on 16 April 2019 and cancelled the agreement.

4.7 As a result of the breach and repudiation of the agreement the Plaintiff suffered damages in the amount of R36 000 000.00 calculated as follows:-

4.7.1 the Plaintiff would have received an amount of R1 000.00 per month from the corporate entities for each person placed by it;

4.7.2 the Plaintiff could and would have placed 1 000 persons with corporate entities (*including, without limitation, Bidvest Protea Coin*); and

4.7.3 the Plaintiff would have earned R1 000 000.00 per month for a period of 36 months.

The Defendant's pleaded case and its averments in the response to the Further Particulars

[5] In the Plea the Defendant:-

5.1 admits the agreement and its terms;

5.2 avers that it was a further term of the agreement that:-

5.2.1 the Plaintiff would develop an annual joint work plan with milestones to be realised per annum for approval by the Defendant;

5.2.2 the Plaintiff was obliged to design and implement empowerment interventions, *inter alia*, for the activation of a joint recruitment and placing programme of Ekurhuleni youth.

5.3 Also avers that the recruitment and placement programme to be activated was to be a joint programme, conceived and approved by both the Plaintiff and the Defendant.

5.4 Further avers that the Plaintiff breached the agreement by failing to:-

5.4.1 develop an annual joint work plan with milestones to be realised per annum, for approval by the Defendant; and

5.4.2 design and develop an empowerment intervention for the activation of a joint recruitment and placement programme, either to the highest quality standard, or at all.

5.5 Alleges that the Plaintiff sought to unilaterally place interns as security guards which placements were neither:-

5.5.1 pursuant to a joint recruitment and placement programme of both the Plaintiff and the Defendant; nor

5.5.2 in terms of an annual joint work plan with milestones to be realised per annum that was approved by the Defendant, nor in terms of any joint work plan at all.

5.6 Further avers that the Defendant would not approve a joint work plan, nor would the Defendant participate in a recruitment and placement programme of Ekurhuleni youth graduates under the agreement that was calculated to place youth graduates as security guards with security companies.

[6] In the response to the Further Particulars:-

6.1 The Defendant alleges that it would not approve a plan to place qualified graduates, with post-matric qualifications, with security companies in positions as security guards. This undermined the purpose of the graduate placement programme to suitably upskill unemployed graduates.

6.2 The Defendant would approve a work plan that suitably upskilled unemployed graduates, with post-matric qualifications. Companies and industries which the Defendant would approve are those which would recruit, as a minimum, youth graduates with post-matric qualifications.

6.3 The industries that the Defendant would consider included “*technical, building, engineering, health, social sciences, and ICT industries*”.

6.4 The Defendant did not participate in the placement of youth graduates at security companies as security guards under the agreement (concluded during October 2018).

The issues

[7] There was no separation of the issues in terms of subrule 33(4). In the premises, this Court was called upon to decide both the issue of liability (*whether or not the Defendant is liable to compensate the Plaintiff in respect of its proven damages*) and, if so, the quantum of those damages. It was common cause between the parties that both the duty to begin and the onus of proof rested upon the Plaintiff.

[8] The central or core issues this Court is required to determine are the following:-

8.1 The status of the “*Addendum*”, namely whether it was in fact agreed to between the parties and whether or not it satisfies the requirement as contemplated in the agreement that the parties must agree on a recruitment and development plan (“*the plan*”).

8.2 A proper interpretation of the agreement, namely whether the agreement was limited to the placement of youth graduates, or whether it applied to all youth in Ekurhuleni.

8.3 The discretion afforded to the Defendant to accept or reject placements and whether (*and on what basis*) the Defendant was entitled to reject placements of interns.

8.4 In the event of this Court finding that the Defendant did breach and/or repudiate the agreement whether the Plaintiff had placed sufficient evidence before this Court to substantiate its claim for damages in the sum of R 36 000 000.00. More particularly, to

find whether the Plaintiff had suffered damages and whether those damages were in the contemplation of the parties.

The evidence at trial

[9] At the trial the Plaintiff placed before this Court the *viva voce* evidence of two witnesses, namely that of Mr Freeman (*“Freeman”*) and Ms Botha (*“Botha”*). Freeman concluded the agreement on behalf of the Plaintiff with the Defendant and Botha was, at the time of trial, employed by the Plaintiff (*and was so employed at all relevant times in relation to the Plaintiff’s claim for damages against the Defendant*).

The evidence of Freeman

Evidence – in – chief

[10] This witness was the first to testify on behalf of the Plaintiff. Freeman testified that he is the founder member and a director of the Plaintiff which is a social enterprise that has its main focus on finding creative and innovative ways to impact the unemployment crisis faced by this country. He explained that the Plaintiff secured its funding through partnerships, either with private companies or government institutions, in the form of a monthly stipend that unemployed young people would get as payment for placement in internship programmes. The Plaintiff managed the internship programmes and would source the funding in the form of a monthly stipend that would be paid to the interns which were hosted at a particular company.

[11] The witness further explained to this Court that these interns would be placed at a particular experiential working programme in order to gain working experience and the programme would be funded by either government or the private sector. The host company would then provide the training to the intern. In some instances, the host company would *“top up”* the monthly stipend offered to an intern.

[12] Freeman testified that the Plaintiff was a full profit business. It made its money

through charging the host companies a fee per intern placed within its company. In this regard the witness testified that this was clearly communicated to the Defendant since the inception of the 2014 agreement which was the first contract entered into between the parties.

[13] Further, the witness told this Court that, in October 2018, the Plaintiff entered into a similar contract (*the agreement*) with the Defendant to provide placement and management of intern services. As part of the process, a representative of the Defendant, namely one Colin Ramogale ("*Ramogale*") needed to be present at the induction meetings and provide candidates with their contracts of employment for signing. This was a pre-requisite that the Defendant had insisted on having in the agreement. It is noted that such a provision is not included in the agreement. However, it will be accepted by this Court that, on the evidence, it was common cause that the parties had agreed thereto. At the end of the day, this supports the decision by this Court in respect of the discretion vesting with the Defendant.

[14] Freeman stated that he and his team had found it extremely difficult to deal with Ramogale. He had failed to attend induction meetings which had a detrimental effect on the progress of the project. If Ramogale was not present at an induction meeting the candidates would not be able to sign the contracts and thus would not be able to be placed with the host employers and commence their training. Freeman further stated that the issues that the Plaintiff experienced with Ramogale were escalated to one Alisha Nkadimeng ("*Nkadimeng*") of the Defendant but were never resolved.

[15] To enable candidates to get paid their monthly stipends, Freeman explained that they had to keep timesheets and submit those to the Plaintiff for processing and then submission by the Plaintiff to the Defendant. Representatives of the Plaintiff would attend to the processing of the timesheets and submission of same to the Defendant in order for the Defendant to capture the time and attend to the processing of the stipend payments. If the foregoing process was not followed, it was the evidence of Freeman that stipends would not be paid.

[16] It was the further evidence of Freeman that the Plaintiff would charge the host company a fee for managing this process and that fee is how the Plaintiff would earn its

income. This witness stated that the Defendant was fully aware of the method by which the Plaintiff derived its income and this had been mentioned in multiple discussions during meetings that were held between the parties dating all the way back to 2014. According to Freeman, it was evident that the Plaintiff was neither charging the Defendant nor the interns for their services and only the host companies.

[17] In his testimony before this Court, Freeman stated that, in terms of the agreement, there had been no changes in respect of the services required when compared to the 2014 agreement. The 2014 agreement terminated in 2017 when it reached its end date. However, the Defendant found new ways to change the goalposts regarding what was required from the Plaintiff by unilaterally implementing new steps and requirements. These included a new requirement for a training element to be provided to interns which was not part of the 2014 agreement. He testified that this amounted to a unilateral change of the terms of the agreement which disregarded the initial contract.

[18] It is worth noting, at this stage, that when it was put to him, under cross-examination, that the Defendant's version was that the agreement (entered into in 2018) was a new agreement which was different from the 2014 agreement and expressly made provision for the placement of unemployed youth graduates, Freeman rejected this by stating that at no point did this form part of the discussions held between the parties during negotiations.

[19] Freeman stated that he had established a WhatsApp group to assist with the administration of the agreement by streamlining things and to ensure that the parties were on the same page. The said WhatsApp group was also intended to assist with the day-to-day running of the project.

[20] The witness testified that he had posted a message on the group reiterating to the group members that the Plaintiff generated its income from corporate clients and that the project required the placement of 3 000 unemployed youth from Ekurhuleni in the next three years. This was contained in the draft Service Level Agreement (*"the SLA"*) which was yet to be concluded between the parties.

[21] Freeman explained to this Court that in order for the Plaintiff to get paid for the

services rendered, it was obligated to ensure that the monthly stipends payable to the interns were actually paid by the Defendant.

[22] When dealing in his evidence with the contents and requirements of the agreement relating to the placement of candidates, Freeman testified that the agreement required that the Plaintiff place unemployed youth. He stated that there was no express requirement that these youth have a post-matric qualification and that this was in line with the requirements of the 2014 contract which had just terminated prior to the parties entering into the agreement.

[23] In relation to the foregoing, Freeman testified that, in terms of the 2014 agreement, the Plaintiff had placed unemployed youth in a host of industries including the security, call centre and landscaping industries. He further stated that there was never any restriction on the types of industries in which the Plaintiff could place interns, particularly that no interns could be placed in the security industry.

[24] Freeman told this Court that there was a lot of discussion between himself and Mr Caiphus Chauke ("*Chauke*") prior to the parties entering into the agreement. At that time, Chauke was employed by the Defendant as the Head of Department for Economic Development. He stated that on 25 May 2018, a letter of intent was sent to the Plaintiff by Chauke, via email, confirming that the parties had worked together in the past and would be engaging in a further project where 1 000 youth would be placed with host employers for a period of three years.

[25] The witness further testified that he had engaged one Nkadameng of the Defendant on various occasions, including in a meeting that was held on 11 October 2018, in relation to the project and not once was the issue of post-graduate or post-matric holders discussed. This was neither in the placement of youth in general nor in the non-placement of youth in the security industry.

[26] Freeman further stated that the 1 000 youth placement project would be a placement of 1 000 youths per annum over a period of three years amounting to the placement of 3 000 youths by the end of the three year contract period. He disputed the contention that the agreement made provision for the placement of a total of 1 000 youth

graduates over the full three year period and thus 333 graduates per annum, stating that this would have been in contradiction to the original letter of intent.

[27] Freeman further asserted that the Plaintiff would definitely have placed all 3 000 interns during the duration of the agreement since, at the commencement of the agreement, the Plaintiff already had 250 placements lined up.

[28] Before this Court, Freeman testified that the understanding was that, after receiving this letter of intent, a contract would be drawn up which would deal with the implementation of the project.

[29] After the letter of intent and the various engagements with Chauke, Freeman stated that he put together an Addendum to the Memorandum of Agreement/Service Level Agreement (*"the Addendum"*), which set out the project activities and responsibilities of the parties which they would be taking on as a collaboration, in order to ensure that the parties understood what the project entailed. He forwarded the Addendum to Chauke and his team at the Defendant, as well as the team at the Plaintiff. He also testified that the parties had numerous interactions regarding the contents of the Addendum. These were both face to face and telephonically. According to Freeman, consensus was reached between the parties that the project would be rolled out as set out in the Addendum.

[30] Freeman further testified that officials at the Defendant had input into the Addendum. This included Chauke to whom the Addendum was sent. However, he never responded to the document as the Addendum had already been agreed to. According to Freeman, this could be seen from the WhatsApp message Freeman had sent to the WhatsApp group wherein he confirmed that there had been a meeting of minds in relation to the contents of the Addendum that was, at that stage, sitting with the Defendant's legal department. Freeman testified that the Addendum was never questioned by the Defendant.

[31] When dealing with the allegation made by the Defendant that the Plaintiff had failed to provide the Defendant with a joint work plan setting out the milestones which had to be reached as required by the agreement, Freeman testified that the representatives of

the Defendant neither requested the Plaintiff to provide it with such a document nor did they place the Plaintiff in breach for failing to provide the document. He further stated that the addendum was a live working document which detailed the plan and milestones. Further, this document had been accepted by the Defendant.

[32] He stated (*without providing any reasons therefor*) that it was his view that Ramogale sought to sabotage the project because every time the Plaintiff brought new opportunities and every time Ramogale was meant to attend induction meetings, he would change the goalposts or was extremely difficult and would turn away some host employers. This would end up jeopardising the relationship between the Plaintiff and the host employers which, in turn, would result in the Plaintiff being unable to reach its targets for placement.

[33] When dealing with the purpose of the agreement, Freeman testified that the purpose of the agreement was not only for the placement of graduates as contained in the agreement. He testified that the agreement sought to place unemployed Ekurhuleni youth. These were people who were under the age of 27. He categorically refused to accept that the agreement sought to place only unemployed youth graduates and stated that it was only well into the execution of the programme that the Defendant informed the Plaintiff that it only sought to place graduates and youth with post-matric qualifications.

[34] In dealing with the damages allegedly suffered by the Plaintiff, Freeman testified that had 1 000 interns been placed in the business sector the Plaintiff would have received R1 000.00 per intern, per month, for the duration of the agreement. According to Freeman, the agreement was meant to be for a period of 36 months thus equating to the R 36 000 000.00 claim that the Plaintiff had instituted against the Defendant.

[35] Finally, Freeman testified that the Plaintiff's case is that due to the behaviour of the Defendant, as well as its repudiation of the agreement, the Plaintiff had lost its opportunity to make an income.

Cross – examination of Freeman

[36] Under cross-examination, Freeman conceded that the host employers who employed interns had to be acceptable to the Defendant as the “owners” of the project.

[37] It was put to Freeman that, as the contract owner, the Defendant had the right to veto any sector or refuse the placement of any interns in a particular sector. Freeman conceded that the Defendant was in a position where it could refuse a certain sector.

[38] Freeman further stated that the Defendant had a discretion regarding which host employers it wanted to contract with for the placement of unemployed youth graduates.

[39] In addition, he also conceded that the agreement and the Addendum did not specifically state that the Defendant was obliged to accept the placement of interns in the security industry.

[40] It was put to Freeman that it was not possible for him to have produced an Addendum to an agreement that had not yet been entered into by the parties as this would render the Addendum null and void on the basis that it related to an agreement that had not yet come into effect. Freeman responded by stating that there was no dispute to the Addendum during correspondence entered into between the parties.

[41] Freeman was taken to a clause in the agreement which dealt with amendments and variations. It was put to him that, in terms of the agreement, no amendment or variation to the agreement would be of any force or effect unless it was agreed upon in writing. Freeman was unable to refute this point. The witness further conceded that the Addendum he referred to was drafted by him and that it was never signed by the parties.

[42] It was also put to Freeman that there was a distinction between the 2014 agreement and the agreement entered into in 2018 made specific provision for the placement of graduate youths and that Freeman had missed this point in the initial stages of engaging with the Defendant, hence the misplaced assumption by the Plaintiff that both agreements were the same. Freeman refuted this point by stating that this interpretation was inaccurate.

[43] In relation to the number of unemployed youth graduates to be placed, it was put to Freeman that the agreement made provision for the placement of 1 000 interns over a three-year period and not 1 000 per annum over the three-year period. Freeman responded by stating that the understanding was always that it would be 1 000 interns per annum over the three-year period.

The evidence of Botha

Evidence – in – chief

[44] Botha testified that she had been employed by the Plaintiff for 8 years and was responsible for the recruitment funding and administration of the Defendant's project. This included establishing and maintaining relationships between sponsors/funders of projects on the one hand and host employers on the other hand.

[45] In relation to the placement of interns with host employers, Botha testified that she was responsible for overlooking activities, collecting timesheets and verifying timesheets before they were submitted to funders for processing and payment. She was also responsible for the overall project management in the agreement which included maintaining relationships between the parties.

[46] Botha further testified that the Plaintiff and the Defendant had a long-standing relationship where the Plaintiff continued to place interns with host employers. She stated that the Plaintiff had a vast number of people in the pipeline for placement. Botha testified that when the agreement was finally signed in October 2018, nothing material changed.

[47] Botha stated that for the three-month period during which the Plaintiff had placed interns before the signing of the agreement, interns could not be paid as there was no agreement making provision for the payment of their stipends. Thus, host employers had to use their own revenue to pay the interns to avoid a situation where interns did not receive payment at all. Essentially, Botha conceded that no agreement existed during this period since the 2014 agreement had terminated and the 2018 agreement

had not come into effect. Lulaway had effectively continued providing services on its own volition without any consensus or terms.

[48] In relation to the agreement, Botha testified that the agreement to place interns was concluded long before the agreement was signed because the Plaintiff knew what they needed to do and had the criteria they had to work from in order to continue with the placements. She told this Court that, once the agreement was concluded, the Plaintiff was required to place 3 000 interns.

[49] Botha further testified that it was untrue that the placement of security guards was not required by the Defendant. She asserted that they had always placed interns within security companies and nothing different was done in terms of the agreement. Botha further stated that even after signature of the agreement, it was business as usual and placements in the security industry were still taking place. She further mentioned that the agreement that was signed was silent on the kinds of industries that the Plaintiff would be required to place interns in.

[50] In relation to the placement of graduates with host employers, Botha testified that the only graduates they placed were in the logistics sector. There were also a few isolated incidents where they would place graduates in other sectors. However, it was the evidence of Botha that the majority of the interns that they placed were not graduates. According to Botha, some were matriculants but certainly not graduates.

[51] With regard to the existence of a discretion by the Defendant relating to the choice of host employers, Botha testified that she would arrange meetings between Ramogale and various host employers. She stated that during these meetings Ramogale would categorically state that the Defendant was not willing to accommodate a particular industry because the Defendant did not intend to place interns in that particular industry.

[52] Botha further testified that Ramogale made it difficult for the Plaintiff to comply with the terms of the agreement because he would not arrive to scheduled induction meetings. This resulted in interns not being able to be placed with host employers which gave rise to the Plaintiff not being able to earn an income

[53] In addition to the difficulties being faced due to Ramogale, Botha testified before this Court that Ramogale added a new requirement to the agreement. This was that interns would be provided with formal training by their host companies. She testified that this requirement was never part of the agreement and was a major setback to the ability of the Plaintiff to place interns with host companies.

Cross – examination of Botha

[54] During the course of cross-examination, Botha conceded that the Defendant preferred the placement of graduate youth and no longer simply unemployed youth.

[55] She further conceded that, although the Plaintiff continued with what she termed “*business as usual*” under the 2014 agreement before the agreement was signed, that when the agreement was ultimately signed, there was “*push back*” from Ramogale. This was in relation to the placement of interns in the security sector because the Defendant did not want interns to be placed in the security sector. Botha also conceded that the Defendant had a discretion to choose which sectors they wanted to place interns in and could use this discretion in the implementation of the project.

[56] In relation to the payment of the Plaintiff’s fee by the host companies, it was put to Botha that the Defendant was not provided with copies of the agreements and thus had no knowledge of the terms of the relationships between the interns and host companies. Botha confirmed that these agreements were not provided to the Defendant. According to Botha they were not provided since those agreements were between the host employers and the interns.

The evidence of Chauke

Evidence – in – chief

[57] The Defendant relied on the evidence of a single witness, namely that of Chauke. He testified that he was employed as the Head of Department for the Economic

Development Department at the Defendant and had occupied that position for the past 11 years.

[58] Chauke told this Court that the relationship with the Plaintiff commenced in 2014. He further testified that, according to the agreement which governed the relationship between the parties, the Plaintiff would be responsible for the placement of youth graduates and the Defendant would be responsible for the payment of stipends to these youth graduates. Chauke stated that host companies would not be required to make any payments or “*top up payments*” to interns.

[59] This witness went on to testify that he was not aware that host companies had agreements with the Plaintiff in terms of which they would pay the Plaintiff a fee for the management of the placement relationship between them and the interns which the Plaintiff had placed.

[60] Chauke also testified that, according to the 2014 agreement, the requirement was for the Plaintiff to place 1 500 youth within a three-year period. At the expiry of the 2014 agreement, the Plaintiff had only managed to place a total of 400 youth interns and 60% of these placements had been made in the security industry.

[61] The Defendant’s witness testified that he was the author of the agreement and was very well versed with its contents. He further stated that the agreement was intended for the placement of youth graduates who held a post matric qualification. Moreover, he testified that the intention of the Defendant was always that the agreement was for the purpose of placing youth graduates and that this was made clear in the agreement through the inclusion of the reference to “*youth graduates*” and not just “*unemployed youth*”.

[62] When dealing with the discretion vested in the Defendant in terms of the agreement, Chauke testified that the agreement was designed in such a way that it allowed the Defendant to control the quality of the youths being placed as well as the quality of the host employers which were being chosen for placement.

[63] In relation to the communication between the parties, Chauke testified that he was

not part of the WhatsApp group that Freeman alleged he was a part of. He further testified that he was not aware of any communication that had been sent in the WhatsApp group, particularly in relation to the Addendum which Freeman alleged should form part of the agreement.

[64] Chauke testified that the Defendant was not in favour of the placement of graduates in the security sector as it held the view that there was an over saturation of the placement of interns in that industry based on, *inter alia*, previous projects. There was thus a limitation of capacity and hence the decision to move away from placing candidates in the security industry.

[65] When dealing with the allegation that the parties had entered into an Addendum to the agreement, Chauke testified that it was not possible for the Defendant to have entered into an Addendum with the Plaintiff before the actual agreement had been entered into. He further testified that it was not possible for him to have entered into the Addendum because there was no document to sign. Hence, to date, the Addendum was still not signed. Chauke also testified that he had never had sight of the purported Addendum until it was submitted to the Defendant as part of the Plaintiff's correspondence sent to the City Manager's office and which formed part of a complaint made by the Plaintiff in respect of the Defendant's alleged behaviour.

[66] Also, this witness disputed the version put up by Freeman that the Addendum constituted the joint working plan that was required in terms of the agreement. Chauke stated that this Addendum was neither presented to the Defendant nor was it approved by any of the Defendant's officials. This, he said, was evident from the lack of signatures on the Addendum by both parties.

[67] Chauke further testified that the letter provided to the Plaintiff on 25 May 2018 was authored by him. The purpose of the letter was to assist the Plaintiff in applying for funding from the "*Jobs Fund*" which the Plaintiff required to assist it in the running of its business. According to Chauke, the request for the letter had come from the Plaintiff for the Defendant to confirm the existence of a partnership between the parties and was in no way intended to form a basis for the agreement between the parties since the agreement had not yet come into being.

Cross – examination of Chauke

[68] Chauke conceded that in the 2014 agreement the reference to youth referred to all youth and not just graduates. However, this concession was qualified by his evidence that in relation to the agreement the word “*graduate*” had a different meaning. It related to youths who held a post-matric qualification.

[69] The witness testified that in the 2014 agreement the majority of interns placed by the Plaintiff did not have post-matric qualifications. As a result, in the agreement, it was made a clear stipulation that interns to be placed had to be in possession of a post-matric qualification.

[70] Chauke also conceded that the preamble to the 2018 agreement referred to unemployed youth and not unemployed graduates. He further conceded that the parties to the agreement agreed to co-fund the placement of unemployed youth and not unemployed graduates. However, Chauke testified that the agreement preceded discussions that took place between the parties wherein the Defendant made it very clear to the Plaintiff that the focus area for placements under this contract was for youth graduates.

[71] In relation to the question about the payment of stipends as contained in subclause 4.3 of the agreement, Chauke testified that stipends were to be paid specifically to youth graduates as targeted in the agreement.

[72] Chauke further testified that, according to the Defendant's youth placement policy, youth who did not have a matric only qualified for a stipend of R1 500.00 whereas youth who possessed a post-matric qualification qualified for the R2 500.00 stipend as agreed to in terms of the agreement. He further stated that this also applied to the 2014 agreement.

[73] In an attempt to disprove the above statement, Plaintiff's Counsel referred Chauke to page 68 of the bundle which contained an agreement for the placement of a Mr Ntuli (“*Ntuli*”) with “*Stallion Security*”. Ntuli was a non-graduate who was being paid

R 2 000.00 per month. Chauke confirmed this.

[74] However, Chauke clarified this point and stated that at the time the placements were made, there was a commitment by Stallion Security that they intended to train interns taken on, within three months, to get them “CIRA” accredited. It was on this basis that the approval for the placements was granted. Stallion Security had aligned itself with the requirement that graduates needed to be placed and hence the special allowance for those placements.

[75] He also testified that the agreement made provision for the placement of 1 000 graduates over a three-year period amounting to the placement of 333 graduates per annum.

[76] In relation to his participation in the WhatsApp group, Chauke was shown proof that at the time Freeman sent the communication about the addendum on the group, Chauke was a member of the group and later exited the group on 26 May 2018. Chauke responded by stating that he could not prevent people from adding him to the group, however, he did not partake in the discussions of the group.

[77] It was put to Chauke that he was aware of the existence of the Addendum from as early as May 2018 and had discussions with Freeman regarding its contents. Chauke denied any knowledge of the Addendum; the existence thereof and having had any discussions pertaining thereto with Freeman or any other person.

[78] The Plaintiff’s Counsel also put it to Chauke that the Defendant did not use its best endeavours to ensure that it complied with the terms of the agreement. This was due to it not taking action against Ramogale for the alleged failure to attend induction meetings. Chauke responded by stating that he would have expected that the Plaintiff would have escalated the issue so it could be brought to his attention. He stated that this was never done.

[79] It was also put to Chauke that his behaviour in dealing with the dispute was not a conciliatory one and the Defendant had never intended to settle the dispute. Chauke responded by stating that he had invited Freeman to discuss the issues raised with him

and the discussions did not yield any positive results. According to Chauke “*the horse had already bolted*” and the situation could not be salvaged.

The law

Repudiation

[80] When determining whether repudiation by a contracting party has been established the evidence must be considered objectively, in the context of what a reasonable person would have understood by the communication in question.

[81] In the matter of *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*¹ the Supreme Court of Appeal (“*the SCA*”) explained the concept as follows:

“[16] Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract. Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated . . . '... this Court has repeatedly stated that the test for repudiation is not subjective but objective ... Conceivably it could therefore happen that one party, in truth intending to repudiate (as he later confesses), expressed himself so inconclusively that he is afterwards held not to have done so; conversely, that his conduct may justify the inference that he did not propose to perform even though he can afterwards demonstrate his good faith and his best intentions at the time. The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the

¹ 2001 (2) SA 284 (SCA) at paragraphs [16] to [18]

agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.

... As such a repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.

The conduct from which the inference of impending non or malperformance is to be drawn must be clearcut and unequivocal, ie not equally consistent with any other feasible hypothesis. Repudiation... is 'a serious matter' ... requiring anxious consideration and - because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments - not lightly to be presumed.

[17] ... the approach is that a court, faced with the enquiry of whether a party's conduct amounted to a repudiation, must superimpose its own assessment of what the innocent party's reaction to the guilty party's action should reasonably have been.

[18] Consistent with that approach it further follows that a court in making its assessment must take into account all the background material and circumstances that should have weighed with the innocent party.”²

[82] The onus lies on the party who asserts repudiation to prove that the other party has repudiated the contract.³

[83] As dealt with earlier in this judgment, the question as to whether the Defendant has repudiated the agreement turns, *inter alia*, on the interpretation of the agreement. In the premises, this Court is required to engage in the interpretation of the agreement.

² *Emphasis added.*

³ *Schlinkman v Van der Walt 1947 (2) SA 900 (E) at 919.*

Interpretation

[84] The principles applicable in respect of the interpretation, *inter alia*, of agreements, was established by the SCA in the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*.⁴

“[18] Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”⁵

[85] In the matter of *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*⁶ the SCA recently provided an exposition of the current legal position, bearing in mind the various developments of the law since *Endumeni*. The SCA confirmed that the legal position remained as follows:

⁴ 2012 (4) SA 593 (SCA) at paragraph [18].

⁵ *Emphasis added.*

⁶ [2021] 3 All SA 647 (SCA) at paragraphs [25] and [26].

[25] ...The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality* (“Endumeni”) offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasised, citing well-known cases, “[t]he inevitable point of departure is the language of the provision itself”.

[26] None of this would require repetition but for the fact that the judgment of the High Court failed to make its point of departure the relevant provisions of the subscription agreement. Endumeni is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does Endumeni licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable.”⁷

[86] Accordingly, in terms of the current legal position, as correctly submitted on behalf of the Defendant, the following approach stands to be followed:

86.1 Regard must, as the starting point, be had to the language of the provisions, in light of the ordinary rules of grammar and syntax.

86.2 The provisions must not be read in isolation but must be read in the context of: the contractual instrument as a whole and the circumstances that led to the contractual instruments coming into being, including the apparent purpose to which they are directed and the material known to those responsible for their production.

⁷ Footnotes omitted; emphasis added.

86.3 Where more than one meaning is possible, each possibility must be weighed in the light of all these factors.

86.4 A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document; and

86.5 The Court should guard against “*making a contract for the parties*” under the guise of interpreting the contract.

The discharge of the civil onus

[87] In the matter of *Stellenbosch Farmers’ Winery Group Ltd and Another v Martell et Cie and Others*⁸ the SCA held:-

“[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’ candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions,

⁸ 2003 (1) SA 11 (SCA) at paragraph [5].

(v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail. "

Submissions made on behalf of the respective parties

Submissions made on behalf of the Plaintiff

[88] Prior to making submissions to this Court in respect of why the Plaintiff had discharged the onus incumbent upon it to prove, on a balance of probabilities, that the Defendant had repudiated and/or breached the agreement, thereby giving rise to the Plaintiff having suffered damages, Counsel for the Plaintiff brought to the attention of this Court certain legal principles. It was submitted, on behalf of the Plaintiff, that these principles, if correctly applied in this matter, illustrated the deficiencies in the Defendant's case which, in turn, supported the argument that the Plaintiff had discharged the onus and should succeed in its action.

[89] These principles relate to:

89.1 the failure of a Defendant to put a version to a Plaintiff;

89.2 the failure of a party to give evidence.

The failure of a Defendant to put a version to a Plaintiff

[90] In the matter of *Boloang v Road Accident Fund*⁹ it was held:

*“[61] The institution of cross-examination not only constitutes a right; it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Brown v Dunn* and has been adopted and consistently followed by our courts.*

*[62] The rule in *Brown v Dunn* is not merely one of professional practice but 'is essential to fair play and fair dealing with witnesses'. It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.*

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.”

[91] Further, in the matter of *Masilela v Leonard Dingler (Pty) Ltd*¹⁰ it was held:

⁹ 2005 JDR 1350 (W) at paragraphs [61] to [63].

¹⁰ 2004 (25) ILJ 24 (LC) at paragraph [28].

"[28] ... it is trite that if a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the facts that he intends to prove in contradiction, to give the witness an opportunity for explanation. Similarly, if the Court is to be asked to disbelieve a witness he should be cross-examined upon the matters that it will be alleged make his evidence unworthy of credit."

[92] In *Small v Smith*¹¹ the Court held as follows:-

"... it is grossly unfair and improper to let a witness' evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved."

[93] In the matter of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹² it was held that if a point in dispute is left unchallenged in cross-examination the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.

[94] It was submitted, on behalf of the Plaintiff, that the following versions, as testified to by Chauke, were not put to either of the Plaintiff's witnesses when they were cross-examined, namely, that:

94.1 the Defendant had an internal policy which was that a stipend of R 2 500.00 was only for graduates and that non-graduates could only receive a stipend of R1 500.00;

94.2 the letter of intent had nothing to do with the agreement;

94.3 Chauke had never seen the Addendum prior to it being attached by Freeman to Freeman's response to the City Manager;

94.4 Chauke and Freeman had discussions that the agreement would be only for the placement of graduates;

¹¹ 1954 (3) SA 434 (SWA).

¹² 2000 (1) SA 1 (CC).

94.5 the agreement was intended to be for graduates because of the Defendant's "Bursary Scheme";

94.6 the Defendant did not know that the Plaintiff was earning a fee from host companies.

[95] In the premises, the Plaintiff submitted that, in line with the legal principles enunciated herein¹³ the Plaintiff's version must be accepted as true and this Court should disregard the said evidence of Chauke.¹⁴

The failure of a party to give evidence.

[96] The *locus classicus* regarding adverse inferences to be drawn from the failure to call an available witness, is the matter of *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd*¹⁵ in which the Court held:-

"The learned Judge a quo drew an inference adverse to plaintiff from its failure to call Gerson as a witness, notwithstanding the fact that he was available and in a position to testify on the crucial issue in the case, ie what was discussed at the meeting which took place on 4 August 1972. Before this Court, it was submitted on plaintiff's behalf that he had erred in doing so. We were referred to a number of authorities which set out the principles governing the question in issue. See, eg, Elgin Fireclays Ltd v Webb 1947 (4) SA 744 (A) in which WATERMEYER CJ stated (at 749, 750):

"It is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. (See Wigmore ss 285 and 286.) But the inference is only a proper one if the evidence is available and if it would elucidate the facts."

¹³ Paragraphs [90] to [93] *ibid*.

¹⁴ Paragraph [94] *ibid*.

¹⁵ 1979 (1) SA 621 (A) at 624.

*In my opinion, however, it is to be doubted whether WATERMEYER CJ intended laying down a general and inflexible rule to be applied without more in every case where a party fails to call as his witness one "who is available and able to elucidate the facts". Whether the inference, that the party failed to call such a person as a witness because he "fears that such evidence will expose facts unfavourable to him", should be drawn could depend upon the facts peculiar to the case where the question arises. It was pointed out in *Webranchek v L K Jacobs & Co Ltd* 1948 (4) SA671 (A) at 682 that it might appear that the person concerned was equally available to both parties, and that the inference could then be drawn against both parties. VAN DEN HEEVER JA also stated:*

"After all, plaintiff was entitled to rest his case upon evidence which he considered adequate to discharge the onus which lay upon him."

*See, also, the remarks of MARAIS J in *Rand Cold Storage & Supply Co Ltd v Alligianes* 1968(2) SA 122 (T) at 123, 124. The learned Judge a quo carefully considered the circumstances present in this case before concluding that the inference contended for on defendant's behalf was the proper one to be drawn. I am in respectful agreement with his approach and with his conclusion that in this case an inference adverse to plaintiff should be drawn from its failure to call Gerson. I refer briefly to some of the circumstances which satisfy me that it has not been shown that the Court a quo erred in its conclusion. "*

[97] It was submitted, on behalf of the Plaintiff, that what further detracted from the credibility of Chauke's evidence, in addition to the contradictions therein and inherent improbabilities in respect thereof, is that the Defendant could have led evidence from a number of other witnesses to verify his version (*such as Ramogale*) yet declined to do so. Instead, the Defendant elected to rely solely on the evidence of Chauke. As such, Chauke is a single witness.

[98] Counsel for the Plaintiff further submitted that Ramogale would have been able, *inter alia*, to verify Chauke's allegations regarding (a) internal policies at the Defendant relating to stipends, (b) whether there was an internal Exco meeting, where it was decided that only graduates would be accepted, (c) that the placements of the non-graduate interns to Stallion in 2018 was a specially motivated case, (d) the Plaintiff's

contentions of repudiation, (e) that Chauke did not know how the Plaintiff derived its income, (f) that Chauke did not know about the Addendum and (g) that Chauke was unaware of the WhatsApp group.

[99] In this regard, it was submitted that Ramogale was “*front and centre*” in the allegations made by the Plaintiff regarding, *inter alia*, the ambit of the agreement in that the agreement catered for non-graduates; the Defendant accepted security companies in October 2018 and further, the Defendant was going to issue agreements to these companies.

[100] It was also submitted that, when he testified before this Court, Chauke frequently stated that he could not give evidence on particular topics and that those queries would have to be asked of the “*responsible manager*”.

[101] This “*responsible manager*”, namely Ramogale, did not provide this Court with the benefit of his testimony.

[102] Further, it was pointed out, on behalf of the Plaintiff and the attention of this Court drawn thereto, that the Defendant’s Senior Counsel, during, *inter alia*, the course of cross-examining the Plaintiff’s witnesses, placed on record, on “*numerous occasions*” that Ramogale would be testifying during the course of the trial and, *inter alia*, that the Defendant still had two witnesses that were “*both alive and kicking...*”.

[103] Arising therefrom, it was submitted by Plaintiff’s Counsel that Ramogale was clearly available and the Defendant had, prior to closing its case after the evidence of Chauke, always intended to call Ramogale as a witness at the trial. According to the Plaintiff, Ramogale clearly had evidence that was crucial to deciding the issues to be determined by this Court and could have clarified a number of these issues, which, as dealt with earlier, Chauke could not (*and did not*) provide any explanations in respect of.

[104] Relying on the principles as set out, *inter alia*, in *Munster*, it was submitted, on behalf of the Plaintiff, that Ramogale’s failure to testify was clearly because “*he fears*

that such evidence will expose facts unfavourable to him” and, arising therefrom, this Court should draw an adverse inference against the Defendant in respect thereof.

Submissions made by the parties

[105] This judgment now turns to deal with the submissions made by the parties in respect of the central or core issues to be decided by this Court.

The status of the “Addendum”, namely whether it was in fact agreed to by and between the parties.

Submissions on behalf of the Plaintiff

[106] The Plaintiff relied upon the testimony of Freeman who had testified, *inter alia*, that the Addendum was a document he had drafted after discussions with Chauke. He further testified that this Addendum reflected the meeting of minds as to how the new agreement would be implemented going forward. In fact, Freeman stated that this was the recruitment and placement plan contemplated by the agreement.

[107] It was submitted that the semantic title of the document, namely “*ADDENDUM TO MOA – COE & LULAWAY*”, is of no moment. Rather, it was submitted that what *is* of moment, are the contents of the Addendum, being the recruitment and placement plan.

[108] A proposition was put to Freeman, under cross-examination, that the Addendum did not form part of the agreement because it was not reduced to writing and signed by the parties. Reliance was placed by the Defendant on the non-variation clause as set out in the agreement.

[109] In this regard, it was submitted, on behalf of the Plaintiff, that this proposition misconstrues what Freeman said the Addendum was. The Plaintiff relies on the fact that Freeman explained that it was not an amendment *to* the agreement but was the recruitment and placement plan contemplated *by* the agreement.

[110] Plaintiff's Counsel further drew the attention of this Court to the fact that Freeman had also explained that there was no agreed format for the recruitment and placement plan and that the agreement does not require it to be in writing and signed by the parties.

[111] The attention of this Court was also drawn to the fact that Freeman gave evidence that the Addendum specifically set out the process for recruitment and placement of interns and that it was the recruitment and development plan contemplated by the agreement.

[112] In the premises, it was submitted by the Plaintiff that the recruitment and placement plan is thus not an amendment or variation to the agreement but a document contemplated by the agreement which deals with the implementation of the agreement. This is not a document that is required to be in writing or signed by the parties.

[113] It was further submitted that even if it was an amendment or variation to the agreement, it is an amendment that the agreement itself contemplates. Arising therefrom, it was submitted by Plaintiff's Counsel that it is settled law that where an agreement itself contemplates a variation otherwise than in writing and signed by the parties the non-variation clause will not find application. Finally in this regard, it was submitted by the Plaintiff that the agreement contemplates the creation of a recruitment and placement plan and does not require this document to be signed by the parties, or indeed, even to be in writing.

[114] It was also submitted that the Plaintiff had thus adduced sufficient evidence to show that the Addendum was the "*recruitment and development plan*" which regulated, *inter alia*, the industries in which the interns would be placed.

[115] The Plaintiff relied upon the evidence of Freeman where Freeman explained that not only was this document expressly negotiated between himself and Chauke but that he also adduced evidence of a message that he had sent to the WhatsApp group. On that basis, it was submitted by Counsel for the Plaintiff that there had been a "*meeting of minds as to how the process is going to work going forward as per the addendum that is currently at the city's legal department...*"

[116] Freeman's evidence was that this document was agreed to between the parties. Botha and Freeman testified that the parties in fact acted in accordance with the *"recruitment and placement plan"*.

[117] Chauke's evidence was in direct contrast to Freeman's evidence. He stated that the first time he ever saw the Addendum, or its contents, was when Freeman sent his response to the City Manager in November 2018. The Plaintiff submitted that this version is patently false given that:-

(a) He was a member of a WhatsApp group in which Freeman advised that *"There has been a meeting of minds as to how the process is going to work going forward as per the addendum that is currently at the city's legal department"*.

(b) Chauke denied that he was a member of the WhatsApp group. This denial was, however, proved to be false in cross examination. When challenged on this, his evidence shifted and mutated to *"When I discovered that I am included that is why I left"*.

(c) Chauke received a WhatsApp from Freeman that made express reference to the Addendum.

(d) Chauke steadfastly denied that he had discussions with Freeman regarding the contents of the Addendum. It was submitted on behalf of the Plaintiff this must be patently false and unbelievable.

(e) The contents of the Addendum mirror the contents of the agreement (*which Chauke admitted he drafted*), namely the opening of co-branded youth placement job centres and the development and updating of a joint online database.

(f) If Chauke never had discussions with Freeman regarding the contents of the Addendum, on what basis did he include ostensibly the same content in the agreement when he drafted the agreement?

(g) Finally, it was submitted that the fact that Chauke had never seen the Addendum prior to the letter to the City Manager, was never put to Freeman. In the premises, the Plaintiff was entitled to assume that Freeman's unchallenged testimony was accepted by the Defendant to be correct.

[118] It was also submitted that the agreement itself contemplates that the recruitment and placement plan was a joint document. It must follow that it had to be agreed upon between the parties. Since it was a joint document, it could only be changed if a new "*joint recruitment and placement programme*" was then agreed to by the parties.

[119] The Plaintiff argued that this means that once the parties had agreed to the industries in which the interns would be placed (*as they had in the Addendum / recruitment and placement plan*), these industries could only change if a new recruitment and placement plan had been agreed to. The Defendant could not unilaterally change the recruitment and placement plan by refusing to accept placements in the security industry.

[120] Finally, it was submitted that the Defendant's Counsel had in fact conceded as much whilst cross-examining Freeman when he stated, "*both the partners should agree on a business objective on a business purpose on a business enterprise, is that correct*".

Submissions on behalf of the Defendant

[121] It was submitted, on behalf of the Defendant, that the attempt by the Plaintiff to present the so-called Addendum as the joint work plan, does not bear scrutiny because:

121.1 The first difficulty is that it is common cause that the Addendum was prepared *prior* to the signature of the agreement. On the Plaintiff's own version, at the time that the parties signed the agreement, Chauke had been made aware of the Addendum through the WhatsApp group. Notwithstanding this fact the parties made the deliberate election to record that a plan was to be developed following signature of the agreement.

121.2 Second, the agreement requires that the working plan should have annual milestones to be realized during the three-year period. The so-called Addendum does not contain the annual milestones to be realized for the three-year period.

121.3 Third, subclause 5.3 of the agreement makes it plain that the plan must be approved by the Defendant, as it is a joint working plan. There can be no dispute that the plan was not approved by the Defendant. Chauke testified that he did not receive the Addendum and the Addendum does not contain the signature of either of the parties. Freeman himself could not testify to any response and approval from the Defendant concerning the so-called Addendum.

[122] It was further submitted by the Defendant that the fundamental difficulty for the Plaintiff is that, even if the Addendum can be relied upon as a joint working plan, it precedes the agreement. At the time the parties signed the agreement, they agreed that a joint working plan must be prepared. Therefore, any *“previous plan captured in the Addendum”* has been overtaken by events and a plan which accords with the agreement was to be developed by the Plaintiff for the Defendant’s approval.

[123] The Defendant further argued that the agreement could not and did not contemplate the Addendum as the joint working plan since the terms of the agreement clearly contemplate the preparation of a plan by the Plaintiff for submission and approval by the Defendant. The plan could not have been agreed upon prior to the conclusion of the agreement.

[123] Also, the Defendant submits that this is particularly pronounced given that the parties, by signature of the agreement, introduced the appointment of *“graduates”*. So, argues the Defendant, even if the Addendum could be considered a plan the plan would, with the approval of the Defendant, have to be modified to make provision for the appointment of graduates in terms of the signed agreement. It is common cause between the parties that the Addendum does not deal with graduates at all.

[124] In light of the foregoing submissions the Defendant submits that the Plaintiff therefore seeks to enforce and claim damages in circumstances where it has not complied with its own contractual obligations. The Defendant was therefore not obliged

to accept placements in terms of the Addendum, as alleged by the Plaintiff. This was because the said Addendum was not the joint working plan as contemplated by the parties in terms of the agreement.

[125] In addition to seeking to rely on the Addendum to demonstrate performance of its contractual obligations the Plaintiff also seeks to rely upon the Addendum as a basis to interpret the agreement. Counsel for the Defendant submitted that, for the reasons set out above, the Addendum cannot be used as a basis to interpret the agreement. In this regard, it was submitted, on behalf of the Defendant, that, in fact, the agreement demonstrates a deliberate intention of the parties to break from the previous position of appointing youth that are non-graduates. The Addendum, in the Defendant's submission, is clearly unhelpful and irrelevant for the purposes of interpreting the agreement.

Upon a proper interpretation of the agreement, is the agreement limited to the placement of youth graduates or does it apply to all youth in Ekurhuleni.

Submissions by the Plaintiff

[126] It was submitted that the agreement must be interpreted in a businesslike manner, having regard to the text, context, and purpose of its provisions.¹⁶ Further, it was submitted that the conduct of the parties when implementing the agreement should also be taken into account when interpreting the agreement.¹⁷

[127] It was also submitted that interpretation is a matter of law and not of fact. Accordingly, interpretation is a matter for the court and not for witnesses.¹⁸

¹⁶ *Endumeni at paragraph [16].*

¹⁷ *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani 2016 (2) SA 307 (SCA) at paragraphs [23] to [26].*

¹⁸ *KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA) at paragraph 39; Gouws and Another NNO v BBH Petroleum (Pty) Ltd 2020 (4) SA 203 (GP) at paragraph [32].*

[128] It was noted by the Plaintiff that the Defendant's argument was that the agreement was limited to the placement of graduates. The Plaintiff, on the other hand, contended that the agreement was intended to cover the placement of youths and graduates.

[129] In support thereof the Plaintiff submitted that the text of the agreement is replete with references to the agreement being for the placement of youths (*that is, not limited to graduates*). Also, the preamble recognises the "*shortage of appropriate skills, high youth unemployment and limited placement opportunities*". Further, the preamble contemplates that the parties "*commit themselves to addressing the above-mentioned strategic focus by encouraging and implementing human capital development interventions through mainstreaming youth development through the provision of financial investment towards the development and operationalization of the Ekurhuleni-Lulaway Youth Placement and Development Programme to boost employability skills in the region*".

[130] Subclause 3.1.3.2 of the agreement contemplates that the Programme would include the development of a "*youth IT system & portal that integrates the CoE and Lulaway databases*".

[131] Moreover, subclause 3.1.3.6 of the agreement contemplates that the Programme would include co-funding by the parties "*of placement of Ekurhuleni youth with external parties*".

[132] Also, subclause 3.1.3.7 contemplates that the Programme would be to "*Secure placement opportunities for Ekurhuleni youth at no cost to the COE*";

[133] In addition, it was submitted, on behalf of the Plaintiff, that subclause 3.1.3.8 of the agreement contemplates that the parties would "*Secure funding from external sources to enable the skilling and placement of Ekurhuleni youth*".

[134] Further and in this regard, subclause 4.3 of the agreement contemplates that the Defendant would "*effect payments of stipends to Ekurhuleni youth that are placed within external organizations as part of the Programme*".

[135] Finally, Counsel for the Plaintiff submitted that subclause 5.1 of the agreement contemplates that the Plaintiff shall “*undertake to provide youth placement and development operational capacity, IT system, hardware & software, expertise and co-funding for the Ekurhuleni-Lulaway youth Placement & Development Programme over three (3) years*”.

[136] The attention of this Court was drawn to the fact that the only reference in the entire agreement to “*graduates*” is in subclause 6.1 thereof, which provides for the ring-fencing of “*a budget for the placement of one thousand (1000) youth graduates at a rate of R2,500 per month over three years as co-funding...*”.

[137] In the premises, it was submitted that the Defendant’s Counsel was incorrect in suggesting to Freeman that the agreement “*speaks of just graduates*”.

[138] It was further submitted, on behalf of the Plaintiff, that:-

138.1 subclause 6.1 does not deal with the criteria of person whom the Plaintiff was obliged to place and whom the Defendant was obliged to fund. The criteria of person is dealt with elsewhere in the agreement:-

138.1.1 subclause 4.3 of the agreement obliges the Defendant to “*pay stipends to Ekurhuleni youth that are placed within external organizations*”;

138.1.2 in terms of subclauses 3.1.3.6, 3.1.3.7 and 5.1 of the agreement the Plaintiff is obliged to secure placement opportunities for Ekurhuleni youth at external parties.

138.2 Subclause 6.1 rather deals with the budget for the programme, namely that the Defendant is budgeting a maximum amount of R 2 500.00 per graduate as their co-funding. It was noted, on behalf of the Plaintiff, that *Collins Dictionary* defines a “*budget*” as “*the amount of money that you have available to spend*”.

138.3 Accordingly, it was submitted that, in its proper context, all that subclause 6.1 of the agreement provides for is the maximum amount of money available to the

Defendant to pay in terms of the agreement. It was submitted that this does not provide for, or limit, the category of person who may be placed.

138.4 The Plaintiff submits that the fact that a maximum of R 2 500.00 per month was allocated for graduates, does not mean a lesser amount (*say of R 2 000.00 per month*) would be allocated for non-graduates. This is, submits the Plaintiff, in fact precisely what happened in the implementation of the agreement.

138.5 In the premises, it was the submission of the Plaintiff that Chauke's evidence that this amount was only ever for graduates because the Defendant has a policy in place that allocates R 2 500.00 for graduates and only R 1 500.00 for non-graduates, should not be accepted by this Court. This was in light of the fact that, aside from there not being a shred of evidence to support this allegation (*the alleged policy documents were not produced in discovery, despite being available*) the said contention, submits the Plaintiff, was proved to be false when Chauke was referred to contracts issued by Stallion to non-graduates for an amount of R 2 000.00.

138.6 The Plaintiff also submitted to this Court that, when confronted with this contradiction (*and when he had time to reconsider his evidence overnight*) Chauke's evidence shifted to be "*the Stallion Security placements were agreed upon because the motivation was such that it was enough to convince me that this would be something to be worth considering...*". Plaintiff's Counsel submitted that Chauke's sudden memory of these special circumstances was patently false.

138.7 It was also submitted, on behalf of the Plaintiff, that Chauke's evidence was further belied by the letter of intent signed by him and which contemplated the payment of a monthly stipend of R 2 500.00 per month for non-graduate interns. In this regard, Plaintiff's Counsel brought to the attention of this Court that this version was never put to either Freeman or Botha.

[139] Plaintiff's Counsel further submitted that the context in which the agreement was concluded also illustrates that it was not limited to graduates and included all youth. In this regard the attention of this Court was drawn to the following facts, namely:-

139.1 The parties had originally contracted with one another in 2014 in terms of a *“Placement Agreement”*.

139.2 The 2014 agreement contemplated the placing of unemployed youths (*not graduates*).

139.3 Both Freeman and Botha explained that the vast majority (*if not all*) of the persons placed by the Plaintiff under the 2014 agreement were non-graduates who were placed in the security, cleaning, logistics, retail and other industries (*that is, industries that were not suited to and unsuitable for, graduates*). This was conceded by Chauke.

139.4 The Plaintiff's main business with the Defendant was thus the placing of unemployed youth and not youth graduates.

139.5 Freeman explained that nothing changed in the manner in which the Plaintiff rendered services to the Defendant in the 2014 agreement and the 2018 agreement. The only thing that changed was that the Plaintiff was going to provide additional services (*such as the digitizing of the Defendant's database*).

139.6 Freeman also explained that his discussions with Chauke regarding the new 2018 agreement were all on the basis that it would be a continuation of the project with a few add-ons, namely, digitizing the database, opening the job centres and the like. However, the core placement function of the Plaintiff remained identical. There was no talk at the time about the new agreement being limited to graduates.

139.7 Chauke's evidence was that the discussions between the parties, at least from June 2018, related to placements of graduates only. He said that the Plaintiff presented to the Defendant on the basis that it would be placing graduates. The Plaintiff submits that there is not a shred of evidence to support this contention. To the contrary, it was submitted, on behalf of the Plaintiff, that if regard is had to the presentation referred to by Chauke:-

139.7.1 it contemplated the “*Placement of unemployed registered job seekers in workplaces on internships*”; a process where the Plaintiff would find suitable host employers (preferably SMMEs); that “*SMMEs require unskilled / low-skilled workers (increasing demand for the over-supply of unskilled / low skilled labour)*”;

139.7.2 it provided that the internship programme would be a “*lifeline to both SMMEs and the unemployed*” and it made no mention of graduates whatsoever.

139.8 The Plaintiff pointed out that Chauke’s original evidence was that this presentation only related to graduates. However, the attention of this Court was drawn to the fact that when he returned to court to continue testifying the following day, his version allegedly “*mutated*” and he testified that the presentation was for the placement of youth and graduates.

139.9 Further, Plaintiff’s Counsel drew the attention of this Court to what he described as an “*interesting*” fact, namely that Chauke denied ever receiving the presentation under cover of an e-mail. However, Counsel for the Plaintiff submitted that this was “*wildly implausible*” since, when Freeman gave evidence that the presentation was sent to Chauke, this evidence was never specifically challenged. Also, Freeman made reference to the presentation in his letter to the City Manager. Chauke never raised the fact that he had not received the presentation at that stage.

139.10 Finally, Chauke complained in his evidence that he could not remember certain events because “*we are in 2023 and we are dealing with issues of 2018*”. On behalf of the Plaintiff, it was submitted that it was interesting that Chauke contends that he could not remember being part of the WhatsApp group but was very confident that he did not receive the presentation.

139.11 Counsel for the Plaintiff also drew to the attention of this Court that when it was put to Chauke that the presentation did not refer to graduates, his version changed yet again and he testified that the presentation was an “*unsolicited proposal*” by the Plaintiff.

139.12 It was further submitted that, simply put, Chauke’s *ex post facto* denial that he received the presentation is a contrivance. Plaintiff’s Counsel submitted that his denial

is contradictory, implausible and unbelievable. It is, counsel submitted, yet another shifting and mutating of his evidence to suit the Defendant's version.

139.13 Plaintiff's Counsel also brought to the attention of this Court that, when the Plaintiff presented at the Ekurhuleni Youth Summit in June 2018, it was clearly advertising for placements in non-graduate industries (*Fashion, Retail, Security, Hospitality, and Call Centres*). Following thereon, it was submitted that it is clearly apparent that Chauke left the witness box on the third day of trial; went back to the presentation made by the Plaintiff; saw that it did not refer to graduates and changed his evidence when he continued with his testimony. In the premises, it was submitted that Chauke clearly shifted and mutated his evidence to suit the Defendant's case as and when the shoe pinched. Unlike Freeman's evidence that the core placement function was going to be identical, it was submitted, on behalf of the Plaintiff, that Chauke's evidence was fraught with contradictions and was implausible.

139.14 It was submitted that it was never put to Freeman that he had discussions with Chauke regarding the placement of graduates. In the premises, it was submitted that the Plaintiff was entitled to assume that Freeman's testimony was accepted as correct.

139.15 It was also submitted that the letter of intent sent by the Defendant to the Plaintiff, in addition to the foregoing, did not refer to graduates. Instead, it refers to the placement of 1 000 unemployed youth work seekers with third party host employers per annum over 3 years at a monthly stipend of R 2 500.00 per month, per intern, for 12 months. It also states that the parties "*hope to change the lives of many unemployed youth from the Ekurhuleni region...*". It makes no reference to graduates.

139.16 On this note, the Plaintiff drew the attention of this Court to the fact that Chauke contended that the letter of intent had "*nothing to do*" with the agreement that was eventually signed. It was submitted that this is a wildly implausible contention given that the terms of the letter of intent are almost identical to the wording used in the agreement;

139.17 Further, it was submitted that, in any event, this is also wildly implausible, given that Chauke testified that negotiations regarding the agreement commenced in May 2018 (*that is, when this letter of intent was circulated*).

139.18 Counsel for the Plaintiff made the argument that Chauke would have this Court believe that the parties engaged in two parallel processes, namely the negotiation of the letter of intent for a budget from the Job Fund and the negotiations for the eventual agreement. He would further have this Court believe that whilst the wording of these two documents are almost identical, they were two completely different processes. It was submitted that this is simply absurd and unbelievable.

139.19 Once again, the Plaintiff submits that it was never put to Freeman that the letter of intent had “*nothing to do*” with the agreement. The Plaintiff, it is submitted, was entitled to assume that Freeman’s testimony was accepted as correct;

139.20 The “Addendum”, which Freeman stated was the placement and recruitment plan that had been agreed between the parties, also makes no reference to graduates.

139.21 The Ekurhuleni Youth Summit, at which the Plaintiff had a stand, advertised placements in the hospitality, fashion, security and call centre industries.

139.22 The WhatsApp group started by Freeman referred to the placement of “*3000 Ekurhuleni unemployed youth we want to place in the next 3 years....*” and not graduates.

139.23 Chauke also candidly conceded that there is an imperative in government to place all unemployed youth and not only graduates.

139.24 Chauke also expressly conceded that the Defendant had a budget for the placement of 1 000 non-graduates per annum for three years.

139.25 It was therefore submitted by the Plaintiff that the above context shows that, contrary to what Chauke alleged in his evidence, at no time leading up to the signature of the agreement was there any discussion of only placing graduates. To the contrary, the entirety of the context points to the fact that the parties were in agreement that all youth would be considered.

[140] Freeman explained the purpose of the agreement was to place all Ekurhuleni youth (*and not only graduates*) in employment opportunities. This purpose is confirmed

by all the contemporary evidence, including the agreement, the letter of intent and the Addendum.

[141] Accordingly, submits the Plaintiff, if regard is had to the text, context and purpose of the agreement, it is clear that it was not limited to graduates.

[142] It was also submitted that the conduct of the parties clearly indicates that the agreement was not limited to graduates:-

142.1 Freeman and Botha both testified that the Plaintiff collected hundreds of CVs from the Defendant to place into the database the majority of which were for non-graduates. Why, the rhetorical question was asked, would the Defendant give the Plaintiff CVs for non-graduates if the agreement was limited to graduates?

142.2 Botha testified that Ramogale met with various host companies in the security, cleaning and call centre industries. She also explained that he in fact accepted these companies and advised he would be sending Memorandums of Understanding (“*MoUs*”) to these host companies for signature. Why, Botha asked, would Ramogale agree to meet host companies (*and conclude MoUs*) in, *inter alia*, the security and cleaning industries, if the agreement was limited to graduates?

142.3 Ramogale’s feedback to Botha did not dispute the placing of non-graduates at security companies but rather imposed an obligation on these companies to have formal training programmes.

142.4 Freeman advised that in October 2018 the Defendant in fact approved the placing of 60 security guards, without qualifications, at “*Stallion*” and “*Revert*”. The question must be asked as to why the Defendant would approve the placing of these security guards if the programme was meant for graduates only.

142.5 Botha advised that not only were non-graduates placed at security companies but that she also had hundreds of more placements in the pipeline to place non-graduates. This, she advised, continued after the agreement was concluded. She advised that she was never told, at any time, that the agreement was limited to graduates or that no placements in the security industry would be contemplated.

142.6 Chauke's evidence was that after the 2014 agreement expired in 2017, he was "*not aware of any placements*" in the security industry. The Plaintiff submitted that Chauke's evidence then shifted and mutated. His version was then that there may have been placements following the expiry of the 2014 agreement but there would have to be "*strong motivation*". After June 2018, Chauke alleged the Defendant would not have allowed the placement of non-graduates.

142.7 However, the Plaintiff submitted that this is again false as the record is replete with placements and attempted placements in the security industry in August 2018, September 2018, October 2018, November 2018 and December 2018. The record is also replete with attempts to place new interns on the Defendant's payroll system.

142.8 The Plaintiff submits that when presented with these facts, Chauke's evidence shifted and mutated once again. Now, all of a sudden, he remembered approving the placement of non-graduate interns at Stallion because he was happy that Stallion was going to train these interns and give them PSIRA qualifications. This new version was proffered by Chauke despite his earlier version that he could not remember any placements after the 2014 agreement lapsed and blaming this on the length of time between 2018 and 2023.

142.9 It was also submitted by the Plaintiff that Chauke was clearly comfortable shifting and mutating his evidence as and when the shoe pinched. However, the Plaintiff submitted that this mutating version causes more difficulty for the Defendant (*as dealt with later in this judgment*).

142.10 Botha confirmed that the 2014 agreement had lapsed in 2017 and that the agreement was only signed in October 2018. However, in the period between August 2018 and October 2018 the Plaintiff was placing non-graduate interns at security companies in accordance with the concluded, but unsigned, agreement. The Defendant in fact confirmed that all interns placed at security companies "*qualified for funding*" and after the conclusion of the agreement that they were simply awaiting for the Stallion and Revert contracts to be signed.

142.11 Botha also gave evidence that inductions were to take place for the placement of non-graduate security guards in October 2018. Chauke conceded that if interns were attending inductions, they were going to get contracts. It was submitted that this concession belies Chauke's evidence that the Defendant would blanketly refuse to accept non-graduate placements from September 2018.

142.12 When the Defendant's Nkadameng was confronted in October 2018 about Ramogale's failure to arrive at the induction of various interns (all of which were non-graduates), her response was not that the agreement did not contemplate the placing of non-graduates.

142.13 The Plaintiff also sought to rely on the fact that when the Defendant eventually did inform the Plaintiff that it would only accept graduates, its position was that there would be "*no more security companies after these intakes*" and that it wanted "*more graduate placements*" which it would pay up to R 6 000.00 per month for.

142.14 The Plaintiff submits that the implication of this statement is that the original agreement did cater for non-graduates but that the Defendant no longer wanted non-graduates going forward and that the agreement would be amended to provide a R 6 000.00 stipend for graduates (well above the R2 500 that had clearly been agreed to for non-graduates).

142.15 The Plaintiff submits that this implication was further confirmed by Chauke's statement that "*we no longer support placements with security companies*". This sentiment was repeated by Chauke in his letter to the City Manager. This clearly intimates that the Defendant did support placements in security companies but had changed its mind. If the original agreement was to place graduates only for a stipend of R 2 500.00 why, asked the Plaintiff, would the Defendant need to offer an extra incentive to place these graduates.

142.16 Botha also gave evidence that, in response to the proposal from Ramogale, she told him that R 2 500.00 was the stipend for matriculants and that the Plaintiff would be interested in a stipend of R 6 000.00 for graduates. This was not challenged by the

Defendant in cross-examination and Ramogale did not give evidence to counter this contention (despite his availability).

[143] Plaintiff's Counsel submitted that what makes the Defendant's interpretation of the agreement so absurd and untenable, is revealed by Chauke's evidence:-

143.1 He contended that the agreement contemplated that the Defendant would pay R 2 500.00 per graduate intern and that "*nothing is paid by the company*" (that is the host company).

143.2 Chauke would have this Court believe that the agreement contemplated the placement of a graduate youth (*someone with a matric and a post-matric degree, diploma or certificate*) for a monthly salary of R 2 500.00 which would be below minimum wage. This, submits the Plaintiff, is patently absurd and, as explained by Botha, it would be impossible to place graduates with host companies at such a low stipend. In the premises, it was submitted, on behalf of the Plaintiff, that the Defendant's interpretation of the agreement would be unbusinesslike, insensible and impossible to implement.

143.3 It was also submitted by the Plaintiff that an attempt was made by Chauke to change this evidence and to say that, in fact, host companies could contribute to the interns in "*exceptional circumstances*" if there was a "*motivation*" by the host company or the Plaintiff. This was, however, yet another attempt by Chauke to shift and mutate his version as the shoe pinched.

[144] Dealing further with the evidence of Chauke, it was submitted that Chauke contradicted himself time and time again in his evidence.

144.1 He explained that the new agreement (*in 2018*) was limited to graduates because "*in 2012 we invested in a Bursary Scheme where we had placed a considerable amount of money. This Bursary Scheme they produced graduates*". These graduates needed placements. Hence, he alleged the 2018 agreement limited placements to graduates.

144.2 This, however, argues the Plaintiff, made no sense. If the scheme was started in 2012 the graduates would have graduated in 2015 at the latest (assuming a 4-year degree). Why, the Plaintiff asked, was there only an impetus in 2018 to place graduates and not in 2014, 2015, 2016 or 2017 (under the old agreement)?

144.3 If the scheme was started in 2012 the Plaintiff posed the further question as to why the letter of intent, sent by Chauke in 2018, did not refer to the placing of graduates.

144.4 It was further submitted that there was not a shred of evidence placed before the court regarding the alleged “*Bursary Scheme*” or that the Plaintiff was advised of this “*Bursary Scheme*” and the need to place graduates. Finally, this version was never pleaded nor put to Freeman or Botha during cross-examination.

[145] Another contradiction relied upon by the Plaintiff was the allegation that, by June 2018, when the Plaintiff was asked to present at the Youth Summit the Plaintiff was expressly requested to target graduates because this is what the agreement would be focussed on.

145.1 The Plaintiff’s stand at the Youth Summit did not target graduates. It specifically targeted non-graduates (*Fashion, retail, security, hospitality and call centres*). Chauke’s evidence then attempted to shift and mutate his version to allege that these industries did, in fact, contemplate the placing of graduates.

145.2 Plaintiff’s Counsel submitted that in an attempt to extricate himself from the previous falsehood he had told (*namely that the Youth Summit was focussed on graduates*) Chauke made a telling and crucial concession, namely that someone with a PSIRA registration is a graduate and that he had no issues with the placing of persons in the security Industry.

[146] Finally, it was submitted that, to the extent that there still may be any residual ambiguity in the meaning of the agreement the *contra proferentem* rule must apply. It is trite that in such a case the rule states that a contract must be interpreted against a

party who drafted the agreement.¹⁹ Chauke admitted he drafted the agreement. Thus, the agreement must be interpreted against the Defendant. Accordingly, the agreement must be interpreted, in accordance with the *contra proferentem* rule against the Defendant and not be limited to graduates only.

Submissions by the Defendant

[147] The Defendant, whilst accepting that the agreement as a whole plays a role in the interpretive exercise, submits that the starting point is the text of the provision which is in dispute. Subclause 6.1 of the agreement provides:

“6. FUNDING MODEL AND OBLIGATIONS

*6.1 COE (the Defendant) shall ring-fence a budget for the placement of one thousand (1000) youth graduates at a rate of R 2500 per month over three years as co-funding to implement the Ekurhuleni Lulaway Youth Placement & Development Programme, subject to Council Policy and budget availability as per MTREF allocation.”*²⁰

[148] The Defendant points out that the Plaintiff’s claim before this Court is that, if it placed candidates with host employers at the rate of R 2 500.00, as provided for in subclause 6.1, it would have earned R 1 000.00, as a fee, from each of the host companies.

[149] This was confirmed by Freeman who testified that, to get paid for the services, the Plaintiff was obligated to ensure that the monthly stipends payable to the interns were actually paid by the Defendant. In the premises, it was submitted that the inevitable starting point is therefore the language of the provision itself.

[150] It was further submitted that upon a plain reading of subclause 6.1, which is the disputed clause, it is clear that the parties deliberately, in this respect, decided that an amount of R 2 500.00 would be ringfenced by the Defendant for the placement of youth

¹⁹ *Cairns (Pty) Ltd v Playdon & Co Ltd 1948 (3) SA 99 (A)*

²⁰ *Emphasis added.*

graduates. The parties, as Chauke testified, contemplated that the amount which would be ringfenced by the Defendant was for the purposes of the placement of youth graduates, being youth who have a post-matric qualification.

[151] In this regard the Defendant relied upon the fact that nothing in the text of subclause 6.1 refers to youth who are not graduates. The submission is that the parties plainly sought to limit the applicability of the placement to youth graduates. Arising therefrom, it is submitted that subclause 6.1 cannot sustain the Plaintiff's case that it was not obliged to appoint youth graduates.

[152] The Defendant argues that the Plaintiff has attempted to create a textual basis for its interpretation by alleging that the balance of the agreement does not refer to youth graduates but refers only to youth. In this regard the Defendant submits that this submission of the Plaintiff does not bear scrutiny, because:

152.1 Clause 3 of the agreement, which the Plaintiff seeks to rely upon, is unhelpful, as it simply sets out the elements of the Ekhurleni-Lulaway Youth Placement and Development. This includes several activities such as co-funding the placement of youth with external parties, securing placement opportunities for youth at no cost to the Defendant and securing funding from external sources.

152.2 Subclause 6.1 of the agreement is the specific provision which creates the rights and responsibilities of the parties. The Plaintiff's claim arises pointedly from subclause 6.1 where the Defendant undertakes to make money available for the placement of youth graduates.

152.3 The drafters and parties to the agreement made the deliberate decision to include subclause 6.1 in terms of which it sets out the rights and obligations of both parties, notwithstanding that the agreement, in clauses 4 and 5, includes other obligations of the parties. There is a deliberate clause dealing with the funding model and obligations in the context of the placement of youth graduates in the amount of R 2 500.00. The parties made the choice to carve out these rights and obligations. This choice and design by the parties must be respected.

[153] In amplification of the foregoing the Defendant relied on *Capitec* where the SCA explained that:²¹

“Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.”

[154] It was further submitted, on behalf of the Defendant, that the Plaintiff had not attempted to use the context to *“elucidate the text”* but rather, is seeking to make a new contract and asking this Court to simply ignore the reference to youth graduates. Counsel for the Defendant submits that, as the SCA has recently stated, *“Endumeni is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Endumeni does not licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable”*²²

[155] It is further submitted that, in addition to the clear textual basis for the interpretation as contended for by the Defendant the context supports the Defendant’s interpretation as a result of the following facts, namely:

155.1 The 2014 agreement concluded between the parties made a distinction between young people and graduates and provided that the Plaintiff would assist the Defendant to place 1 500 unemployed *young people and graduates* per annum at no cost to the Defendant.

155.2 Where the parties intended to include *“young people and graduates”* the parties did so. In the case of the agreement the parties deliberately made no distinction and decided that the amount of R 2 500.00 would be applicable to youth graduates.

²¹ At paragraph [51]

²² *Capitec* at paragraph [26]

155.3 The amount of R 2 500.00 also supports the fact that the appointment was for graduates. In response to an email from Botha enquiring about the differences in the stipend, Mbovu of the Defendant explained that *“The difference is qualifications if you have matric and certificate of some sort you getting R 2000.00 diploma from two years and your degrees and masters its R 2500.00”* Botha, who testified as the recipient of this email, did not dispute this explanation from the Defendant.

[156] It was also submitted by the Defendant that the reliance by the Plaintiff on previous letters is unhelpful. This is simply because all of those letters predate the agreement. The Defendant submits that the parties, having negotiated the agreement and being aware of the contents thereof, made the deliberate choice to include subclause 6.1 which refers to youth graduates.

[157] Finally, the Defendant’s Counsel submitted that the appropriate interpretation of the agreement makes it plain that the Plaintiff was obligated to place youth graduates. There is no dispute between the parties that the placements offered by the Plaintiff to the Defendant were not suitable for graduates. The Defendant, on the evidence before this Court, quite clearly sought to hold the Plaintiff to its end of the bargain. The Defendant, deciding that it did not accept security placements, in no way objectively demonstrated an intention not to be bound by the agreement. In the premises, it was submitted that the Plaintiff failed to demonstrate repudiation.

The discretion afforded to the Defendant to accept or reject placements and whether (and on what basis) the Defendant was entitled to reject placements of interns.

Submissions by the Plaintiff.

[158] It was noted that the Defendant’s Senior Counsel contended that the Defendant had a discretion whether or not to accept placements / interns. It was put to Freeman that the Defendant had an ultimate discretion to refuse anyone it wanted.

[159] Plaintiff's Counsel submitted that Freeman had denied this proposition and that he had stated that, whilst the Defendant could reject a particular host company that did not meet the criteria, it could not reject an entire industry. In this regard, it was argued, on behalf of the Plaintiff, that Freeman had pointed to the Addendum as the agreement between the parties regarding the industries in which the parties had agreed placements would take place and explained that the Defendant was not entitled to unilaterally change this.

[160] It was further submitted that Freeman's evidence accords with what was submitted earlier on behalf of the Plaintiff and noted herein regarding the status of the "*recruitment and placement plan*". In addition, it was submitted that there is absolutely nothing in the agreement which gives the Defendant a discretion to reject either particular employers or industries.

[161] Plaintiff's Counsel also submitted to this Court that it should not be forgotten that the agreement requires the parties to "*display the highest degree of good faith and reasonableness towards each other in all matters pertaining to the Project*". Accordingly, it was submitted, even if the Defendant had a discretion to reject entire industries, such discretion would have to be exercised reasonably. The submission was made that Chauke had confirmed that the Defendant could not unreasonably reject a host employer or any particular industry.

[162] It was further submitted that Freeman had testified to the fact that the rejection of the security industry in its entirety was entirely unreasonable given that it is one of the fastest growing industries in South Africa; this would undermine the objective of the agreement, namely of employing underprivileged and unemployed youth, together with the fact that it would upskill unemployed youths and give them a certification (PSIRA) that could be used in the marketplace.

[163] Counsel for the Plaintiff submitted that the foregoing had not been rejected or contradicted by Chauke. Moreover, it was submitted that Chauke had testified that he would not (*and did not*) reject the security industry. In this regard, Plaintiff's Counsel pointed out that Chauke's precise words were that the Defendant would accept "*Every*

sector of the economy as long as it assists us to create employment opportunities for our graduates of course” and “I am happy with all sectors of the economy”.

[164] It was also raised, on behalf of the Plaintiff, that when he was referred to the content of the Plaintiff’s advertisements at the Youth Summit, Chauke conceded that the Defendant was only too happy to accept placements in the security industry as long as they were graduates. He also accepted that matriculants with a PSIRA qualification were graduates.

[165] Arising from the foregoing, it was submitted that, given Chauke’s concession, if the Defendant did reject an entire industry it stands to reason that such rejection would be unreasonable. Chauke, submitted the Plaintiff, admitted as much.

[166] Finally, it was submitted, on behalf of the Plaintiff, that, in any event, as set out above, the Defendant did not in fact reject those companies in the security industry that Ramogale met on 19 October 2022. Botha testified that these companies were in fact accepted and Ramogale promised to circulate MoU’s. This was not challenged by the Defendant in cross-examination and Ramogale did not give evidence to counter this allegation.

Submissions by the Defendant

[167] It was submitted, on behalf of the Defendant, that a major difficulty facing the Plaintiff in its attempt to succeed in its claim against the Defendant is that the Defendant had a discretion to reject placements and companies. Further, Counsel for the Defendant submitted that the Plaintiff had conceded that the Defendant had a discretion to decide the kind of host employers it wanted to place its unemployed youth graduates in. It was also submitted that the Plaintiff had further conceded that the Defendant, as the contract owner, had the power to veto any of the companies which would host the unemployed youth graduates. The Defendant thus had the discretion to disallow the placement of unemployed youth graduates in the security industry. Finally, it was submitted, on behalf of the Defendant, that there was no evidence to support the Plaintiff’s contention that the Defendant had been untoward or had acted in bad faith or was in breach of its contractual rights and/or obligations.

Discussion and findings

The status of the “Addendum”, namely whether it was in fact agreed to between the parties and whether or not it satisfies the requirement as contemplated in the agreement that the parties must agree on a recruitment and development plan (“the plan”).

[168] This Court has carefully considered the submissions made by both parties in respect of the status of the Addendum.²³ In the first instance the submission made on behalf of the Plaintiff that this Court should accept the testimony of Freeman that the Addendum was a document he had drafted after discussions with Chauke; this Addendum reflected the meeting of minds as to how the new agreement would be implemented going forward and, in fact, that this was the recruitment and placement plan contemplated by the agreement,²⁴ cannot be accepted by this Court. This evidence must, on a balance of probabilities, be rejected by this Court simply because it is difficult to conceive why, if the Addendum was such an important document (*it being common cause that the recruitment and placement plan was to form a material part of the agreement*), it was not signed by both parties, *alternatively*, clearly accepted by the Defendant, at any stage, as being the said plan. Moreover, the Plaintiff failed to place before this Court, at trial, any evidence to show that the Plaintiff had taken any real steps to ensure that the Defendant clearly accepted (*or perhaps even unreasonably rejected*) the Addendum drafted by Freeman.

[169] The submission of the Plaintiff that the title of the Addendum, namely “ADDENDUM TO MOA – COE & LULAWAY”, is of no moment and that what *is* of moment, is the content of the Addendum, even if accepted by this Court, ultimately has no bearing on the decision of this Court in respect of the status thereof. However, it appears strange to this Court as to why this document (*once again because of the importance thereof*) was not given a title which clearly reflects (*on the drafter’s own*

²³ Paragraphs [106] to [125] *ibid*.

²⁴ Paragraphs [106] to [120] *ibid*.

version) what the document is all about. In addition thereto, it was never explained by the Plaintiff why the document was referred to as an “*addendum*” when the agreement (*as argued on behalf of the Plaintiff*) clearly envisages a separate document. Also, no explanation was provided as to why, if the plan was to be an addendum to the agreement, it was not referred to as such in the agreement and (*it being common cause that the Addendum was never signed by either party*) why it was not signed when the agreement was signed by both parties. All of the foregoing must be seen against the background that it was common cause that the Addendum had been prepared by Freeman prior to the agreement being signed by both parties.

[170] In respect of the non-variation clause contained in the agreement and relied upon by the Defendant in support of the Defendant’s submissions that the Plaintiff could not, in light thereof, rely on the Addendum, this Court finds that, having regard to the common cause facts in this matter pertaining to the Addendum, the Defendant’s reliance thereon takes the issue of the status of the Addendum no further. It is not the Plaintiff’s case that the agreement should be varied by the Addendum. Rather, the Plaintiff wishes this Court to accept that the Addendum (*drafted by Freeman prior to the parties entering into the agreement*) is to be considered a separate agreement thereto and which satisfies the material condition of the agreement that the parties agree to the plan, as referred to above.

[171] The next submission on behalf of the Plaintiff that requires the consideration of this Court is that the agreement did not require the Addendum (*in the context of the plan as set out in the agreement*) to be in writing and signed by both parties. It is true that the agreement does not specifically state that the plan envisaged therein should satisfy those requirements. However, this Court finds, on a balance of probabilities, that the fact that the Addendum, having been reduced to writing, was not signed by either of the parties, is a major obstacle to the argument proffered on behalf of the Plaintiff that not only does the Addendum constitute the plan required by the agreement but that the parties had agreed to the contents thereof prior to them entering into the agreement. It is highly improbable that the parties, having made the effort to enter into a written agreement, would then agree to ignore the obvious benefits thereof and enter into (*on the Plaintiff’s version*) a partly written and partly oral agreement. This is particularly so when one has regard to the fact that, *inter alia*, the plan forms an integral and essential

part of the agreement and the amount of money involved in the project (*the Plaintiff's claim being in the significant amount of R 36 000 000.00*).

[172] In support of the Plaintiff's submission that it had adduced sufficient evidence to show that the Addendum was the "*recruitment and development plan*" which regulated, *inter alia*, the industries in which the interns would be placed, it was acknowledged by Counsel for the Plaintiff that the evidence of Freeman was directly contradicted by that of Chauke.²⁵ However, it was submitted that the evidence of Freeman that Chauke was a member of the WhatsApp group where Freeman published that there was "*a meeting of minds as to how the process is going to work going forward as per the addendum*" should be accepted by this Court in preference to that of Chauke which was inherently contradictory and in light of a WhatsApp message sent directly from Freeman to Chauke in which express reference was made to the Addendum.²⁶ In addition to the foregoing the Plaintiff relied upon the fact that (a) the contents of the Addendum mirror the contents of the agreement in respect of the opening of co-branded youth placement job centres and the development and updating of a joint online database and that (b) the fact that Chauke had never seen the Addendum prior to the letter to the City Manager, was never put to Freeman.²⁷

[173] The difficulty that this Court has with those submissions is that, even accepting that the evidence of Chauke was not perfect in every detail, the onus of proving the status of the Addendum, as relied upon by the Plaintiff (*that it satisfied the terms of the agreement and that the parties had agreed to the recruitment and development plan*) remains with the Plaintiff throughout. Proof thereof is essential to the Plaintiff's cause of action and, more particularly, that the Plaintiff has complied with all of its obligations in terms of the agreement, thus entitling the Plaintiff to its claim for contractual damages. In that regard, it is the opinion of this Court that (a) the contradictions in the evidence of Chauke are not of such a significant degree as to entitle this Court to reject his evidence *in toto* and (b) the WhatsApp communications relied upon by the Plaintiff are insufficient

²⁵ Paragraph [117] *ibid*.

²⁶ Paragraph [117] *ibid*.

²⁷ Paragraph [117] *ibid*.

to find that the Plaintiff has discharged the onus incumbent upon it to prove, on a balance of probabilities, that the parties agreed upon the plan as included in the agreement, thereby satisfying a material condition thereof.

[174] In addition to that as already dealt with earlier in this judgment the fact that the contents of the Addendum may, to one extent or another, appear to “*mirror*” those of the agreement, does not mean, as the Plaintiff would have this Court find (*based on the fact that Chauke drafted the agreement and Freeman drafted the Addendum*) that the status of the Addendum is that of the plan as envisaged in the agreement. In this regard, the mere fact that the Addendum and the agreement both make reference to the opening of co-branded youth placement job centres, together with the development and updating of a joint online database, is not sufficient to elevate the Addendum to this status. These aspects were fundamental to the successful implementation of the agreement. Indeed, it would have been surprising if they were not referred to in both. What, however, the Addendum lacks (*which may possibly have elevated it to the status as contended for by the Plaintiff*) is, as required by the agreement and as submitted on behalf of the Defendant, the setting out of annual milestones to be realized during the three-year period.

[175] Arising from the foregoing (*the reference to the opening of co-branded youth placement job centres, together with the development and updating of a joint online database in both the agreement and the Addendum*), it is far more probable that the Addendum was drafted by Freeman when (*on his own evidence*) he was negotiating with Chauke prior to the parties entering into the agreement. In the premises, it is more probable that this separate document was a “*working*” document rather than the plan.

[176] As to the reliance by the Plaintiff on the fact that the version of Chauke in respect of the parties never having agreed to the addendum not being put to Freeman when he testified, whilst this may be correct, same does not detract from that evidence which is ultimately common cause between the parties or not seriously in dispute and upon which this Court is entitled to rely. Further, when examining the evidence placed before this Court at trial, it must have been clear to the Plaintiff (*and this is supported by the pleadings*) that it was always disputed by the Defendant that, *inter alia*, the Addendum did not form part of the agreement and did not constitute the plan.

[177] Once again, considering the probabilities of the matter, this Court has serious misgivings in relation to the Plaintiff's sole reliance upon the WhatsApp messages tendered into evidence, namely the message on the WhatsApp group and the WhatsApp message sent to Chauke directly. It is not only the fact that Freeman elected to deal with an extremely important aspect of the agreement, namely the parties reaching consensus in relation to the plan, in this manner, but his failure to confirm the contents of these WhatsApp messages by way of a more conventional and acceptable mode of correspondence, namely letters and/or emails. No such evidence was placed before this Court which is problematic for the Plaintiff. Further and in this regard, it is difficult to understand why Freeman (*once again on his own version*), having negotiated with Chauke in relation to the agreement, would send the Addendum to the Defendant's Legal Manager and not to Chauke (*or to both the Legal Manager and Chauke*).

[178] In light of all of the foregoing, this Court finds that the Plaintiff has failed to discharge the onus incumbent upon it to prove, on a balance of probabilities, that a material condition of the agreement, namely that the parties agree to a recruitment and development plan, was fulfilled. It must follow therefrom that the Plaintiff cannot succeed in its claim against the Defendant arising from contractual damages. This consequence was common cause between the parties at the trial in this matter. Indeed, same was never disputed on behalf of the Plaintiff and a considerable amount of court time was spent dealing with the issue as to whether or not the Addendum should be accorded the status of the plan as contemplated by the agreement. This Court having decided that it does not, it must follow that the Plaintiff's claim against the Defendant should be dismissed on this issue alone.

A proper interpretation of the agreement, namely whether the agreement was limited to the placement of youth graduates, or whether it applied to all youth in Ekurhuleni.

[179] Once again, this Court has carefully considered the submissions made on behalf of both parties in respect of whether the agreement was limited to the placement of

youth graduates, or whether it applied to all youth in Ekurhuleni. The Defendant submits the former whilst the Plaintiff submits the latter.

[180] Having done so, it is not the intention of this Court to burden this judgment unnecessarily by dealing with each and every submission made on behalf of the parties. These have already been set out earlier in this judgment.²⁸ Rather, this judgment will deal, in broad terms, with the merits thereof.

[181] Perhaps the most important feature which supports an interpretation of the agreement to include the placement of all youth and not one which is restricted to youth graduates only, when applying a simple textual examination thereof, is that, whilst the agreement makes numerous references to “youth”,²⁹ there is only a single reference therein to “youth graduates”.³⁰ Moreover, that single reference is in respect of stipends payable to youth graduates. In the premises, this subclause of the agreement (*subclause 6.1*), relied upon so heavily by the Defendant in support of the Defendant’s interpretation of the agreement, cannot, in the opinion of this Court, be determinative and give rise to a finding that the agreement was restricted to youth graduates only. This must be so, since the only reference thereto in the agreement is to the payment of “youth graduates” which clearly does not “exclude” the numerous references therein (*as set out earlier in this judgment*) to the many general and “inclusive” references to “youth”. Rather, the unambiguous text of the agreement must support an interpretation that the agreement applies to the placement of all youth in Ekurhuleni which includes youth graduates.

[182] Further and in this regard, it is essential to note that the important rule of interpretation, namely that of “structure”, supports such an interpretation. Not only are there numerous references to “youth” as opposed to “youth graduates” in the agreement but, as correctly submitted on behalf of the Plaintiff,³¹ the preamble to the agreement is replete with various references to “youth” and not to “youth graduates”. Following

²⁸ Paragraphs [126] to [157] *ibid*.

²⁹ Paragraphs [129] to [135] *ibid*

³⁰ Paragraph [136] *ibid*.

³¹ Paragraph [129] *ibid*.

thereon, as already dealt with herein, the parties elected to refer throughout the agreement broadly (*and in some instances specifically*) to “youth”, rather than limiting placement to “youth graduates” only.

[183] In addition to the aforesaid rules of interpretation, a finding that the agreement should be interpreted in favour of the Plaintiff, is supported by the other accepted rules of interpretation, being *context* and *purpose*. Interpreted objectively, such interpretation, taking into account the common cause facts, *alternatively*, the facts which cannot be seriously disputed by either of the parties, results in the agreement having a sensible meaning and giving rise to business efficacy. The same cannot be said should the agreement be interpreted in favour of the Defendant. Moreover, the fact that the agreement was drafted by Chauke and the conduct of the parties during the period that the 2014 agreement came to an end and the commencement of the agreement, are all indications that favour the interpretation of the agreement to be in respect of the placement of youth generally and not restricted solely to the placement of youth graduates.

[184] It must follow from the foregoing that this Court finds that, properly interpreted, the agreement deals with the placement of all “youth” within the Ekurhuleni area and not just those with the necessary qualifications to categorise them as “youth graduates”.

The discretion afforded to the Defendant to accept or reject placements and whether (and on what basis) the Defendant was entitled to reject placements of interns.

[185] The last (*but certainly not the least*) of the issues relating to liability (*whether the Defendant is liable to compensate the Plaintiff in respect of contractual damages suffered by the Plaintiff*) is whether (a) the Defendant had a discretion to accept or reject the placement of youth and (b) if so, on what basis the Defendant could exercise that discretion.

[186] As was the case in respect of the other issues which this Court was called upon to decide, this Court has carefully considered the submissions made on behalf of both parties in respect of whether the Defendant had such a discretion and, if so, the nature thereof. Once again, it is not the intention of this Court to burden this judgment unnecessarily by dealing with each and every submission made on behalf of the parties. These have already been set out earlier in this judgment.³²

Did the Defendant have a discretion to accept or reject the placement of youth.

[187] Earlier in this judgment,³³ it was noted that, under cross-examination, Freeman had conceded that :

187.1 the host employers who employed interns had to be acceptable to the Defendant as the “owners” of the project;

187.2 the Defendant was in a position where it could refuse a certain sector. This concession was made when it was put to Freeman that, as the contract owner, the Defendant had the right to veto any sector or refuse the placement of any interns in a particular sector;

187.3 the Defendant had a discretion regarding which host employers it wanted to contract with for the placement of unemployed youth graduates; and

187.4 the agreement and the addendum did not specifically state that the Defendant was obliged to accept the placement of interns in the security industry.

[188] It was further noted herein³⁴ that, when cross-examined, Botha also conceded that the Defendant had a discretion to choose which sectors they wanted to place interns in and could use this discretion in the implementation of the project.

³² Paragraphs [158] to [167] *ibid.*

³³ Paragraphs [36] to [39] *ibid.*

³⁴ Paragraph [55] *ibid.*

[189] However, during the course of argument before this Court, Plaintiff's Counsel submitted that Freeman and Botha did not make the aforesaid concessions. In the premises, it is necessary for this Court to re-visit the relevant evidence. In this regard, not only is this Court greatly assisted by the Heads of Argument of both parties but has also had the benefit of a transcript of the trial proceedings.

[190] The evidence of Freeman on this issue, under cross-examination, may best be described as confusing and contradictory. At times, he conceded that the Defendant did have a discretion in terms of the agreement, whilst at others, he denied that this was so. In addition, he referred to the agreement and the Addendum interchangeably (*and incorrectly*) which made his evidence extremely difficult to understand. Freeman did not create the impression that he fully understood the terms and conditions governing the agreement between the parties. This was so, despite the fact that he was the principal "*negotiator*" on behalf of the Plaintiff when entering into the agreement with the Defendant.

[191] If there is any doubt that Freeman did not make the concession that the Defendant had a discretion in terms of the agreement, this is clearly dispelled when one examines the evidence, under cross-examination, of Botha. In light of the importance thereof, a portion of that evidence is set out, *verbatim*, hereunder.

[192] The really pertinent portion of the cross-examination of Botha by the Defendant's Senior Counsel is the following:

“ **MR GEORGIADES SC:** *Did Mr Ramagale (sic) or Ekurhuleni Have (sic) the final say in what industry they would place (sic)? After all, they were putting up half the money.*

MS BOTHA: *That would be correct, but we had an agreement in place, and we were just fulfilling the obligations of the contract.*

MR GEORGIADES SC: *So, they would not have a discretion.*

MS BOTHA: *Surely, surely, they will have a discretion, I mean, they are the funders.”*

[193] It is true that any discretion vested in the Defendant to approve or refuse the placement of interns was not specifically pleaded by the Defendant. Rather, the Defendant relied on the fact that it would not approve a plan to place qualified graduates, with post matric qualifications, with security companies in positions as security guards.³⁵ In the premises, upon a strict interpretation of the Defendant's pleaded case, any discretion vesting in the Defendant was in the context of the plan; in respect of youth graduates and in relation to the security industry. It was not a discretion in a "*general*" or "*broader*" sense, being a discretion afforded to the Defendant, in terms of the agreement, to accept or reject placements of interns.

[194] However, this is not an obstacle to this Court considering and finding, in the Defendant's favour, that the Defendant did indeed have such a discretion. In the first instance, as dealt with earlier in this judgment, the Plaintiff not only relied upon the fact that the Addendum constituted the plan as contemplated by the agreement but further, that, in terms thereof, the Addendum set out the various industries in which the Plaintiff was entitled to place interns. The reliance thereon by the Plaintiff and that the foregoing somehow supports the case for the Plaintiff that the Defendant did not have the discretion to accept or reject the placement of interns, cannot be correct. This is simply because, as also set out earlier in this judgment, this Court has already held that the Addendum did not form part of the agreement and did not constitute the plan as contemplated by the agreement. In the premises, it must follow that the Addendum has no bearing whatsoever in either restricting this Court from considering whether the discretion exists or deciding, in favour of the Defendant, that it did.

[195] During the course of the trial, there was no objection, on behalf of the Plaintiff, to the line of cross-examination followed by Senior Counsel for the Defendant when dealing with this issue with both of the Plaintiff's witnesses. In the premises, any failure to specifically plead the nature of the discretion vested in the Defendant (*outside of the context of the plan; in respect of youth graduates and in relation to the security industry*), has been cured by the evidence placed before this Court. It requires no formal amendment to the Defendant's pleadings. Not only was this never raised on behalf of

³⁵ Subparagraph 5.6 and paragraph [6] *ibid*

the Plaintiff during the course of argument before this Court but it was common cause between the parties that the issue of a discretion was one which required a decision by this Court.

[196] Also, the fact that this Court has found in favour of the Plaintiff that the agreement, properly interpreted, applied to all “youth” and was not restricted to “youth graduates” is not a bar to finding in favour of the Defendant on this important issue. This is simply because the exclusion of the latter does not affect the discretion vesting in the Defendant when dealing with the former.

[197] Finally, in the opinion of this Court, having regard to the accepted principles of interpretation (*as dealt with herein*) the agreement, properly interpreted, afforded to the Defendant a discretion to accept or reject placements and the Defendant was entitled to reject placements of interns. This interpretation is supported by all the applicable principles but, in particular, by the principle of business efficacy. The discretion vested in the Defendant was necessary to make the agreement “work”. Viewed objectively, it was only through the exercise of this discretion by the Defendant that the agreement could fulfil its purpose; work efficiently and bring about a “business like” result. This is clear from the evidence of the Plaintiff’s witnesses (*particularly that of Botha*) and taking into consideration the evidence of Chauke.

On what basis did the Defendant have a discretion to accept or reject the placement of youth.

[198] The basis upon which the Defendant had a discretion to accept or reject the placement of youth was not a major focus of the evidence placed before this Court during the trial. Rather, the real issue between the parties was whether the Defendant had a discretion at all.

[199] Having held that the Defendant did indeed have such a discretion, it is the opinion of this Court that the only restriction upon the Defendant in the exercise of that discretion was if it exercised the discretion vested in it unreasonably. This would obviously give rise to a breach or repudiation of the agreement by the Defendant. It

must be noted that it was never directly pleaded by the Plaintiff that in the event of this Court holding that the Defendant did have a discretion to accept or refuse the placement of youth that the Defendant was obliged to exercise that discretion reasonably; that the Defendant failed to do so and that this constituted a further ground for the Defendant's alleged breach or repudiation of the agreement.

[200] In the event that the basis upon which the Defendant exercised its discretion is indeed an issue to be determined by this Court, there is, in the opinion of this Court, no evidence upon which this Court can find, on a balance of probabilities, that the Defendant exercised that discretion unreasonably. Rather, the evidence placed before this Court at trial would support a scenario that, *inter alia*, whilst, as held by this Court earlier in this judgment, the agreement, properly interpreted, was for the placement of all "youth" and was not restricted to the placement of "youth graduates" only, the rejection by the Defendant of the placement of youth by the Plaintiff in predominantly the security industry and, within that industry, in low – skilled positions with no real training, was imminently reasonable. It is also true that it was ultimately the exercise of this discretion by the Defendant that brought an end to the agreement and not the purported breach or repudiation on behalf of the Defendant as relied upon by the Plaintiff.

The failure of the Defendant to put a version to a Plaintiff's witnesses and to call Ramogale as a witness, together with the Plaintiff's criticisms of Chauke as a witness.

[201] The fact that Defendant's Senior Counsel failed to put certain facts to the Plaintiff's witnesses and, after putting other facts which were to be confirmed by Ramogale, Ramogale was not called to testify on behalf of the Defendant is either common cause or matters of record. Certainly, neither the applicable principles of law in respect thereof nor the correctness of the Plaintiff's submissions in relation thereto (*all dealt with earlier in this judgment*) were seriously challenged (*if at all*) on behalf of the Defendant during the course of argument before this Court.

[202] In the opinion of this Court the decision as to whether the said “*deficiencies*” in the Defendant’s case are such that this Court should (a) draw an adverse inference against the Defendant and (b) whether they in fact assist (*and if so, to what extent*) the Plaintiff in discharging the overall onus incumbent upon the Plaintiff, depends largely upon the importance and/or the relevance thereof.

[203] It is not the intention of this Court (*once again, in order not to burden this judgment unnecessarily*) to deal with each and every submission made on behalf of the Plaintiff and as set out herein. Instead, same will be dealt with in a broad or more general manner.

[204] At the end of the day and whilst it may indeed be regrettable that certain facts were not put, in cross-examination, to both Freeman and Botha and that Ramogale was not called by the Defendant to provide *viva voce* evidence before this Court, it is the finding of this Court (*whilst accepting that the various principles of law relied upon by the Plaintiff are, applied in a general sense, correct*) that, in this particular matter and having due regard to the particular facts thereof,³⁶ these so-called deficiencies do not assist the Plaintiff in proving its case.

[205] This is in light of, *inter alia*, the findings made by this Court. As set out above, this Court has found that the Addendum was not agreed to between the parties and that it does not satisfy the requirement, as contemplated in the agreement, that the parties must agree on a recruitment and development plan (*effectively bringing to an end the Plaintiff’s claim*). In addition thereto, this Court has held that the Defendant had a discretion, to be exercised reasonably and in good faith, which it had done, to accept or reject placements of interns. As dealt with, to one degree or another above, neither of these findings can be disturbed by either the failure of the Defendant’s Senior Counsel to put certain facts to the Plaintiff’s witnesses or the failure of the Defendant to call Ramogale to testify before this Court.

[206] This Court is satisfied that, in making these findings, this Court has correctly relied on *proven* facts, having had proper regard to *all* of the evidence placed before the court

³⁶ See *Munster* at paragraph [96] *ibid*.

during the trial. As to the failure of the Defendant to call Ramogale as a witness, this Court is satisfied that *(despite what Senior Counsel may have put to the Plaintiff's witnesses that Ramogale would testify to)* the evidence of Chauke was sufficient *(viewed in the totality of the evidence as a whole)* to justify this Court making the findings that it did.

[207] As to the submissions made on behalf of the Plaintiff that the evidence of the Defendant's *(single)* witness, namely Chauke, contained various contradictions and was less than reliable, this Court is further satisfied that, even after applying the cautionary rule in respect of a single witness, it has made the findings that it has, based upon objective facts and on a balance of probabilities.

[208] Insofar as the credibility of the various witnesses plays a role in this matter, it is clear that all three of them had grave difficulty in providing this Court with evidence which was entirely objective in nature. Rather, as can most often be expected of witnesses testifying in litigation of an adversarial nature, especially where parties have a considerable amount to win or lose, all of the witnesses who provided this Court with *viva voce* evidence tended to "*tout*" the case of the party on whose behalf they had been called to testify. This is not a unique occurrence and is always a factor which every court should, when weighing-up the totality of the evidence, take into consideration. It is certainly not one which should *(depending of course upon the ultimate quality of a particular witness' evidence and, inter alia, the extent of bias exhibited by a witness when testifying)* cloud the ability of a competent court to decide a matter upon the objective facts placed properly before it.

[209] Finally, having due regard to the evidence of Chauke, this Court is satisfied that the contradictions which did exist in his testimony before this Court are not of such a material nature as to warrant this Court rejecting Chauke's evidence *in toto*. As to the failure of the Defendant to call Ramogale as a witness, this Court finds that the decision made on behalf of the Defendant *(without any explanation therefor)* not to lead the evidence of this witness, is not *(based on the facts of this particular matter)* of sufficient importance to justify this Court drawing an adverse inference against the Defendant. This is so, particularly in light of the fact that, *inter alia*, this Court has found *(apart from the other findings already referred to)* that the Defendant acted reasonably and in good

faith when exercising the discretion to reject the placement of interns, particularly those the Plaintiff wished to place in the security industry.

In the event of this Court finding that the Defendant did breach and/or repudiate the agreement whether the Plaintiff had placed sufficient evidence before this Court to substantiate its claim for damages in the sum of R 36 000 000.00. More particularly, to find whether the Plaintiff had suffered damages and whether those damages were in the contemplation of the parties.

[210] It is clear that, in light of the findings made by this Court earlier in this judgment, the Plaintiff's claim against the Defendant for contractual damages arising from a material breach or repudiation of the agreement by the Defendant, cannot succeed and falls to be dismissed. Following therefrom, *(despite there being no separation, in terms of subrule 33(4), of the issues of liability and quantum)*, it is not strictly necessary for this Court to consider whether the Plaintiff had discharged the onus incumbent upon it to prove its claim for damages and that those damages were in the contemplation of the parties when they entered into the agreement.

[211] However, it is worth noting that, even in the event of this Court being incorrect in respect of the findings made in relation to liability, this Court is further of the opinion that, whilst the Plaintiff may have proven that it was clearly within the contemplation of the parties, when entering into the agreement, that should the Defendant breach or repudiate the agreement, it would be liable to compensate the Plaintiff in respect of its proven damages, the Plaintiff has failed to prove, on a balance of probabilities, that it has suffered damages in the sum of R 36 000 000.00 *(or any lesser amount)*.

[212] It is not the intention of this Court *(for obvious reasons)* to deal in detail with the evidence *(or lack thereof)* placed before this Court at trial in respect of the Plaintiff's alleged damages. Rather, what is set out hereunder, is a summary thereof.

[213] The manner in which the Plaintiff has calculated its claim for contractual damages is as set out earlier herein.³⁷ Whilst appealing in its “*simplicity*”, this method of calculating any damages suffered on behalf of the Plaintiff is, in the opinion of this Court, far too “*simplistic*” and severely lacking in laying a true foundation upon which this Court could have properly ascertained whether the Plaintiff did indeed suffer any damages and, if so, the quantum thereof.

[214] In this regard, the Plaintiff failed to lead any evidence whatsoever as to what steps it took, if any, to mitigate its damages. It is trite³⁸ that there is a duty upon the party claiming damages to take all reasonable steps to mitigate the damages caused by another party and to prove same at trial. No evidence was placed before this Court to show, for example, that the Plaintiff made an attempt to mitigate its damages by, *inter alia*, taking on other work and earning other income to replace that lost as a result of the Defendant’s breach or repudiation of the agreement.

[215] Most problematic for the Plaintiff in respect of its claim for damages is that the manner in which the claim has been formulated, relates to the “*gross profit*” only, namely the total amount the Plaintiff alleges it would have received from the various host companies had the agreement run its course and the Plaintiff had complied fully with the terms and conditions thereof. No expenses incurred on behalf of the Plaintiff to produce the turnover of R 36 000 000.00, such as, for example, staff salaries and other related expenses, were taken into account (*nor was any evidence in respect thereof placed before this Court*) to arrive at a “*nett profit*”. It is the latter which is a true reflection of any actual damages suffered by the Plaintiff and not the former.

[216] In addition to the foregoing the Plaintiff’s bald allegations that it would have been able to satisfy all the requirements of the agreement, namely, to place the requisite number of interns in the industries as provided for, with the approval of the Defendant and within the stipulated timeframes, thereby giving rise to a damages claim in the sum of R 36 000 000.00, is totally insufficient. In this regard, one would have expected the Plaintiff to have led fairly extensive *viva voce* evidence and provided documentary

³⁷ Subparagraph [4.7] *ibid*.

³⁸ *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1*.

evidence in support thereof. Also, it may well have been appropriate to have requested this Court, in its discretion, to apply a suitable contingency in the calculation of the Plaintiff's actual damages. Such a contingency would have taken into account factors such as, *inter alia*, the economic climate during the period in which the agreement was to operate and the ability of host companies to employ interns in the designated industries.

[217] It is true that, as set out in the matter of *Esso Standard SA (Pty) Ltd v Katz*,³⁹

"....in some types of cases damages are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty".

[218] Also, this Court accepts the submission that, as a general proposition, in such circumstances, a court will come to a Plaintiff's aid and make an estimate in that Plaintiff's favour provided the Plaintiff has led the best evidence available.

[219] However, in the matter of *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd*⁴⁰ the erstwhile Appellate Division held:

*"The agreement was not one for the sale of goods or of a commodity procurable elsewhere. So that we must apply the general principles which govern the investigation of that most difficult question of fact – the assessment of compensation for breach of contract. The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party."*⁴¹

[220] As pointed out on behalf of the Defendant the "*more flexible approach*", as contended for by the Plaintiff, should not be taken too far. This was made clear in the

³⁹ 1981 (1) SA 964 (A) at 968 H.

⁴⁰ 1915 AD 1 22.

⁴¹ *Emphasis added; See also Combined Business Solutions CC v Courier and Freight Group (Pty) Ltd t/a XPS [2011] 1 All SA 10 (SCA).*

matter of *Monumental Art Co v Kenston Pharmacy (Pty) Ltd*⁴² where it was held:⁴³

“... it is not competent for a Court to embark upon conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of loss could have been made.”

[221] As submitted on behalf of the Defendant the sole basis upon which the Plaintiff claims R36 000 000.00 by way of damages is based upon forecasted projections of placements which could or could not have been made. There is no guarantee that the Plaintiff would have placed 3 000 unemployed youth in the three-year period of the agreement. Chauke's evidence was not seriously disputed that in terms of the 2014 agreement the Plaintiff did *not* reach the required placement target. The projections upon which the Plaintiff bases its claim are also speculative in that the Plaintiff failed to provide any evidence to substantiate its claim. Also, the submission by the Defendant that placement agreements relied upon by the Plaintiff cannot be elevated as proof to compute contractual damages, is a good one.

[222] The contract provided by the Plaintiff with Stallion Security predates the conclusion of the agreement; makes specific reference to only 40 candidates and concerns an amount of R 1 500.00. The contract with Bidvest Protea Coin, predates the agreement. Further, the contract with Samatech relates to Port Elizabeth and areas in the Eastern Cape and would therefore not be applicable to the placements of Ekurhuleni youth. In addition, by October 2018 the contract with Samatech had terminated by the effluxion of time.

[223] In light of the foregoing, even in the event of this Court being incorrect in making the findings that it did when dealing with the issue of liability, the Plaintiff failed to prove that it had suffered damages in the amount of R 36 000 000.00 or any lesser amount. This is so, accepting (*without deciding*), for the purposes of this judgment and in favour

⁴² 1976 (2) SA 111 (C).

⁴³ At 118E

of the Plaintiff, that not only were the damages arising as a result of a breach or repudiation of the agreement by the Defendant within the contemplation of the parties but that the Plaintiff had indeed suffered some damages. The failure of the Plaintiff to place before this Court any real evidence (*which was available*) to enable this Court to properly quantify those damages, would have resulted in this Court dismissing the Plaintiff's claim, *alternatively*, at best for the Plaintiff, absolving the Defendant from the instance.

Conclusion

[224] In conclusion, this Court holds that:

224.1 the Addendum was not agreed upon between the parties and cannot be accorded the status of the plan as contemplated by the agreement. In the premises, a material condition of the agreement, namely that the parties agree to a recruitment and development plan, was never fulfilled. Arising therefrom, the Plaintiff cannot succeed in its claim against the Defendant arising from contractual damages;⁴⁴

224.2 properly interpreted, the agreement deals with the placement of all “youth” within the Ekurhuleni area and not just those with the necessary qualifications to categorise them as “youth graduates”;⁴⁵

224.3 the Defendant had a discretion, in terms of the agreement (*to be exercised reasonably*), to accept or reject the placement of interns by the Plaintiff.⁴⁶ The Defendant exercised this discretion reasonably and did not breach or repudiate the agreement.⁴⁷

224.4 even in the event of this Court being incorrect in making the findings that it did when dealing with the issue of liability the Plaintiff failed to prove that it had suffered

⁴⁴ Paragraph [178] *ibid.*

⁴⁵ Paragraph [184] *ibid.*

⁴⁶ Paragraph [197] *ibid.*

⁴⁷ Paragraph [200] *ibid.*

damages in the amount of R 36 000 000.00 or any lesser amount. The failure of the Plaintiff to place before this Court any real evidence (*which was available*) to enable this Court to properly quantify those damages, would have resulted in this Court dismissing the Plaintiff's claim, *alternatively*, at best for the Plaintiff, absolving the Defendant from the instance.⁴⁸

[225] In light of the findings as set out in subparagraphs 224.1; 224.3 and 224.4 hereof, it is clear that the Plaintiff's action must be dismissed. The finding made in subparagraph 224.2 hereof has no bearing thereon.

Costs

[226] It is trite that the issue of costs (*and the scale thereof*) falls within the general discretion of this Court. This discretion is to be exercised judicially. Further, it is trite that, unless unusual circumstances exist, costs should normally follow the result. No such circumstances have been brought to the attention of this Court.

[227] The Defendant seeks costs on the party and party scale, such to include the costs of two Counsel. There was no opposition thereto on behalf of the Plaintiff. Having regard to, *inter alia*, the complexity and volume of the matter, this Court is satisfied that any award for costs in favour of the Defendant should include the costs of two Counsel.

Order

[228] This Court makes the following order:

1. The Plaintiff's action is dismissed.

⁴⁸ Paragraph [223] *ibid*.

2. The Plaintiff is to pay the Defendant's costs, such to include the costs of two Counsel.



BC WANLESS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Dates of Hearing: 4, 5, 6 and 7 September 2023; 24 July 2024

Judgment reserved: 24 July 2024

Date of Judgment: 12 June 2025

APPEARANCES

On behalf of the Plaintiff: Adv JM Hoffman

Instructed by: Swartz Weil Van der Merwe Greenberg Inc.

On behalf of the Defendant: Adv C Georgiades SC

Adv Z Ngwenya

Instructed by: Nozuko Nxusani Inc.