

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO. J1534/98

In the matter between

NDHLELA, JOSEPH MABAYO

Applicant

and

TRANSNET LIMITED

Respondent

JUDGMENT

LANDMAN J:

Mr Joeseph Ndhlela (the applicant) was both an employee and an office bearer, Executive Director, of Transnet Ltd, a major parastatal. On the 18 September 1997 the applicant was advised that Transnet Ltd had decided to convene a disciplinary enquiry in regard to allegations concerning (a)undisclosed transaction/s and undisclosed conflict of interest, (b)breach of fiduciary duty, as director and employee, (c)misrepresentation and dishonesty, and (d)misconduct and/or gross misconduct.

The enquiry was conducted before Mr Justice Trengove, a retired Judge of the Supreme Court of Appeal. The inquiry stretched over 11 days.

Judge Trengove found that the applicant was guilty of misconduct and breaches of fiduciary duty in respect of six groups or categories of charges. See the summary of findings and conclusions.

Following the findings, a further hearing was conducted for the purposes of determining what recommendation Judge Trengove should make to Transnet's Board and to its shareholder, represented by the Minister of Public Enterprises, the Hon. Ms Sigcau. Judge Trengove considered that the Board and the Minister should have regard to the cumulative effect of the transgressions, but particularly the transgressions in relation to the applicant's nondisclosure of commissions from CLS, the authorisation of recruitment fees to Insearch and the instances of the unauthorised bugging of an employee's telephone.

Judge Trengove found that there had been serious breaches of the applicant's fiduciary duty as an Executive Director and that these had been aggravated by the important and responsible position that the applicant held with Transnet. He was found to be a dishonest

witness, that he made unfounded and gratuitous allegations of *mala fides* against the Chairman and Managing Director of the company and that he was, and still appeared to be, quite unrepentant. Judge Trengove recommended the removal of the applicant as a director and considered, in the light of the consideration that his appointment as Executive Director was one in two capacities (director and employee) and as it was an indivisible contract, if he was removed as a director Transnet was entitled to terminate the contract as a whole.

On 20 January 1998 Transnet's Board met and considered the report of Judge Trengove, together with representations made by the applicant and his attorney. The Board resolved to recommend the applicant's removal as an Executive Director and the termination of any contract of employment that he might have with the Transnet. Transnet's shareholder, represented by the Minister of Public Enterprises, also considered the report of Judge Trengove, representations made by the applicant and his then attorney and the recommendation of the Board. She resolved to accept that recommendation. On the same date, consequent upon the resolutions, the contract of employment was terminated.

The applicant referred a dispute concerning his alleged unfair dismissal to the CCMA. At the employee's instance the Director of the CCMA referred the dispute to the Labour Court for adjudication in terms of section 191(6) and (8) of the Labour Relations Act 66 1995.

The applicant was represented at the hearing in this court by Mr G Moashoana and Transnet by Mr A I S Redding SC. The applicant alleges that his was both substantively and procedurally unfair. The onus rests on Transnet to establish the fairness of the dismissal.

Transnet limited its case and led evidence in respect of two issues: (a) the CLS commissions and (b) the authorisation of recruitment fees to Insearch.

These charges, as set out in the chargesheet, reads as follows:

"Charge 1 - Undisclosed transactions and undisclosed conflict of interest

It is alleged that you have failed to disclose to the company certain transactions when you had a duty to disclose the same, and/or failed to disclose to the company a conflict of interest, or to disclose an interest when you had a duty to disclose the same, which include or arise out of the following:-

1.1 the receipt by you, during or about the period 1993/4 to 1996/7, of various payments in the sum of approximately R750 000,00 from a company known as Credit Life (Management) Services, or its associated companies as commission or brokerage fee for services allegedly rendered by you, including the implementation of the Transnet Funeral Benefit Scheme during the period 1993 to 1996 which was underwritten by XB Brokers, now in liquidation; and

1.2 failure, by you, to fully disclose to the company, during your directorship, that :-

1.2.1

1.2.2 you are or were a member of, and/or had a pecuniary

interest or benefit in and to, *inter alia* :-

1.2.2.1 the transaction concluded by or through the instrumentality of Credit Life (Management) Services; and

1.2.2.2 ...

Your action and/or non-action constitutes a breach of trust, an act of disloyalty towards the company and its officers, and has caused a complete loss of trust and confidence by the company in you as a director and employee.

2. Charge 2 - Breach of fiduciary duty as director and as employee of the company

It is alleged that, during your directorship in and employ by the company, you breached your fiduciary relationship as director and employee, in circumstances including or arising out of the following:-

2.1 the receipt by you, during or about the period 1993/4 to 1996/7, of various

payments in the sum of approximately R750 000,00 from a company known as Credit Life (Management) Services, or its associated companies as commission or brokerage fee for services allegedly rendered by you, including the implementation of the Transnet Funeral Benefit Scheme during the period 1993 to 1996 which was underwritten by XB Brokers, now in liquidation;

2.2 the authorisation by you of company payments to Insearch Practitioners CC (a recruitment agency), of approximately:-

2.2.1 R86 000,00 in respect of the engagement by the company of Dr. D Mkatshwa, for services, which were never rendered to the company; and

2.2.2 R60 000.00 111 respect of the engagement of Mr. N L Ndinisa by the company, for services which were never rendered, or partially rendered to the company;

2.2.3 failure to fully disclose to the company, during your directorship, that:-

2.3.1

2.3.2 you are or were a member of, and/or had a pecuniary interest or benefit in and to *inter alia*:-

2.3.2.1 the transaction concluded by or through the instrumentality of Credit Life (Management) Services;

2.3.2.2

2.4 ...

Your action and/or non-action has resulted in the relationship of trust and confidence between yourself as director, and as employee, of the company being breached and broken down irretrievably.

3. Charge 3 - Misrepresentation and dishonesty

It is alleged that you have engaged in an act of misrepresentation and/or dishonesty, including or arising out of

the following: -

....

3.3 your failure to disclose to the company that you are or were a member of, and/or had a pecuniary interest or benefit in and to, *inter alia*:-

3.3.1 the transaction concluded by or through the instrumentality of Credit Life (Management) Services; and

3.3.2 ...

3.4 your failure to disclose to the company the receipt by you, during or about the period 1993/4 to 1996/7, of various payments in the sum of approximately R750 000,00 from a company known as Credit Life (Management) Services, or its associated companies as commission or brokerage fee for services allegedly rendered by you, including the implementation of the Transnet Funeral Benefit Scheme during the period 1993 to 1996 which was underwritten by XB Brokers, now in liquidation.

Your action and/or non-action was a blatant disregard for the BIS mandate and of your fiduciary duty to the company as director and employee, and a blatant disregard for the integrity of the company and its officers, particularly its Chairman. Furthermore your conduct reflects on your ability as an officer and a senior employee of the company, is dishonest and constitutes a gross misconduct, which renders the employment relationship intolerable.

4. Charge 4 - Misconduct and/or gross misconduct

It is alleged that you have engaged in acts of misconduct and/or gross misconduct which include or arise out of the following:-

4.1 your having authorised and procured payment of approximately R86 000,00 to Insearch Practitioners CC, an employment agency, for placing services allegedly rendered by such agency when the company engaged Dr. D Mkatshwa as an employee, when you knew that-

4.1.1 such agency did not find or place Dr. D Mkatshwa,

4.1.2 or ought to have known that such agency did not render any services to the company in respect of Dr D Mkatshwa; and

4.1 (*bis*) Your having authorised and procured payment of approximately R43 000,00 to Insearch Practitioners CC, an employment agency, for placing services allegedly rendered by such agency when the company engaged Mr E. Vilakazi as an employee, when you knew that:-

4.1.1 such agency did not find or place Mr E. Vilakazi;

4.1.2 or ought to have known that such agency did not render any services to the company in respect of Mr E. Vilakazi.

4.1.3 Dr. D Mkatshwa was found and recruited by the company, and was interviewed by you at the instance of the company;

4.2 your having authorised and procured payment of approximately R60 000,00 to Insearch Practitioners CC, an employment agency, for placing services allegedly rendered by such agency when the company engaged Mr. N L Ndinisa, when you knew, or ought to have known that:-

4.2.1 such agency had only conducted an interview of Mr. N L Ndinisa at your instance and request, after you had forwarded the curriculum vitae of Mr. N L Ndinisa to such agency; and

4.2.2 Mr. N L Ndinisa was found and recruited by the company, and was interviewed by Mr. K Mabentsela (of the company) at the instance of the company, and not at the instance of such agency, whereafter Mr. K Mabentsela recommended that Mr. N L Ndinisa be employed by the company;

Your misconduct and/or gross misconduct has (i) had a negative financial impact on the company; (ii) compromised the company *vis-*

à-visthird parties; (iii) amounted to an abuse by you of your position; (iv) adversely reflects on your ability to duly discharge and execute your duties and functions of executive director/employee; and (v) has resulted in a loss of confidence in you by the company, which has led to the total breakdown of the working relationship.”

Insearch Practitioners

Transnet presented the following evidence at the trial in support of this charge.

1. The disciplinary enquiry record

Transnet sought the admission of the disciplinary enquiry record as evidence in the present proceedings, and as evidence of what was stated in the disciplinary enquiry proceedings.

The record is contained in thirteen volumes and is accompanied by a certificate of correctness from the sole director of Speedwriting Transcription Services (Pty) Limited, Mrs Molly Benjamin. The certificate certifies that the record was transcribed by members of Molly Benjamin's staff from audiocassettes recorded by herself and which were personally checked by her. The record is, in appearance, a verbatim transcript of what was stated at a disciplinary enquiry. The applicant's case, at the disciplinary inquiry, was that he had authorised the payments to Insearch. He had done so after he had satisfied himself that the employment consultancy had effected the introductions of Dr Mkatshwa, Mr Ndinisa and Mr Vilakazi.

2. The findings by Judge Trengove.

These findings have been summarised above.

3. Mr Mostert's heads of argument

Mr Mostert, the applicant's attorney during the disciplinary hearing, submitted heads of argument (Exhibit "K"). The heads show that Mr Mostert referred to the record in his argument and during the disciplinary enquiry. Mr Mostert advanced the case that the applicant was, at the most, negligent because he "had no reason to doubt Insearch" when they represented to him that they had effected the introductions of the three employees mentioned above to Transnet.

4. Mr Mazwai

Mr Mazwai was the attorney who represented Transnet during the inquiry and instructed Senior Counsel. Mr Mazwai attended at the enquiry and instructed counsel on behalf of Transnet. Mr Mazwai stated that he was not present at every moment of the enquiry but was there for approximately 95% of the time. He read all of the transcripts and, as far as he could see, they were accurate. The transcripts were made available to both parties at the disciplinary hearing. He said that there had been no objection by his counsel or from the applicant's then attorney concerning the accuracy of the record.

5. Mr Steyn

Mr Steyn was employed by Transnet and reported to the applicant.

He testified that the reason he allocated one payment to the applicant's account was because the invoices were brought to him by the applicant's secretary. During cross-examination, he explained that in fact that the invoices are brought to him from the applicant's secretary through an office "messenger".

He said it was the applicant's habit to append his signature when he authorized a payment. When he was referred to invoices directly sent to him he testified that on those occasions he would telephonically obtain authorisation from the secretary of the applicant.

Insearch sent an invoice concerning Mr Ndinisa to Mr Steyn on 18 November 1996. The appointment of Mr Ndinisa was approved by the applicant on 4 1996 while he was overseas.

Mr Steyn said, at the conclusion of his testimony, that hindsight he has been negligent. He should have checked with the applicant whether he had authorised. In re-examination Mr Steyn spoke of a cost centre report.

6. Mr Mahlangu

Mr Mahlangu is an accountant. He came to certain conclusions on the basis of the so-called Ernest and Young report.

7. Mr Mabentsela

Mr Mabentsela is a former Trasnnet employee. He uncovered the payments. He did not say that the applicant authorised payment. One of the invoices was put under his cost centre.

The evidence of applicant

The applicant's case as regards the Insearch issue is that the invoices were not due and that he did not authorise payment to the persons listed in the evidence. He was consistent in maintaining this defence when confronted with statements relating to his defence during the inquiry he adopted the following approach:

(a) He said that he did not accept the legitimacy of the inquiry or the tribunal conducting the inquiry. He also used his argument to argue his case by referring to the evidence of other witnesses in this trial.

For instance at page 146 of the record of the proceedings in this trial Mr Redding put the following to the applicant:

“Mr Van der Linde is cross-examining you at the disciplinary enquiry and he says, perhaps we should start at the bottom of page 95, if one looks at the context, if one sees that you and Mr Van der Linde

were talking about Dr Mkatsoa and it says Mr Van der Linde, it is the second last line

Mr Ndlela where does Insearch Practitioners introduce you. --- I think Mr Van der Linde I have explained to you in terms of how head hunters operate and I have also testified to the effect that I have had relationships with various head hunting companies or executive search companies and in terms of how they operate. I even made reference to my own example pertaining to various companies that appointed me. In terms of that process which I followed there was a position that we created and I am sure – I mean I followed company procedures in terms of interviews and on his appointment, I mean I was approached by Insearch to say the CV was referred to my office by then and which I accepted on the basis of the fact that I mean they would not at any one point in time claim something that is not.”

And then Mr Van der Linde asked,

Did you instruct Insearch Practitioners to head hunt Dr Mkatsoa? --- I did not.

And then you go on and you say

I have explained to you and I still repeat sometimes search companies would actually on appointment or where they hear the candidate has been interviewed would approach you and indicate that they realise that we are busy interviewing a candidate who is currently on their books and would you comply with the conditions and terms that they are putting before you.

And is that what happened here Mr Ndlela? --- Exactly.
So you interviewed Mr Ndlela? --- I phoned and I verified.

Why did you tell Mr Van der Linde that you had phoned and verified when it is not true? --- M’Lord I am testifying (inaudible) before you and the testimony (inaudible) before the court is consistent with how I would operate and also in term of the testimony that has been led by the witnesses pertaining to the how they were appointed. No head hunting company was responsible for these three candidates.”

(c) He explained the contradictions by saying that he based his defence on the available documentation. The applicant clearly implies that when other

documents become available he trimmed his sails to suit the wind.

See the cross-examination at page 138 of the trial record.

“Indeed it is very – most contrary to, I agree with you Mr Ndlela what you are saying today is quite contrary to the version that was advanced on your behalf by your legal representative at the hearing and I am going to suggest that the version that you have advanced here is a fabrication.--- M’Lord the version that I have actually presented in this honourable court is the truth of what the actual events were, any version beyond what is before you M’Lord, whether through myself, witnesses or the respondent cannot be accepted because it is incorrect. What you have before you M’Lord is the versions of the witnesses and myself.

Well can I ask you why you advanced an incorrect version at the disciplinary enquiry then? --- M’Lord as I cannot comment on what was said, I cannot recall what precisely happened seven years ago in terms of that and I actually said to this honourable court that certain vital documentary evidence was not going to myself, nor my legal team that would have actually changed our preparation in terms of the cross-examination of the witnesses.”

At times, when confronted by Mr Redding with the propositions put to Transnet’s witnesses at the disciplinary enquiry, the applicant said he could not comment.

An illustration of this approach appears at pages 132 – 133 of the record of the proceedings in this court.

“If you go to the second line you will see Mr Mostert

who was your representative is recorded as having said the following

Mr Chairman the employment agency will be paid its fee if it introduced a candidate to a specific position, and the witness answered yes.

So Mr Ndlela will testify that Insearch Practitioners being a personnel agency did in fact introduce your particulars at one stage or another to Transnet, do you have any comment on that?

This is in the cross-examination of Mr Vilikazi. So the version that is put is that you are going to testify that in fact Insearch Practitioners did introduce your particulars at one stage or another to Transnet. Now that is not in fact true, can you explain why Mr Mostert would have said that at the disciplinary enquiry if it is not true? --- M'Lord I cannot comment thereon.

You were present when Mr Mostert was cross-examinining Mr Vilikazi am I right? --- M'Lord I cannot recall but I think I sat (inaudible), that is possible (inaudible).

So you have no explanation as to why Mr Mostert would have said that that was going to be your version? --- M'Lord no comment."

Transnet's argument

Mr Redding advanced the following argument concerning the Insearch issue.

Mr Redding submitted that at the disciplinary enquiry the applicant advanced the version that he had authorised the payments to Insearch and had done so after he had satisfied himself that the employment consultancy had effected the introductions of Dr Mkatshwa, Mr Ndinisa and Mr Vilakazi. This version is found repeatedly in the transcript of the disciplinary enquiry proceedings.

Furthermore, in the heads of argument which, it is common cause, his then attorney, Mr Mostert, filed on his behalf at the disciplinary enquiry, his version was that he was, at the most, negligent because he "had no reason to doubt Insearch" when they represented to him that they had effected the introductions of the three employees mentioned above to Transnet.

When asked for an explanation regarding the discrepancies between what was put on his behalf in cross-examination during the disciplinary enquiry, his evidence during the disciplinary enquiry, the statements made in the heads of argument by his attorney at the disciplinary enquiry and the statements and findings made by the Judge in the disciplinary enquiry report, (on the one hand) and his current version, he provided no acceptable explanation.

The applicant first said that he could not recall what had happened seven years ago. He then said that the reason he did not advance the version that he had not authorised the payments was because vital documents had not been given to him, which would have changed the picture.

When pressed on whether the judge wrongly recorded his version in the disciplinary enquiry report the applicant could only say that he "cannot comment".

He could not explain in cross-examination which of the documents, which subsequently became available led to the assertion or defence of no authorisation. First, he relied upon the documents which constituted "payment advices", but could not say why these documents gave rise to the defence. No other documents were then referred to.

When it was put to the applicant that even if the payments had been wrongly authorised, Mr Steyn had testified that the applicant, as Head of the Department, would have picked up the wrong authorisations on the monthly cost reports which were sent to him for verification, he denied that this was the case. However, he could not explain why Mr Steyn was not challenged on this issue in his evidence and could give no acceptable explanation for why this issue was left unchallenged in cross-examination.

Mr Redding submitted that the most reasonable and plausible inference for the change of tack on the part of the applicant is that he changed his defence when he discovered that his signature did not appear as authorisation on any of the documents. His defence at the enquiry that he had duly authorised the payments and that this was in Transnet's interests was hopelessly inadequate. He led no evidence at the enquiry to support his assertions, clearly because there was no evidence which did so. He could not explain why he had omitted authorising the payments when he did not do so. The inference is inescapable that he did authorise the payments and that they were not due or owing.

In the present proceedings he recognised the version previously advanced was a hopeless justification. He now advanced a version that he had not authorised the payments at all. But he cannot say why he admitted authorising the payments at the enquiry if that was not the case.

The inference is inescapable that he did indeed authorise, directly or indirectly, the payments to Insearch. There is no explanation advanced in these proceedings which might explain his admission of this fact at the enquiry if, in truth, he had never authorised the payments. The applicant is bound by that admission. His attempt to distance himself from the very basis of his defence to the charge at the enquiry is manifestly a desperate and unconvincing stratagem.

While Steyn admitted that the procedure, which was followed in the authorisation procedure, led him to believe - perhaps erroneously, he conceded - that the applicant had authorised the payments, he did not concede that he knew the payments were not authorised; nor did he say (because he could not say) the applicant had not authorised the payments. The usual procedure led him to believe they were authorised (i.e. the documents came from the applicant's office). Steyn made it clear that if the three authorisations were wrongly made they should have been picked up by the applicant from the cost report. This was not denied.

Finally Mr Redding submitted that in the premises, Transnet has shown that the applicant authorised or was party to authorising payments to Insearch Practitioners in respect of work and services which were not actually performed. It was not an inadvertent act on his part, but a deliberate one. Since it is common cause that no services were actually due, the inference is irresistible that the authorisation was performed knowing that it prejudiced Transnet's interests. At worst, it was a fraud (as the criminal court found), at best it was utterly reckless.

On any basis, the applicant's conduct is inconsistent with that of an executive

director and an extremely serious act of misconduct. The seriousness of the act of misconduct is aggravated by the patent dishonesty of the applicant in his testimony. This has a material bearing on the request for attorney and client costs which Transnet makes.

The applicant's misconduct on its own accordingly constitutes a fair reason for his dismissal. On this ground alone his application ought to be dismissed with attorney and client costs.

The applicant's argument

Mr Moshwana advanced the following submissions on behalf of the applicant.

Mr Steyn testified that the reason he allocated one payment to the applicant's account was because the invoices were brought by the applicant's secretary; in fact he got the invoices from a "messenger". At the end of his testimony he conceded that hindsight he has been negligent and should have checked with the applicant whether he had authorised them.

When referred to certain invoices in **Bundle E** which bears the applicant's signature, he conceded that it was in the nature of the applicant to put his signature if he has authorized. Further when referred to invoices directly sent to him he testified that, on those occasions, he would telephonically obtain authorisation from the secretary of the applicant.

Strange invoices appear in of Bundle E. appointment of Mr Ndinisa was approved by the applicant on 4 1996, when the applicant was overseas. The invoice was sent to Mr Steyn on the 18 November 1996.

In re-examination, he raised the issue of a cost report. The irony about this report is that it had costs in relation to other centres, however it appears that only the applicant was singled out. In any event, the applicant in his testimony stated that such a cost report was not distributed as it was also of concern to other directors. He testified that this he would have raised with senior employees, had they testified.

In any event, the fact that a cost report, which would invariably be seen after payment was made was not disputed would not suggest that the applicant authorised payment in the first place. It is not Mr Steyn's testimony that because the applicant did not object to the cost report, he authorised payment. His testimony is largely that the secretary authorised payment.

The evidence of Mabentsela who allegedly uncovered this conduct was not that the applicant authorised payment. In fact one of the invoices was put under his cost centre.

Accordingly, Mr Moashoana submitted that the evidence of Mr Steyn did not establish that the applicant authorised payment. It is not the duty of the applicant as it appears to be the stance on this charge, to discharge the onus that rests on Transnet.

THE CLS ISSUE

The evidence

The following emerged as being common cause:

(a) Transnet set up a funeral benefit scheme for its employees in 1991/2. It was administered by XP Brokers and underwritten by an insurance company called ACA.

(b) Credit Life Management Services (Pty) Limited ("CLS") provided insurance broking services. Its managing director was Cat Dreyer and a director was Dave Macaskill. CLS was a sister company of ElectroSport. The two companies had a common shareholding and, to an extent, common directors. ElectroSport was in the business of providing sporting equipment.

(c) CLS, together with African Life Insurance Co., an insurance underwriter, tendered for the funeral benefit scheme. They were unsuccessful.

(d) The arrangement between African Life and CLS in respect of commission, at that stage, was that CLS would receive from African Life 7.5% of the premiums received.

(e) ACA dropped out as underwriters of the funeral benefit scheme in 1992. The applicant introduced CLS (Macaskill and Dreyer) to XP Brokers and, after negotiation, African Life replaced ACA as the underwriters of the scheme.

(f) In terms of an arrangement between them African Life provided CLS with 12.5% of net premium as commission.

(g) In 1992 Ndhlela was asked by Dreyer and Macaskill to become a director of ElectroSport.

(h) Over three years, until March/April 1995, the applicant received approximately R750 000.00, the majority of it in payments directly from CLS. The payments were directed either to the applicant personally, or his wife, Ms Dlamini, or a consultancy, Nyiko Consultants CC.

(i) CLS described the payments to the applicant as commission. Dreyer requested the accountant of CLS and ElectroSport, Howard Wills, to draw up a schedule of commission payments received by CLS from African Life and commission payments paid to the applicant.

(j) Dreyer has emigrated.

(k) During the period May 1993 to April 1994, the applicant was a Senior

Manager at Transnet. During the period April 1994 to November 1994 he was in the employ of other companies. He became a non-executive director of Transnet until April 1996. During the period April 1996 to date of dismissal and removal, namely 20 January 1998, the applicant was an executive director.

Transnet led the evidence of :

1. Mr Wills

Mr Wills testified that the payments were designated by Mr Dreyer as commissions. He made out the commission cheques and calculated the amount payable to the applicant on the basis of one-third of 7.5% of the commission received by CLS from African Life in respect of the Transnet Funeral Benefit Scheme premium.

He testified that he was aware of an agreement but he had not seen the agreement.

2. Mr Macaskill

Mr Macaskill testified that he, Mr Dreyer and the applicant had entered into an agreement in terms of which they would each take one-third of 7.5% of the commission received from African Life (the initial figure which was to be received under the arrangement with African Life at the time of initially tendering). Macaskill's and Dreyer's share was left in CLS. The money was paid to the applicant so that he could provide introductions and connections of influential people to Electroport (and CLS). In part, it was also a reward for the applicant's introduction of CLS to XP Brokers, which had secured the benefit scheme when ACA had fallen out.

Mr Mackaskill said that payments to the applicant were not connected to the Funeral Benefit Scheme. He said: *"But we had a desire to develop a working relationship with Ndhlela irrespective of the fact that we had not been successful with our insurance offer".*

They had identified the applicant as an ideal future partner. The payments to the applicant came from the commissions because it was their only substantial form of income. He did not regard the applicant as a decision maker within Transnet. He did not identify the applicant as a person who would be able to substantially promote business for the Credit Management Services within Transnet.

Applicant's evidence

The applicant says that he met Mr Macaskill at a social meeting. Mr Macaskill was impressed with him and they agreed to meet on a regular basis. At one of the meetings the applicant was offered a directorship of Electro Sport (Pty) Ltd. That was in 1992 or 1993. Electro Sport and Credit Life Management (Pty) Ltd share the same members.

At the instance of Dr Willie Coetzee, the staff of the HR department were obliged to sign a register of their interest. This was to avoid conflicts of interest. The applicant declared in 1994 that, *inter alia*, he was a director of Electro Sport and received payments. In 1996 the applicant also signed a declaration of interest, *inter alia*, in the company on a form supplied by Transnet's company secretary.

The applicant says his role as a director was to provide advice on strategic issues.

Transnet's funeral fund only covered white employees. CLM had made a proposal to extend the members covered by the fund but it had been rejected. The applicant, as senior manager responsible for social investment, revisited the scheme. A decision was taken by a committee to make certain proposals to top management. The applicant was not a party to the decision. The result was that in 1992 an agreement (the master agreement) was entered into between Transnet and XP Brokers.

The applicant said that during the period 1993 to 31 March 1994 he was a

senior manager and had an obligation to disclose any material interests in any contracts that the organization had with external organizations. The applicant said that there was no agreement between him and CLS regarding payment of commission relating to the funeral scheme. Nor was there an agreement with regard to the payment of directors fees but he expected that there would be payment.

The following document was found in the applicant's office after he had been suspended:

The applicant admits receiving payment of R 750 000 from Electrosport or CLS. These payments were made to him or Ms Dlamini his wife or her business. Although the applicant had disassociated himself from the payments to Ms Dlamini or Engiko at the disciplinary inquiry he said that payment to his wife was to be regarded as payment to himself.

Argument

Transnet's submissions

Mr Redding contended that at the disciplinary enquiry Transnet alleged that the applicant had an interest in the Transnet Funeral Benefit Scheme, or a benefit from it, and he failed to disclose it. It was also alleged that his receipt of the money constituted a breach of his fiduciary duty to Transnet. Judge Trengove found that the applicant was materially interested in the Transnet Funeral Benefit Scheme and that this constituted a breach of his fiduciary obligation to Transnet.

Mr Redding submitted that, the applicant's defence at the enquiry was, in brief:

1. He received only approximately R400 000.00, solely in respect of services provided by him to Electrosport.
2. He did not provide particulars of the services that he rendered to

Electroport, for which he was criticised in the enquiry.

3. He denied that he was the true recipient of the money paid by CLS to Nyiko and Ms Dlamini. He contended that Ms Dlamini and he had an armslength relationship, she paid him for advice.

Mr Redding submitted that in the course of the trial before me the applicant contended that:

1. He received the money by virtue of his relationship with Electroport. Electroport were under no obligation to pay him, but paid the money as and when Messers Dreyer and Macaskill wanted to.

2. The applicant cannot say why the overwhelming majority of payments were made by CLS, but points to the relationship between the two companies.

3. Ms Dlamini is his wife and whether the payments were directed to him or her is immaterial. Transnet led evidence of Messrs Macaskill and Wills. Mr Dreyer has emigrated. Mr Wills testified that the payments were designated by Mr Dreyer as commissions. He made out the commission cheques and calculated the amount payable to the applicant on the basis of one-third of 7.5% of the commission received by CLS from African Life in respect of the Transnet Funeral Benefit Scheme premium.

4. Macaskill testified that he, Dreyer and the applicant had entered into an agreement in terms of which they would each take one-third of 7.5% of the commission received from African Life (the initial figure which was to be received under the arrangement with African Life at the time of initially tendering). Macaskill's and Dreyer's share was left in CLS. The money was paid to the applicant so that he could provide introductions and connections of influential people to Electroport (and CLS). In part, it was also a reward for Ndhlela's introduction of CLS to XP Brokers, which had secured the benefit

scheme when ACA had fallen out.

5. The clear evidence of Messrs Wills and Macaskill was that the source of the money, overwhelmingly, paid to the applicant was CLS; the source of the money for CLS's payment to the applicant was African Life; the source of the payment to African Life was Transnet, in respect of the Funeral Benefit Scheme.

6. Although there was considerable debate about whether the money received by the applicant was "commission", this issue is a red herring. The only issue is whether applicant money which originated from, or was based upon, commissions received by CLS from African Life in respect of the Transnet Funeral Benefit Scheme. If so, he was materially interested in the Scheme.

Mr Redding pointed out that Judge Trengove found that the applicant was so interested. He found, further, that it is a well-known obligation at common law that a director is obliged to disclose his interest in a contract with the company of which he is an office bearer. This is a consequence of the fiduciary relationship in which a director stands towards the company. See **Robinson v Randfontein Estates Goldmining Co.** AD 168.

It was submitted that the facts put before the Labour Court warrant the same finding. The nature of the obligations which both a director and executive employee owe the company is repeated in **Sappi Novoboard (Pty) Ltd v Bolleurs**(1998) 19 ILJ 784 (LAC) at 786 F - 787 D.

In the premises, the material interest which the applicant had in the Transnet Funeral Benefit Scheme and his common cause failure to disclose it,

constituted not only a valid basis upon which he could be removed as a director in terms of s 220 of the Companies Act of 1973, but it also constituted a fair reason for termination of the linked relationship of executive director and employee.

The obligation was breached by the applicant while he was a director. He was not, throughout the period when he received payments, always an employee. However, the breach of his fiduciary obligations as a director go to the very root of his relationship with Transnet. If it is intolerable for a company to retain a person as a director, it is fair in the circumstances to terminate that relationship, together with the employment relationship with which it is linked.

The applicant's submission

Mr Moshwana submitted that no fiduciary duty rested upon the applicant to disclose his involvement with CLS. He referred to **Phillips v Fieldstone Africa (Pty) Ltd & another** [2003] JOL 12155 (SCA); (3) SA 465 (SCA) the court at page 14 stated the following:

"There is no magic in the term fiduciary duty. The existence of such a duty and its nature and extend are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of the relationship".

The court referred to **Frame v Smith** [1987] 2 SCR 99 (SCC) where the following characteristics of fiduciary obligations were quoted with approval:

1. Scope for the exercise of some discretion or power.
2. That power can be used unilaterally so as to effect the beneficiary's legal or practical interests; and
3. A peculiar vulnerability to the exercise of that power or discretion.

I was also referred to **Ganes and another v Telecom Namibia Ltd** [2003] JOL 12133 (SCA); 2004 (3) SA 615 (SCA) which dealt with an issue of the duty owed by an employee. Mr Moshwana submitted that the facts of that case are distinguishable from the matter before court in that in *casu* the payments were made amongst others to the applicant as a director of a company and for services rendered by the applicant.

Mr Moshwana submitted that the payments made to the applicant were not sourced from the Transnet Funeral Benefit Scheme and accordingly the applicant was not materially interested in the scheme. In terms of annexure "A1" no money was received in February, March and April, yet "A6" suggest that an amount contained therein arise from the Funeral Benefit Scheme. Payment of round figures also suggest that the amount cannot be linked to Funeral Benefit Scheme.

Mr Moshwana contended that as far as is concerned, the crux of his evidence, which was heard in the criminal court for the first time, was that there was nothing connected to the Funeral Benefit Scheme that led to the payment to the applicant. Mr Macaskill said:

"But we had a desire to develop a working relationship with Ndhlela irrespective of the fact that we had not been successful with our insurance offer". It was submitted that it appears clear from the evidence that the relationship between the applicant and the companies CLS and Electro Sport would have started and continued irrespective of the contract from Transnet.

Mr Moshaoana submitted that, with reference to the transcript, Macaskill has contradicted himself at various stages of his evidence. On the one hand he testified that the applicant was not remunerated as a director of Electro Sport, on the other hand he testified to the contrary. Accordingly he submitted that his evidence should be treated with great caution.

Mr Wills, in Mr Moshaoana's submission, was a poor and unreliable witness. On the one hand he testified that he was aware of an agreement on the other hand he generated "AI" on the instructions of Mr Dreyer and had not seen the agreement. As the author of "AI", he was unable to explain what it means to court. He then passed the buck to Mr Dreyer. This he did when pertinent issues were raised with him in cross-examination.

Mr Moshaoana dealt comprehensively with the testimony of Mr Steyn. He pointed out that at the end of his testimony he conceded that with hindsight he has been negligent and should have checked with the applicant whether he had authorised.

In re-examination, Mr Steyn raised the issue of a cost report. The irony about this report is that it had costs in relation to other centres, however it appears that only the applicant was singled out. In any event, the applicant in his testimony stated that such a cost report was not distributed as it was also of concern to other directors. He testified that this he would have raised with senior employees, had they testified.

The evidence of Mabentsela who allegedly uncovered this conduct was not that the applicant authorised payment.

Accordingly, it was submitted that the evidence of Mr Steyn did not establish that the applicant authorized payment. It is not the duty of the applicant as it appears to be the stance on this charge, to discharge the onus that rests on Transnet.

During the period May 1993 to April 1994, the applicant was a Senior Manager. The applicant was neither an officer, a manager or a director as defined in the Companies Act at that time. Any allegation that he breached his fiduciary duties in terms of the Companies Act during this period is absurd. Equally although not argued, even his duty as an employee.

During the period April 1994 to November 1994 he was in the employ of other companies and cannot be said to have owed a duty to the Respondent.

During the period November 1994 to April 1996 he was a non-executive director of Transnet. It was submitted that it was not clear from Transnet's case which fiduciary duties were breached. If it is about the alleged interest in the Funeral Benefit Scheme, which was concluded in 1992, then no causal connection exist.

During the period April 1996 to date of dismissal and removal, 20 January 1998, the applicant was an executive director. Simply he assumed another capacity which he did not have when appointed in November 1994, the Companies Act during this period is absurd.

Transnet seems to suggest that the removal of the Applicant as a director in terms of s 220 is a fair reason for dismissal. It is submitted that for removal to occur in terms of s 220, no breach is required. It being so, it cannot follow that such removal justify dismissal, regard being had to the provisions of s 188 of the Labour Relations Act. For a dismissal to be fair it has to accord with s 188

of the Act. If Transnet wishes to rely on misconduct as ground of justification it has a duty to prove such misconduct and to further prove that the misconduct justify dismissal as a sanction.

The evidence before court fails to prove misconduct as alleged. It was submitted that the Transnet failed to discharge its onus and the dismissal is substantively unfair.

Findings and conclusion

I am of the view that Mr Macaskill's evidence must be approached with a measure of caution. I reject the evidence of the applicant outright. I have the indelible impression that he will say whether is for the moment expeditious. I accept the credibility of the other witnesses without qualification.

Mr Redding submitted, as an alternative argument, that the valid removal of an employee as an executive director in terms of s 220 of the Companies Act of 1973 renders the contract of employment impossible to perform where (as in the present case) the office of director and the employment as executive director are interwoven together. It may well be so but I need not decide this issue. Nor do I need decide whether the termination of the applicant's employment took place by virtue of supervening impossibility of performance, so that there was no dismissal in terms of s 186 of the Labour Relations Act.

The Insearch charge

Transnet has sought the admission of the Disciplinary Enquiry Record for consideration by the court on two bases: (a) as evidence in the present proceedings; and (b) as the record of what was stated in the disciplinary

enquiry proceedings.

Ordinarily, a record of a witness's evidence in earlier proceedings is hearsay. See Zeffertt, Paizes, St Q Skeen **The South African Law of Evidence** at 400. evidence of one of the parties at the previous proceedings is not hearsay.

The onus rests upon Transnet to prove the authenticity of the record. The applicant disputes the authenticity of the record of the disciplinary enquiry proceedings. It appears, from the findings by Judge Trengove and the heads of argument submitted by Mr Mostert, that the transcript was used in and during the disciplinary enquiry. These two documents were not themselves challenged.

Transnet led the evidence of Mr Mazwai, its attorney who attended at the enquiry. He was present at the inquiry for approximately 95% of the time. He read the transcripts and says they were accurate. The transcripts were made available to both parties. Mr Mazwai says the attorney who represented the applicant at the inquiry did not complain about the accuracy of the record. What is contained in the record accords with the findings and statements by Judge Trengove in his report.

The applicant contested the accuracy of the transcript. He had not listened to the tapes. He could not point to any specific inaccuracy. At a stage during his evidence the applicant contended that the record was inaccurate. It put words in his mouth and had been presented and compiled *mala fide*. applicant did not challenge the accuracy of the transcript at the criminal trial. He said he had relied upon an argument concerning its admissibility in those proceedings.

I am satisfied, on a balance of probabilities, that the record of the disciplinary enquiry is authentic and accurate. The reliance on the record is almost exclusively to demonstrate the thrusts of the applicant's defence at the inquiry. There is no quibble about words.

The question is whether the applicant's admissions made through his legal advisors are sufficient to show that the invoices rendered by Insearch which were not due were not paid following the applicant's authorisation. It must be said that there is no other direct evidence that he authorized the payment. Mr Steyn assured that he did so. There is also the strange circumstances of the Mr Dinisa's case.

The applicant changed his defence to the Insearch charges between the disciplinary inquiry and this trial. I am satisfied that the applicant is being opportunistic when he changes his defence. The applicant was even at pains to explain why it was fortuitous that the unauthorized invoices assisted in demonstrating that the sometime curious appointments were above board. The applicant is clearly guilty of the Insearch charge.

The CLS charge

The applicant admits receiving payment of R 750 000 from Electro sport or CLS. These payments were made to him or Ms Dlamini his wife or his business. Although the applicant had disassociated himself from the payments to Ms Dlamini or Enyiko at the disciplinary inquiry he said that payment to his wife was payment to himself.

When the applicant was re-employed as an employee of Transnet and particularly when he was appointed to the position of executive director he was obliged to disclose that he was receiving payments from CLS of Electro Sport which related to the contract between Transnet and outsiders.

It was not sufficient to say that he was director of Electro sport and that he was entitled to payment. He was obliged to say that he was involved with CLS or Mesrrs Dreyer and Macaskill in making money from an activity of his employer or company Transnet. The payment derived either from his involvement with Transnet's Pension Scheme no matter how the applicant might wish to describe it.

The duty of good faith which rested upon the applicant by virtue of the composite office he held required him to provide Transnet with more than an ambiguous and misleading clue to the extent of his material interest in third party doing business with it. Transnet was entitled to be apprised of the full extent of his involvement.

I find that the applicant is guilty of the charges relating to his failure to declare his conflict of interest stemming from his relationship with CLS.

Procedural fairness

Mr Moshwana submitted that it is common cause that an inquiry was conducted by Judge Trengove. In terms of his terms of reference, the judge was to consider mitigating circumstances and to recommend if appropriate disciplinary action required. Contrary to the terms of reference the judge concluded in paragraph 9.4 that the decision rests with the Board and Minister. Although the decision may have rested with the Board or Minister, the consideration of mitigating circumstances and recommendation, which could either have been accepted or rejected by the decision making body rested on the judge.

It is common cause between the parties that the sole purpose of the meetings of 20 January 1998 was to consider removal of the Applicant in terms of s 220. To elevate this meetings to a status of a "second hearing" is ambitious and less than candid.

If this meetings were hearings, then the applicant was subjected to an unfair hearing in that the chairperson of the said hearing was a witness at the inquiry, certain comments prejudicial to the Applicant were made in his absence and did not have an opportunity to comment. The second meeting was chaired by the same witness. The person to decide the fate of the applicant was the Minister who was consulted prior to suspension (about something). An application to have her substituted was rejected. A plea to observe schedule 8 of the Labour

Relations was equally rejected. When the applicant was charged, he was informed that because there is no code applicable, the provisions of the Labour Relations Act shall apply.

In terms of item 3(5) of schedule 8, when deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity consider the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself. In terms of item 3(4), for a misconduct to attract dismissal it has to be serious and its gravity make continued employment relationship intolerable.

None of the person who were present at the "second hearing" testified to state whether factors in 3(5) were considered and whether continued employment was rendered intolerable.

The other factor that merit consideration on this aspect is the period when the misconduct allegedly was committed. In relation to charge 1, the misconduct was "committed" from 1993 to 1996, and the applicant was charged only in 1997. According to Mackaskill, the employer was aware of the receipt of payment but was not aware of the quantum.

The chairman ignored certain submissions. The court does not know what the Minister took and did not take into consideration.

Conclusion

The dismissal of an employee must be preceded or at least accompanied by a fair procedure. Item 4 of Schedule 8 to the Labour Relations Act - the Code of Good Practice: Dismissal provides guidance on what constitutes a fair procedure. The Code does not require the investigation to be a formal enquiry. The Code also deals with the question when an inquiry may be dispensed with.

The inquiry did not hear or make recommendations regarding a suitable sanction of the applicant as employee. The post that the applicant held changed when it was decided that the incumbent of that post was to be an executive director of the company. The result was that the HR director's employment contract and relationship was predicated on the incumbent being an director of the company.

When the directorship was terminated the employment contract terminated. Some questions may arise as to whether the termination of a directorship by a shareholder terminates the employment contract. This question need not be explored as Transnet informed the applicant that it terminated his employment contract. The trial was conducted on this basis.

An inquiry to be procedurally fair as regards substantive fairness would, taking into account the basis of the composite nature of the director / employment relationship, be limited as to

- a) the nature of the relationship;
- b) whether the directorship was validly terminated.

The two inquiries may be conducted at the same time. This is what happened here. The applicant is substantively guilty of misconduct in both his capacities. Procedural fairness would require an inquiry as to whether compensation would be appropriate eg as in the case of a no fault removal of the employee as a director.

I am of the view that Transnet was justified in not holding the limited inquiry regarding sanction. But, even if I assume in favour of the applicant that the dismissal was procedurally unfair, I, in the circumstances decline to provide him with any relief.

Costs

The proceedings brought by the applicant are, in the respondent's submission,

vexatious. The applicant was guilty of dishonesty and brought the case to court on a patently false basis. This, it is submitted warrants and the applicant's conduct during the proceedings warrants an order of attorney and client costs.

I am of the view that I should make a costs order against the applicant on the ordinary scale.

In the premises the application is dismissed with costs.

SIGNED AND DATED AN MMBATHO THIS 9TH DAY OF
NOVEMBER 2004

A A Landman
Judge of the Labour Court

Date of hearing: 17, 18, 19, 20, 21, 24, 25, 27 May and 26, 27, 28, 29, 30
July and 11 September 2004

Date of judgment: 9 November 2004

For applicant: Mr G N Moshwana of Mohlaba and Moshwana Inc

For respondent: A I S Redding SC instructed by Mr R Carr of Bowman
Gilfillan Inc