(1) Reportable: NO
(2) Of interest to other Judges: YES

[redacted]

Signature <u>04 May 2026</u> Date

THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Case no: C 233/2020

In the matter between:

HUNG-WA MAN	**Plaintiff**
and	
UFF AGRI-ASSET MANAGEMENT (PTY) LTD	**First Defendant**
ME VAN WYK	**Second Defendant**
DUNCAN KELVIN VINK	**Third Defendant**
ERWIN BOULAND	**Fourth Defendant**
CRYSTAL TREE (PTY) LTD	**Fifth Defendant**

Heard: 25-26 July and 16-18 October and 4 December 2024
Delivered: 04 May 2026

Summary: (Contract of employment – purported cancellation of contractual provision by employee following alleged breach of provision - claim under s 77(3) for restitution in the form of reimbursement of salary forfeited for the purchase of shares in a different company from the employer – Oral contract

relied on - Shares in other company not issued – Plaintiff unable to prove existence of a contractual obligation on employer to procure shares in other company – Employer not liable for procuring issue of shares – claim dismissed – costs follow the result)

JUDGMENT

LAGRANGE, J

<u>Nature of the case</u>

[1] The plaintiff in this matter, Mr H Man ('Man') is suing the defendants for restitution of 25 % of his salary forfeited by him following the cancellation of a contract in the amount of R 1,32 million, plus interest and costs. He claims the reimbursement of his forfeited salary in lieu of receiving shares for the salary he forfeited. The plaintiff's claim is based on a breach of an oral contract and is brought under section 77(3) of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA'). Man, who at all relevant times was employed at the time by the first defendant, UFF Agri-Asset Management (Pty) Ltd ('UFF') asserts that the partial forfeiture of his salary was in exchange for UFF issuing shares to him in the fourth defendant, Crystal Tree (Pty) Ltd ('Crystal Tree')'. Man contends that all the defendants are jointly and severally liable for the breach of contract, but he only seeks relief against one of them, namely UFF, his erstwhile employer.

[2] UFF disputed that Man was an employee of UFF after his fixed term contract expired on 31 July 2016. In any event, they contend that the agreement that Man would forfeit his remuneration in exchange for shares in Crystal Tree, was an agreement between himself and second, third and

fourth defendants (who are also the founder members of UFF) in their personal capacities as intended co-shareholders in Crystal Tree and that UFF merely assisted by facilitating the salary forfeiture. They argue that UFF had no power to issue shares in Crystal Tree to Man. UFF disputes that Man's claim can be brought under section 77(3) of the BCEA because the salary-sacrifice-for-shares agreement on which it is based was not part of an employment contract.

[3] In the original pleadings, which pre-date the amendment of the Labour Court Rules in 2024, the parties were designated as applicant and respondents. To bring the citation in conformity with the current nomenclature, they are now designated as plaintiff and defendants.

<u>Chronology of Events</u>

[4] UFF provides investment and asset management services to clients. This entails it performing various activities such as: Identifying and structure agricultural investment opportunities; conducting due diligence on farms and agribusiness assets; advising investment committees of client funds; managing and monitoring agricultural assets post-investment; structuring acquisitions and disposals of equity participations and providing financing and structuring solutions for agricultural investments. Bouland testified that the main investors in UFF were Old Mutual, the Public Investment Corporation and Future Growth. The investments were subject to a mandate that the funds would only be used for land and biological assets.

[5] M Van Wyk ('van Wyk'), Mr D Vink ('Vink') and Mr E Bouland ('Bouland') were founder members of UFF holding 51 % of its shares. Van Wyk was the Chief Executive Officer (CEO) and a director. Vink was also a director and Bouland was a director from time to time.

[6] Man was first employed on 1 August 2014 under a two-year fixed term contract ending on 31 July 2016, Man's central function was to act as an investment adviser within UFF's agricultural asset-management business.

His core functions were: advising UFF on investment strategies and opportunities in the agricultural sector; providing specialist input into equity participations and agricultural investment structures, and assisting with investment decision-making at a senior, strategic level. He also had the responsibility of fundraising, especially focussing on Asia and China. This required him to engage with international investors and institutions, assisting UFF to obtain foreign capital for agricultural investment funds and acting as a bridge between Asian investors and African agricultural opportunities.

[7] These functions fell under 'financial advice" and 'intermediary services' as defined in the Financial Advisory and Intermediary Services Act 37 of 2002 ('FAISA'), in terms of which he was required to register as a financial advisor.

[8] Different stages in the relationship between the parties are summarised below.

Fixed-term employment and core advisory work

[9] From August 2014, Man was employed by UFF Agri-Asset Management (Pty) Ltd under a written fixed-term contract expiring on 31 July 2016.

[10] UFF's investment and asset management business at that time was in the agricultural field. It advised and managed investment funds holding agricultural assets, earning management fees and performance linked returns tied to asset productivity. UFF depended materially on the operational performance of farms under its management and, as part of its value creation strategy, it engaged in research, innovation and productivity enhancing initiatives alongside orthodox fund management.

[11] During this period, he performed senior advisory functions: mentoring and supervising investment analysts, structuring and analysing investments, drafting investment proposals, engaging in fundraising (particularly in Asia), and liaising with external investors and technology providers relevant to agricultural productivity. Man's written employment contract

demonstrated he had a wide mandate extending beyond narrow fund-administration tasks. Man was wholly engaged in UFF's business and his sole remuneration was his salary.

July to August 2016: Expiry of the fixed term and uninterrupted continuation

[12] On 31 July 2016 the fixed-term contract expired by effluxion of time. However, Man continued working without interruption, performing his usual functions, and being paid his full monthly salary by UFF. No new written contract was concluded, and no communication suggested his employment had ended. The parties dispute the legal characterisation of the continuation of the relationship, but not the facts. Man maintains this gave rise to a tacit continuation of his employment on the same terms (save for later changes), while the defendants say this period formed part of an interim holding arrangement pending a new venture. There is no document recording an "interim" arrangement and Man's payslips and payroll records show he received his normal payment in August 2016. During August 2016 Man remained engaged in UFF's ordinary advisory work and preparatory discussions.

Late August to September 2016:"Special projects" and an oral agreement, with or without tacit terms

[13] In late August or early September 2016, discussions took place between Man, van Wyk, Vink and Bouland. It was common cause that they agreed on a shift in Man's work focus from day-to-day fund management duties to work mainly on "special projects", on which he would spend about 80% of his time. Special projects referred to technology, innovation and productivity-enhancing initiatives, fundraising and advisory opportunities, especially those connected to Asia, which were considered ancillary to, but supportive of, UFF's agricultural asset-management business. Because of UFF's client mandates and risk sensitivities, it was not desirable for UFF to pursue these more speculative projects as part of its own activities. To that end, Crystal Tree, a shelf company registered on 23

July 2015 and owned by van Wyk, was identified as the intended special-purpose vehicle under which such projects would be housed. Man's engagement during this transition shifted from routine analyst supervision to the conceptual and developmental work required to identify, scope and plan these projects, and engage potential investment partners. Man contends it was part of this agreement that he would remain an employee of UFF and he would forfeit one month's salary every four months which entitled him to 25% of issued Crystal Tree shares, which UFF would procure for him. It was also part of the agreement that UFF would provide office space in the building it leased for Crystal Tree related activities.

[14] The existence of a so-called '*special projects agreement*' concluded in September 2016 is common cause, but which obligations were undertaken by the various parties to the agreement is a matter of contention. Man contends that UFF was a party to this agreement and that the agreement *inter alia* restructured his remuneration while he remained a UFF employee and, in exchange for forfeiting his salary every four months UFF undertook to procure that a quarter of Crystal Tree's issued share capital would be issued to him (the '*salary sacrifice for shares agreement*'). The defendants contend the salary sacrifice was part of a personal joint-venture arrangement between Man and the three founder members of UFF in their personal capacities, with UFF playing only an administrative role.

September 2016 onwards: Implementation of salary-for-shares arrangement

[15] From September 2016 UFF continued to pay Man's salary and, every fourth month, withheld one month's salary, amounting to a forfeiture of 25% of his income per annum. Man, for his part, was to devote 80 to 90 percent of his working time to develop special projects, which were to be housed under another company, Crystal Tree (Pty) Ltd ('Crystal Tree'), a dormant shelf company wholly owned by van Wyk.

[16] It is unclear from the evidence exactly when Crystal Tree was registered, but it did exist by the time discussions took place between Man and Bourland in August or September that year.

[17] Owing to Man being dedicated to spending most of his time on special projects, he was expected to spend a correspondingly reduced portion of his time mentoring analysts and assisting UFF directly. Man's work during this period consisted of identifying opportunities, developing feasibility analyses, preparing budgets and projections, and engaging with potential technology partners, funders and counterparties.

[18] The character of the legal obligations between the parties regarding the 25% salary withheld is a matter of dispute. Man claims it was a substitution of a portion of his salary in exchange for receiving shares in Crystal Tree. The defendants contend it was 'sweat equity' or capital in the form of work contributed at risk. The only documentary record relating to the transaction are the payslips and payroll deductions, showing that UFF paid his salary and made the deductions.

[19] Van Wyk's evidence was that UFF did invoice herself, Vink and Borland for Man's salary costs insofar as it related to the work he performed for Crystal Tree. Accordingly, to the exent that no salary was paid to him every fourth month, yet he still performed work for Crystal Tree, he provided his labour that month at no cost to Crystal Tree and consequently they were relieved of funding his salary that month, thereby reducing Crystal Tree's operating costs.

November 2016: Regulatory confirmation of role

[20] On 7 November 2016, Vink, writing as a director of UFF, issued a letter to the registration department of the Financial Sector Conduct Authority describing Man as having been appointed as an investment manager since August 2014 and stating, amongst other responsibilities, that he *'recently … took up the role to enhance the investment research field enabling UFF Agri-Asset Management's involvement in relevant*

agri-related innovative projects.' This letter post-dates the expiry of Man's fixed-term contract and records Man's role in special projects as part of UFF's activities. Man relies on this as proof that he remained a UFF employee engaged in UFF-aligned work. The defendants maintain it was merely supportive correspondence to assist him with regulatory requirements and did not describe his contractual arrangement with UFF.

2016 to 2017: Development work and the Pargo opportunity

[21] During late 2016 and early 2017 Man continued intensive development work: exploring agri-tech and energy projects, logistics and advisory opportunities, and preparing detailed budgets for Crystal Tree. One such opportunity concerned Pargo Logistics ('Pargo'). It seems to have been the most concrete initiative embarked on by Man. Pargo was a South African parcel-delivery company. It was seen as offering a commercial opportunity capable of generating fee income, which would potentially develop an early revenue stream to support the contemplated Crystal Tree venture while other projects matured. Because the nature of the business fell outside UFF's investment mandate and funding would have to come from the Crystal Tree sponsors.

[22] In pursuing this prospect, Man prepared memoranda, financial projections and budgets, and sought capital commitment from the intended shareholders by January 2017. However, by 18 January 2017, the deadline set by Pargo for funds to be raised to acquire it, nothing was forthcoming so the opportunity fell through.

June 2017: Written confirmation of the agreement

[23] On 5 June 2017 Man sent an email to van Wyk, which he copied to Bouland, summarising the September 2016 agreement. He confirmed that he would remain an employee of UFF, that he would give up one month's salary every four months, and that *'in return for the sacrificing of one month's salary every four months I would receive 25% shareholding in Crystal Tree'*, with the other shareholders being the current shareholders

in Crystal Tree, namely Bouland, Vink and van Wyk. He noted the commencement date as September 2016, and he recorded discrepancies in past deductions. He also recorded that office space was to be provided for Crystal Tree on the fourth floor of the Hudson building and that Crystal Tree would assume the operational costs funded by the current founding shareholders of UFF.

[24] After noting that he agreed with a contention made previously by van Wyk that he started sacrificing one month's salary every four months, beginning in September 2016, he recorded his view that the obligation to issue him with shares in Crystal Tree had not been met:

> *'Nonetheless, I maintain my point that, although I have accepted a de facto decrease in my salary, UFF (or founding shareholders' of UFF) did not discharge their share of the arrangement; until date I have not received shareholding in Crystal Tree nor are certain expenses incurred and paid by me in the course of my employment reimbursed.'*
>
> (*sic*)

[25] This contemporaneous document delineated Man's understanding of the parties' obligations. Man said he sent it to record the agreement reached in August or September 2016 and when the salary sacrifice arrangement had started. No written response corrected or repudiated this letter at the time. Man continued thereafter with the same mix of special-project development and limited UFF mentoring.

[26] Van Wyk testified that no response was made to this letter because it was understood as an informal recap of ongoing discussions about the Crystal Tree shareholder arrangement and payroll accommodation, not a contractual statement about Man's employment terms with UFF. It appears there was no dispute about the content of the letter, but merely about the interpretation of who bore the obligations concerning the issuing of shares to Man.

2017 to early 2020: Attempts to formalise shareholding

[27] Between 2017 and early 2020 various drafts of a shareholders' agreement for Crystal Tree circulated. On 12 February 2020, Man and Bouland eventually signed a version drafted by Man, but van Wyk and Vink did not. Man conceded that because it had not been signed by all the shareholders in Crystal Tree, it was neither valid nor operative. However, he interpreted it as a written confirmation of his orally agreed upon rights. It was the oral agreement which was the original source of those rights.

[28] The parties to the intended written shareholders' agreement were Bouland, Vink, van Wyk, Man and Crystal Tree. Bouland, Vink and van Wyk were describes as 'Sponsors' in the agreement. Provisions of the Introductory section set out in paragraphs 3 and 4 of the agreement, which are pertinent to the matter, read:

> *'INTRODUCrystal TreeION*
>
> *…*
>
> *3.2 <u>The Sponsors and Man wish to conduct the Business in the Company with a view to collaborate with Chinese technology and venture capital firms who wish to enter the African market</u>.*
>
> *3.3 <u>The Sponsors will contribute Operational Costs while Shareholders and until such time as the Company can secure its own funding from third parties, finance itself out of its own business activities or by the completion date</u> (whichever is the soonest).*
>
> *3.4 Man will affect from the signature date be employed or be seconded with the objective of ultimately being employed by the Company on a full-time basis, as the Chief Executive Officer of the Company. <u>Man will continue for so long as the Sponsors contribute operational costs to the Company.</u>*
>
> *3.5 the shareholders wish to regulate the relationship amongst each other and the Company.*
>
> *3.6 the agreement will regulate:-*
>
> *3.6.1 the issue of shares in the Company to man, Bouland and Vink;*

3.6.2 the operation and management of the Company; and

3.6.3 the relationship between the Shareholders and between the Shareholders and the Company.

…

4. SHAREHOLDING:-

4.1 The Company was incorporated on 23 July 2015 and has an authorized share capital of 1000 ordinary shares of no par value.

4.2 On the Signature Date, Van Wyk is the sole Shareholder and holds 100 issued shares.

4.3 <u>The intention is that the Parties shall be equal Shareholders and accordingly Bouland, Vink and Man will each subscribe for 100 shares in the share capital of the Company at a nominal subscription price of R1 per share</u>.

4.4 <u>Van Wyk shall procure that the Company shall allot and issue to each of the other three shareholders or their nominees the number of shares subscribed for within 30 calendar days of the Signature Date</u>.'

(emphasis added)

[29] The reason that van Wyk and Vink did not sign the draft agreement was that they were unhappy the last sentence in 3.4 of the draft which they were concerned could be interpreted to mean that they would potentially be liable to fund Man's income in perpetuity during in the course of Crystal Tree conducting business, which was a commitment they were not prepared to make. Bouland testified he had signed the agreement in good faith without reading it carefully.

[30] Crystal Tree never became a distinct operational entity, had no employees, and generated no income. Bouland stated that himself, van Wyk and Vink had collectively invested about R 5.2 million in cash in Crystal Tree, but the business came to nothing, and it reached a stage when they felt it would not generate any income for the shareholders. At that point they were no longer prepared to invest any more cash in the

business. In the end, it was a failed investment which resulted in them suffering a loss.

[31] Neither Man, Vink nor Bourland ever received their 25% share allocation in Crystal Tree. The parties dispute the legal significance of the shareholder agreement drafts. The defendants argue that the conclusion of a signed shareholders' agreement was a precondition of any share entitlement. Man contends the shareholders' agreement was intended merely to give formal effect to an existing and binding remuneration arrangement.

March–April 2020: Demand for share transfer and cancellation of the contract

[32] In March 2020, after repeated informal requests, Man formally demanded delivery of his 25% shareholding, giving notice that failure to issue the shares to him so would result in cancellation.

[33] When the shares had still not been delivered by late March or early April 2020, he cancelled the arrangement insofar as it required him to sacrifice salary in exchange for shares, which he interpreted as a provision of his employment contract. He did not resign or purport to terminate his employment with UFF. In an email of 24 March 2020, Man gave notice to van Wyk of his intention to cancel the agreement of 12 February 2020 and copied his email to Vink and Bouland. The email headed '*Crystal Tree/UFF Employment*' read:

> *'Dear Miné*
>
> *With reference to our understanding, which has been documented in the agreement dated 12 Febuary 2020, which in essence entails:*
>
> - *That I surrender 25% of my gross salary at UFF effective already from September 2016 to date,*
> - *That in exchange for my benefit sacrifice, I receive 25% unencumbered shares in Crystal Tree (Pty) Ltd, and*
> - *<u>That you, Erwin and Duncan further undertook to fund the operational costs of Crystal Tree (Pty) Ltd.</u>*

To date, albeit that I have performed my functions diligently as we had agreed and have sacrifices a huge portion of my salary for an extended period of time, <u>you</u> have for some unknown reason not issued me with the shares/share certificates in Crystal Tree (Pty) Ltd.

I have taken this up with you numerous occasions since September 2016, the most recent discussion last week Wednesday the 18 of March in which you promise to revert. Until date <u>I have been unable to get you (and or the other shareholders) to fulfil their side of the agreement.</u>

<u>I have have no option but to place you and the other shareholders, who are copied into this communication</u>, <u>on terms</u> as I hereby do; to specifically perform as per our written agreement <u>and hereby giving you 5 working days' notice to issues the said shares in Crystal Tree (Pty) Ltd, and arrange the funding as per budget, without delay</u>.

In the hopefully unlikely event you do not intend honouring our agreement, or we don't come to a mutually agreed position, I have no option but to cancel the agreement, and I am giving you such notice now by close of business Monday 30 March 2020. <u>I will then have the expectation and I believe legitimately so to be reimbursed my benefits that I had sacrificed at UFF plus interest and related losses</u>. Hopefully we don't get to this position.

I await your urgent response.

Respectfully, …'

(emphasis added).

Notably, this demand was not addressed to UFF. In the absence of a response to this email, Man followed up with an email on 3 April 2020, in which he cancelled the February agreement and demanded reimbursement of his salary sacrifice with interest, in the following terms:

Dear Miné,

I refer to my email dated 24 March 2020 to <u>in which I demanded from you, and the other shareholders, to perform your obligations</u> in terms of the signed agreement dated 12 February 2020, failing I would cancel the agreement per 30th March 2020.

Notwithstanding my demand of the 24 March 2020, until date *<u>you failed, ignored or refused to, among others, issue the shares in Crystal Tree (Pty) Ltd to me</u> and, arrange the funding as per budget. You, Duncan Vink and Erwin Bouland have thus breached and remain in breach of the agreement.*

As per my email of the 24th of March 2020, <u>the agreement is now cancelled</u>, which I reconfirm in this correspondence.

In the light of your breach of the now cancelled agreement, I suffered damages and/or losses. <u>Therefore, I demand from UFF Agri Asset Management, you, Duncan Vink and Erwin Bouland, jointly and severally, to reimburse me for my salary sacrifice to date including interest and benefits and all my other losses and damages which I have to suffered</u>

According to my calculations (to be amended as time goes on) I have sacrificed a portion of my salary since September 2016 to the amount of R1 320 000, interests thereon of R 265 925 and sacrificed annual adjustments to my salary to the amount of R 854 225.

I thus demand from <u>UFF Agri Asset Management, you, Duncan Vink and Erwin Bouland to arrange payment of the total amount of R 2 440 150 forthwith but no later than 10 April 2020.</u>

Failing such payment, I will have no option but to approach the applicable forum for relieve.

Respectfully,

Hang-Wah MAN'

(*Sic-emphasis added*)

[34] This was the first communication directed at UFF as well as the other intended shareholders in Crystal Tree. Even so, at that stage, it is apparent that he still did not hold UFF directly responsible for the failure to deliver the shares, but only for reimbursing his forfeited income.

Post-cancellation 2020: Abandonment of special projects and retrenchment

[35] Following this correspondence, the other partners in the Crystal Tree venture realised that relations with Man had taken on a litigious character added to which they had not even concluded the shareholder agreement.

They concluded there was no longer any trust in their relationship with Man. Added to which the project had failed to generate income over a number of years and they were no longer prepared to fund it. With its collapse, the main *raison d'etre* for Man's continued employment by UFF, namely to get special projects off the ground to be housed in Crystal Tree, fell away, making him redundant and UFF proceeded to retrench him under section 189 of the Labour Relations Act.

[36] The retrenchment documentation and correspondence between Man and defendant's attorneys link the cessation of special projects to the termination of Man's employment. There is no evidence that Crystal Tree pursued any business or generated income after that point.

[37] Man referred an unfair dismissal claim to the CCMA and the arbitration award was pending review in the Labour Court when this trial was underway. The retrenchment proceedings were not addressed in any detail during the testimony, but both parties sought to draw inferences from it. Man argued that the fact that UFF retrenched him, rather than Crystal Tree demonstrated that UFF regarded him as its employee right up to 2020 and undermined UFF's argument that he had effectively ceased being a UFF employee after 2016. In 2016 his remuneration structure was simply modified. Moreover, the money he had forfeited under the new remuneration structure in return for shares, meant that if the reciprocal obligation to issue the shares was not met, he had to be fully reimbursed. As the Crystal Tree venture effectively ended with his cancellation of the agreement, there was no justifiable basis for retaining his forfeited remuneration.

<u>Evaluation</u>

[38] A number of issues have to be resolved, namely: Man's employment status with UFF after 31 July 2016; the effect of non-variation clause in Man's expired fixed-term contract; the nature of the agreement concluded in September 2016 and the parties to that agreement; the respective

obligations of UFF and founder members of UFF relating to the salary-sacrifice-for-shares agreement.

[39] Ultimately, the onus rests on Man to establish the existence of a contractual obligation on UFF to arrange for the delivery of shares in Crystal Tree to him and, if it failed to do so on demand, he was entitled to cancel salary fofeiture arrangement the agreement and, in lieu of the promised shares, claim a refund of the salary he had sacrificed for the shares,.

Man's legal relationship with UFF after his fixed term contract ended on 31 July 2016.

[40] Following the expiry of Man's fixed-term contract on 31 July 2016, the employment relationship between Man and UFF continued, albeit that his fixed term contract expired. From August 2016 until his retrenchment in 2020, Man continued to render services while remaining on the payroll of UFF. He was paid remuneration through UFF's payroll system, received payslips, and statutory deductions were effected on his behalf. During this period, Man's role evolved: he continued to perform certain functions directly for UFF, including the mentoring and oversight of junior analysts, but devoted the majority of his time to the development of so-called "special projects". These projects were operationally housed within Crystal Tree (Pty) Ltd, but Man's duties to develop these projects for the benefit of Crystal Tree would be done whilst remaining an employee of UFF, which retained control over his remuneration, the allocation of his working time, and the administrative framework of his employment.

[41] From September 2016, Man's remuneration by UFF was restructured so that he forfeited one month's salary every four months. This forfeiture was to fund his entitlement to shares in Crystal Tree. The employment relationship persisted on that footing until early 2020, when Man was retrenched by UFF following the breakdown of the parties' relationship.

[42] The defendants argued that in accordance with the principles in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* [1] and *Brisley v Drotsky* [2] non-variation clauses are binding. Consequently, the non-variation provision in Man's fixed term contract meant that his conditions of employment could not be altered to reflect changes such as the salary forfeiture arrangement. If so, his terms of employment could not have been varied to include the salary sacrifice scheme.

[43] The difficulty with this argument is that the non-variation clause in the fixed term contract could not have outlived the fixed term of the contract. Clause 2 of that contract fixed the term of the contract. As the fixed term contract could only have been extended if that change was reduced to writing and signed by both parties, which the non-variation clause required, the contract and all its terms, including the non-variation provision, came to an end on 31 July 2016. Any employment of Man by UFF after that date was undertaken under a new employment contract, whether tacit or express. The fact that his remuneration remained the same simply reflects that the parties accepted this arrangement, and he continued to perform the same services he had rendered before. By their conduct both parties accepted that he continued to work and perform duties for the same remuneration as before but no longer subject to a fixed term contract. There was a shift in the emphasis of his responsibilities. He was expected to devote less time to service the direct needs of UFF and more time on the development of special projects which had to be housed under another entity, Crystal Tree.

[44] Aside from this modification of his responsibilities, there is no dispute about the continuity in the respective performance of obligations by both parties from 1 August 2016, all of which is demonstrative of an ongoing employment relationship. Thus, UFF continued to pay Man through its payroll, issued payslips in its own name, deducted PAYE and statutory

---

[1] 1964 (4) SA 760 (A)

[2] 2002 (4) SA 1 (SCA)

contributions as employer, controlled his work allocation and reporting lines, used its own infrastructure to support his work; and ultimately retrenched him via a section 189-type process. The defendants argued that it maintained his employment status because it was necessary for him to have a recognised employer for tax and visa purposes and Crystal Tree did not yet have its own independent operational structure.

[45] However, even if I accept that the intention of the parties after 31 July 2016 that his work would increasingly be devoted to Crystal Tree activity, and that it was for reasons of practical convenience that his formal employment status with UFF was maintained, he remained employed by it. The fact an employee of one entity is engaged in the work of another does not mean the formal employment relationship is a sham. Secondment of an employee to work for a third party does not end the employment relationship with the seconding party.

[46] When the shift in his duties became more pronounced in September 2016 and he agreed to the salary forfeiture scheme, it is true that 80 to 90 percent of his time was allocated to trying to develop special projects which were to be housed under Crystal Tree. However, even though he devoted a correspondingly smaller part of time only to UFF work, his employment relationship with it continued.

[47] In conclusion, I am satisfied that Man continued to be employed by UFF after 31 July 2016 until he was ultimately retrenched in 2020.

The agreement altering Man's remuneration in September 2016

[48] Notwithstanding the sharp legal dispute between the parties, there was a high degree of consensus regarding the events of September 2016. All parties accepted that, following discussions during August 2016, an arrangement was reached in or about September 2016, under which Man's working conditions were changed. The negotiations were conducted between Man and van Wyk, Vink and Bourland

[49] It was common cause that, from that point, Man's work focus at UFF shifted predominantly to what were described as "special projects", and that these projects were conducted as part of Crystal Tree's business. It was further common cause that, from September 2016 onwards, Man did not receive his full salary every fourth month, that this altered payment pattern was implemented through UFF's payroll systems, and that the arrangement was sustained in practice over a period of several years. Where the parties diverge is on the legal characterisation and consequences of the salary sacrifice arrangement.

[50] Man founds his entitlement on '*an uncontradicted email*' to Bouland and Van Wyk on 5 June 2017, which confirmed that during September 2016 Mr Man concluded an oral agreement ('the Special Projects Agreement') with UFF, Bouland, Vink and Van Wyk.

[51] He argues that UFF was a party to the agreement for the following reasons: it benefitted from the agreement; it had to agree to the amendment of Mr Man's employment arrangement; it had to agree to the allocation of his services; it continued paying his salary as before, save for the 25% forfeiture; it was instrumental in providing the office space and other infrastructure for the venture. He submits that this made UFF's consent and performance essential to the agreement.

[52] Further, Man argues that when UFF's attorneys stated in correspondence that *"Mr Man has now terminated the shareholders agreement and the agreement between the parties to pursue the special projects"* this was confirmation that UFF too was of the view that there was a single agreement which it had been a party to. He contended that the agreement to pursue '*special projects*' could only be a reference to the September 2016 agreement and because UFF's attorneys used the term in the context of retrenchment, *'the parties'* must have included UFF.

[53] Under cross-examination it was put to Man that the letter was written to explain why UFF no longer had work for him as the Crystal Tree venture had ended, not a statement of acknowledgement of a joint and several

obligation to delivery Crystal Tree shares to him. It was a letter dealing with causation of his retrenchment, not a statement of legal liability. The fact that the letter referred to the shareholders' agreement ending and the commercial agreement to pursue special projects via Crystal Tree, did not transform UFF into a contractual party to that agreement.

[54] However, Man insisted that the September 2016 arrangement constituted an employment-related agreement with UFF which restructured his duties and remuneration, substituting a portion of his cash salary with an entitlement to shares as part of his remuneration package. The defendants, by contrast, claimed that the agreement of acquiring Crystal Tree shares in exchange for sacrificing part of his salary was an agreement between Man and the founder members of UFF (Van Wyk, Bouland and Vink) in their personal capacities, relating to a private entrepreneurial venture, namely the establishment and operation of Crystal Tree (Pty) Ltd. UFF's undertaking was limited to effecting the salary sacrifice.

[55] On the defendants' version, by effecting the salary forfeiture, as his employer, UFF simply provided a convenient mechanism for Man to make his financial contribution to the Crystal Tree business. However, UFF did this without assuming any contractual obligation concerning the issuing of shares. As Crystal Tree was not yet an operational entity in its own right, UFF was being used as a facility for the founders to conduct activities related to Crystal Tree. Evidence was provided by van Wyk of payments made by UFF relating to the business of Crystal Tree. She also testified that the founders were liable to refund UFF for Crystal Tree related expenses, including that portion of Man's remuneration attributable to his Crystal Tree related work. Man did not dispute this, but argued that it was irrelevant to his claim against UFF to issue him with his Crystal Tree shares which was part of his employment contract.

Did UFF assume the obligation to procure shares in Crystal Tree due to Man on the basis of him sacrificing one quarter of his annual salary?

[56] Man did claim that van Wyk, Bourland and Vink were also parties to the agreement that he would forfeit 25 % of his earnings in exchange for a 25 % shareholding in Crystal Tree. When Man recorded his understanding of the oral September agreement in his email of 5 June 2017, he recorded that neither UFF nor the founding shareholders had discharged 'their share' of the arrangement, namely by issuing him with Crystal Tree shares and reimbursing him certain expenses. Although he never used the term '*joint and severally liable*', in effect he is asserting that all the individual defendants as a group were jointly and severally liable with UFF to deliver the shares, or the individual defendants as a group were jointly and severally liable with UFF to do so. It is not necessary to resolve this nuance for the purposes of the judgment.

[57] The important question is whether UFF assumed joint and several liability with them. In this court, Man only pursues his claim against UFF on the basis that the agreement formed part of his conditions of employment. As he had no employment relationship with van Wyk, Bourland or Vink, he cannot not sue them under s 77(3) of the BCEA for restitution in the form of reimbursement of his salary forfeiture, which is the only statutory provision giving the Labour Court jurisdiction to entertain his claim.

[58] However, in his email of 24 March 2020[3]. He complained to van Wyk that he had been '*unable to get you (and or the other shareholders) to fulfil their side of the agreement*' and his demand for delivery of his share allocation was expressly directed only at her '*and the other shareholders*' to '*perform as per our written agreement*'. UFF is not mentioned. Furthermore, he identified his claim as originating in the agreement of 12 February 2020, which was the draft shareholder's agreement signed by himself and Bourland, albeit that it was never even agreed to by all

[3] See paragraph 32 above.

shareholders, least of all with van Wyk who still held all the issued shares in Crystal Tree.

[59] UFF did not appear as a party to the agreement in that draft, which is hardly surprising because it was never intended it would be a shareholder in Crystal Tree. Thus, to the extent that Man relied on that document to enforce his right to be issued with shares, even if it is debatable it was enforceable against the individual respondents. it could never have provided the basis for deriving an obligation enforceable against UFF. Accordingly, the only possible source of such an obligation on the part of UFF, if it came into being, must have originated in the oral agreement of September 2016. In his follow up email of 3 April 2020, he again clearly identifies van Wyk and *'the other shareholders'* as having failed to perform their obligations to deliver the shares. It was only when it came to demanding substituted restitution in the form of a reimbursement of his salary sacrifice that he identified UFF as being jointly and severally liable with the founder members, even though he never directly demanded delivery of the shares from UFF itself, thereby failing to place it in *mora*.

[60] UFF never held any shares in Crystal Tree and neither did the September agreement provide for UFF to be issued with any shares at any stage. The sole shareholder of Crystal Tree at all times right up until the Man's cancellation of the agreement was van Wyk. While UFF's members in their personal capacities were able to reach an agreement on the disposition of shares in Crystal Tree with Man, even though they were majority shareholders in UFF, UFF simply had no capacity to issue shares to Man itself. Its role in relation to Crystal Tree was confined to performing activities on its behalf subject to reimbursement of the corresponding expenses incurred by Vink, van Wyk and Bourland, one of which was at least 80% of Man's salary. Part of facilitating that arrangement was effecting the forfeiture of Man's salary as his contribution for his shares. By undertaking that obligation UFF was agreeing to perform one more function which was consonant with the other services it provided to facilitate Crystal Tree's operational activities. It does not necessarily follow

that because UFF agreed to implement the four monthly salary forfeiture it necessarily incurred a reciprocal obligation to deliver Man's portion of Crystal Tree shares.

[61] The practical effect of Man's forfeiture of salary every four months meant that Vink, van Wyk and Bourland were relieved of reimbursing UFF for his salary that month. His sacrifice thereby correspondingly reduced their contribution to the running costs of the Crystal Tree project. They were the real beneficiaries of this arrangement, not UFF. This was eventually conceded by Man himself. In the absence of any necessary reciprocity between Man and UFF regarding his shareholding in Crystal Tree and his salary forfeiture, Man's attribution of an additional obligation to UFF that it also would deliver the shares to him appears as a somewhat superfluous addition, when that obligation was already owed to him by the individual defendants. Man provided no explanation why the parties would have agreed that UFF should also have assumed this obligation.

[62] The agreement between Man and the individual defendants was that they would issue him with shares provided he regularly sacrificed his salary and thereby reduced their financial contribution to funding the nascent business of Crystal Tree. The fact that the salary forfeiture mechanism was the most convenient one for the individual defendants and that UFF was amenable to it, did not as a matter of necessity require UFF to assume the same obligation as the individual defendants to issue MAN with the shares in exchange for his contribution. In so far as Man did not provide any direct evidence of how this term came to be agreed on in the discussions, the only alternative basis its existence could established is if it was a tacit term of the oral agreement. However, because a tacit term must be necessary to give business efficacy to an agreement[4], the purported obligation on UFF to issue the Crystal Tree shares, could not even be explained as a tacit term of the agreement that UFF did not have to pay him every fourth month. To issue shares to Man, the co-operation

[4] *Transnet Ltd v Rubenstein* [2005] 3 All SA 425 (SCA) at paragraph [17].

of the individual defendants was essential. It was not essential that UFF also be saddled with the obligation to procure the shares for him.

[63] In the absence of written proof of such an obligation or proof an oral agreement to that effect, Man has not successfully established the existence of an obligation on UFF to procure the Crystal Tree shares for him.

[64] The operative obligation which UFF agreed to give effect to as part of it facilitating the assisting Crystal Tree to get off the ground, was to effect the salary sacrifice, but the sacrifice was to enable him to earn his entitlement to a quarter of the issued share capital of Crystal Tree, just as his three intended partners were entitled to their share allocation by virtue of reimbursing UFF for expenditure it incurred on Crystal Tree's behalf.

[65] As Bourland testified, himself, Vink and van Wyk had sunk R 5,2 million between them in funding the Crystal Tree enterprise, which represented a loss of venture capital. On Man's version, however, his contribution was treated fundamentally differently from that of the other participants: if shares were not issued, he would be restored in full, while the other participants would bear their losses without recourse. That construction is difficult to reconcile with the commercial logic of the arrangement. As far as the obligations of the individual defendants are concerned, it is inherently improbable that the individual defendants would have agreed to expose themselves to the full downside risk of a failed venture while ensuring that Man was insulated from comparable risk through a right of full restitution of his financial contribution. It is even more improbable that UFF, a company with no shareholding in Crystal Tree and no entitlement to its profits, would have put itself at risk by guaranteeing to procure the issuing of Crystal Tree shares, as reciprocal obligation of Man's forfeiture of his income every four months for Crystal Tree's benefit, not its own, and thereby lay itself open to the claim Man has now brought when the shares were not delivered.

[66] In his evidence, Man advanced no plausible explanation why UFF would have assumed the same obligation which the individual defendants owed him to issue him shares in Crystal Tree, nor did he give evidence of what transpired in the August-September oral discussions with the individual defendants, which led to it also taking on that obligation, which was primarily that of the individual defendants. The evidence of any details of those discussions was absent from his account.

[67] His 'explanations' for UFF undertaking the obligation are based on his own assertions and inferences he drew. For example, he inferred that because UFF was the party giving effect to the salary sacrifice it followed it was also responsible for ensuring the delivery of the shares. He also assumed that whenever he spoke with the individual defendants he was speaking to them in their dual capacity as future co-shareholders in Crystal Tree and as directors of UFF. Thus, if there was an agreement that he was entitled to shares in Crystal Tree provided he sacrificed a portion of his earnings, UFF was bound not only to effect the salary deduction, which only it could have agreed to, but it also would provide the shares if asked to. He also believed it agreed to procure the shares for him because the special projects enhanced the performance of UFF investments. However, he conceded under cross-examination that the projects were for Crystal Tree and the financial benefit would inure to Crystal Tree and its shareholders. He also never testified to the effect that, without UFF warrantying that it could also be called upon to procure delivery of the Crystal Tree shares, he would not have entered the salary sacrifice agreement. In the absence of Man laying down an evidentiary basis for the assumption of a joint and several obligation on the part of UFF and the founder members to deliver his shares in Crystal Tree, the assumption of this obligation by UFF is improbable.

[68] The only alternative construction which would permit him to proceed against UFF alone in this court, is that that UFF separately agreed as part of his employment contract that it would procure the shares for him. However, he failed to provide details of any discussion with the individual

defendants in which they represented to him that UFF as his employer also undertook to ensure the delivery of his shares in Crystal Tree. When confronted with the draft shareholders' agreement which stated that *'Van Wyk shall procure that the company [Crystal Tree] shall allot and issue shares*' he agreed it did not impose that obligation on UFF, but nevertheless *'believed that UFF should ensure it happened'*.

[69] In conclusion, I am satisfied that Man has failed to establish that there was an agreement whether express, oral or tacit between himself, the individual defendants and UFF itself that he agreed to forfeit one quarter of his remuneration on the understanding that the individual defendants (either individually or jointly as a group) and UFF were jointly and severally liable to ensure he was issued with one quarter of the issued shares in Crystal Tree. Likewise, he has failed to establish that it was a binding term of this employment with UFF, that it would procure the Crystal Tree shares provided he had sacrificed one month's salary every four months.

<u>Conclusion</u>

[70] In light of the discussion, Man's claim against UFF must fail.

[71] On the question of costs, the claim is contractual in nature and there is no reason why costs should not follow the result[5].

<u>Order</u>

1. The Plaintiff's referral is dismissed.
2. The Plaintiff must pay the First Defendant's costs on Scale C, which costs include the cost of senior counsel for the duration of the trial, and any costs which might have stood over for later determination.

[5] *Baise v Mianzo Asset Management (Pty) Ltd* (2019) 40 ILJ 1987 (LAC) at paragraph 48.

[redacted]

R Lagrange

Judge of the Labour Court of South Africa.

Appearances:

For The Applicant:	Adv. F Rautenbach
Instructed by:	Carelse Khan Attorneys
For the Respondent:	Adv. R Stelzner SC
Instructed by:	STBB Attorneys