



(1) Reportable: Yes
(2) Of interest to other Judges: Yes

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

REPORTABLE

CASE NO: J429/24

In the matter between:

UNIVERSITY OF JOHANNESBURG

Plaintiff

and

ANDRIES HELANI

Defendant

Heard: 6 – 13 March 2026

Delivered: 21 August 2026

Summary: Claim for contractual damages from employee by the employer - alleged breach of contract by senior manager – alleged breach constituting fraud and corruption.

JUDGMENT

Introduction

- [1] The plaintiff brings this action under section 77(3) of the Basic Conditions of Employment Act No. 75 of 1997 ("BCEA") for damages arising from the defendant's alleged breach of his employment contract. Until his dismissal, the defendant was a senior manager closely involved in accrediting service providers that provide private student accommodation to the plaintiff's students. The plaintiff alleges that he assisted service providers that should not have been accredited in obtaining accreditation, in exchange for bribes and kickbacks.
- [2] The primary relief sought by the plaintiff is to recover, as damages, the amount of R18 184 863.62, which amount the plaintiff paid for non-compliant service providers - who were accredited with the assistance of the defendant.¹ In the alternative, the plaintiff sought R4 568 403,62, being the difference between the amount paid to the non-compliant service providers and the maximum number of beds those service providers had available. Alternatively, the plaintiff sought R3 238 896,06, being the irregular payments made to the defendant by the non-compliant service providers and other service providers.
- [3] However, before considering the merits, I must first consider certain preliminary issues.

¹ Amended Statement of Claim at para 9.7 – Pleadings Vol. 1 p15. Initially, the plaintiff claimed R17 106 614,10 but later amended this to claim the full amount it paid in relation to the accreditation of the two properties (allegedly accredited with the defendant's assistance), including the 6% fee levied by its payment agent (Fundi). See Supplementary and Quantification Report in Plaintiff's Trial Bundle Vol. 13 pp2074 – 2124 (to be read with Vol. 14 pp2240 – 2251). The evidence at trial indicated that the amount initially reflected in the statement of claim (R17 106 614,10) was incorrect – it should have been R17 093 771,80.

Preliminary issues

Condonation for late filing of heads of argument

- [4] After the parties' cases closed, on 13 March 2026, I directed the parties to file their heads of argument ("heads") on specific dates. I set the dates after discussing them with the parties' representatives, and they were generous. I directed the plaintiff to file its heads by 31 March, and the defendant by 14 April. I directed the plaintiff to file its replying heads, if any, by 22 April.
- [5] The defendant failed to meet its deadline. Instead, the defendant requested an extension. Given the circumstances and the lengthy period already granted, I declined the request. I directed the defendant to file its heads by 17 April and to seek condonation. The defendant did not comply and instead advised that it would seek to amend its statement of response.
- [6] Ultimately, the defendant filed its heads on 18 April and applied for condonation.
- [7] The reasons for the late filing of the defendant's heads relate to its recognition that its intended argument was limited by the pleadings. In the circumstances, this is insufficient. The defendant recognised the need to amend its statement of response months earlier. The defendant's previous representatives filed a notice of withdrawal on 12 February 2026, just shy of a month before the trial began. The defendant instructed new representatives on 13 February. On 20 February, the defendant's new representative contacted the plaintiff's attorney and mentioned possible amendments to the defendant's response to the statement of claim. Thereafter, the defendant applied for a postponement because his new legal team was unprepared. The application was dismissed, primarily because it was brought in bad faith.
- [8] Ultimately, because the defendant delayed filing its heads, the plaintiff filed its heads in reply on 11 May. While the defendant's delay in filing its heads was

improper, it is unnecessary to mulct it in costs. The prejudice to the plaintiff, if any, was minimal.

- [9] All things considered, it is in the interest of justice to condone the late filing of the defendant's heads and make no order as to costs.

Application to amend

- [10] The defendant filed a notice of intention to amend its statement of response on 16 April. In brief, the amendment sought to introduce allegations that:

10.1 The plaintiff suffered no patrimonial loss because the misappropriated funds belonged to NSFAS and such funds have not been claimed by NSFAS or repaid to it. Accordingly, the plaintiff lacks locus standi to bring the claim.

10.2 NSFAS has a direct and substantial interest in the dispute. Accordingly, the plaintiff was required to join NSFAS. This constitutes a "fatal non-joinder".

10.3 Fundi was the proximate cause of the loss because it had negligently paid the monies to Mahlatse Properties Management and Development (Pty) Ltd ("Mahlatse Properties"), though only Mahlatse Investments (Pty) Ltd ("Mahlatse Investments") was accredited.

- [11] Plaintiff objected to the proposed amendment on the basis that:

11.1 The amendment is sought in bad faith. It was brought after all the evidence was presented and the plaintiff had filed its heads. It was brought to delay the finalisation of the dispute. The amendment could have, and should have, been brought earlier.

11.2 The amendment is bad in law given that it seeks to establish contributory negligence on the part of the disbursing agent, Fundi, when contributory negligence is not a defence to a claim in contract.

11.3 The defendant seeks, impermissibly, to broaden the issues in dispute when these were narrowed in the pre-trial minute.

11.4 It is brought in defiance of two court directives issued to the defendant to file its heads.

[12] The defendant later applied to amend its statement of response. The background is important, and bears repeating. On 20 February, the defendant's attorney advised the plaintiff's attorney that the defendant may seek to amend his statement of response and requested the plaintiff's consent to postpone the trial. This request was repeated by the defendant's attorney during a telephone call on 4 March. During that conversation, the defendant's attorney raised the non-joinder of NSFAS and the plaintiff's alleged lack of standing. On 6 March, the first day of the trial, the defendant's counsel argued for a postponement *inter alia* on the basis that the defendant wished to amend his statement of response.

[13] Through the proposed amendment, the defendant, among other things, alleges that Fundi was negligent in paying monies to Mahlatsi Properties, though only Mahlatse Investments was accredited, and its negligence contributed to the harm to the plaintiff. This is a non-starter. Contributory negligence is foreign to our law of contract² unless the contract provides for it or negligence of the plaintiff was the sole cause of the harm. This is not alleged. Accordingly, the contention is bad in law.

² See *Thoroughbred Breeders' Association of South Africa v Price Waterhouse* (416/99) [2001] ZASCA 82; [2001] 4 All SA 161 (A); 2001 (4) SA 551 (SCA) (1 June 2001)

- [14] Through the pre-trial minute, the parties narrowed the issues for the court to determine. Our law is clear that parties are bound by the pre-trial minute, which has the status of a contract, and may resile from it only by raising defences available in the law of contract.³ The defendant makes out no contractual basis to resile from the minute.
- [15] In *Moolman v Estate Moolman and Another*⁴ the court held: “*The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is male fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed*”.
- [16] In *Sondorp and Another v Ekurhuleni Metropolitan Municipality*⁵ the Labour Appeal Court held that a court should exercise its discretion to allow amendments generously and seek to ensure the full ventilation of the dispute. The defining issue, apart from good faith, is whether the other party suffers prejudice that cannot be remedied with a costs order.⁶
- [17] I believe that the application to amend is brought in bad faith. The timing of the amendment is extremely suspect. The defendant first hinted at the amendment, and its content, in mid-February 2026. Absent any explanation for the delay, I am compelled to infer that the defendant delayed the amendment to ensure the maximum prejudice to the plaintiff. The defendant was no doubt aware that allowing the amendment would raise the possibility of reopening the case and calling further, or recalling, witnesses. I believe the amendment, and the delay in seeking it, was designed to obstruct the

³ See *Telkom SA SOC Ltd v Van Staden & Others* (2021) 42 ILJ 869 (LAC); *Chemical Energy, Paper, Printing, Wood and Allied Workers Union v CTP Ltd and Another* (2013) 35 ILJ 1996

⁴ 1927 CPD 27 at 29

⁵ [2013] 12 BLLR 866 (LAC)

⁶ See *MacDuff and Co. (In Liquidation) v Johannesburg Consolidated Investments Co. Ltd* 1923 TPD 309 at 310

finalisation of the dispute. A party cannot be permitted to frustrate the resolution of disputes in this manner.

[18] A party seeking to amend bears the onus to show that there will be no prejudice that cannot be cured by a costs order. If there is real doubt as to whether there will be prejudice, the amendment should be denied. In the present instance, allowing the amendment would likely require recalling witnesses or calling further witnesses. I note that the defendant has not given any undertakings not to seek to reopen its case and call further witnesses. Nor does it suggest that the plaintiff need not call further witnesses. In the circumstances, there is real doubt as to whether there will be prejudice to the plaintiff which cannot be cured by a costs order. The application must therefore be dismissed.

[19] There is no reason why the defendant should not bear the costs of the application. For these reasons the application falls to be dismissed, with costs.

Locus standi

[20] The defendant contends that the University is an agent of NSFAS and has no locus standi to sue on its principal's behalf absent authority to do so by cession. It cites *Sentrakoop Handelaars Bpk v Lourens and Another*⁷ in support of its argument. As explained below, I do not accept the argument.

[21] Even if one assumes that the University is in fact NSFAS's agent, *Sentrakoop* is not authority for the proposition that an agent can never sue on behalf of its principal absent a cession agreement. In *Sentrakoop*, although Marais J points out that, in general, an agent is not authorised to sue on behalf of the principal, the court points out that there are exceptions to this – such as where

⁷ 1991 (3) SA 540 (W)

there is an undisclosed principal or the principal gives the agent such authority.

- [22] Section 20(2) of the National Students Financial Aid Scheme Act (“NSFAS Act”) provides that when an agreement is concluded between NSFAS and a higher education institution, the purpose of such agreement⁸ is to authorise the institution to “administer” loans and bursaries on behalf of NSFAS.
- [23] The NSFAS Act does not define “administer”, but a meaning must be assigned to the term.
- [24] The interpretation of statutes is a unitary exercise considering the text, context and purpose, adopting an interpretation consistent with the Constitution where this is reasonably possible.⁹ The starting point is the text, and its “ordinary meaning”.¹⁰ The ordinary meaning of “administer” is to manage and be responsible for, a broad meaning.
- [25] There is nothing in the context or purpose of the relevant provisions which suggests that “administer” should be given a narrow meaning. One of the central purposes of the NSFAS Act, and the agreement between the institution and the NSFAS, is to advance education and provide access to those who are eligible to study at the institution but cannot afford it. A further important purpose is to ensure that all NSFAS funds are properly used and accounted for. Indeed, section 17A empowers the Minister to appoint an “administrator” for the NSFAS to “perform the functions of the NSFAS”. The NSFAS Act contemplates that an administrator would have wide powers. The

⁸ It is common cause that there is such an agreement between the University and the NSFAS, and the agreement authorises the University to “administer” the funds of the NSFAS. Clause 4.4 of the agreement states: “In terms of section 20 of the NSFAS Act, the institution hereby agrees to be a designated institution for the purposes of administering bursaries to students of that institution on behalf of NSFAS.”

⁹ *Cool Ideas 1186 CC v Hubbard and Another* (CCT 99/13) [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para [28]

¹⁰ *Kubanya v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at para [18]

same terms in the same legislation will usually bear the same or similar meanings. All this suggests that the word “administer” must be interpreted broadly. The plaintiff must account for NSFAS funds and make good any funds misappropriated. Accordingly, the plaintiff stands in the shoes of NSFAS and may conduct itself as if the funds are its own.

[26] In the circumstances, there is no merit to the defendant’s contention that the plaintiff lacks standing. Having disposed of the preliminary issues, I now turn to the merits.

Background facts

[27] The following facts are drawn principally from the pre-trial minute:

27.1 The defendant was engaged by the University as its Senior Director: Student Affairs from 1 January 2017 to 20 March 2024. His employment contract required that:

27.1.1 He must complete and submit a declaration of interests annually,

27.1.2 He must declare, in writing, any actual (or possible) conflict of interest with the University.

27.1.3 He must declare whether he, or any family member, had any personal interest in the activities of any third party with a relationship or potential relationship with the University through which he may receive any (direct or indirect) commercial benefit,

27.1.4 He must declare, in writing, whenever any new business, commercial or financial interest arises, which could raise a conflict (or possible conflict) of interest with the University.

27.2 On 30 October 2020, the defendant signed a declaration of interest form¹¹ and submitted it to the University. In it, the defendant stated that he did not have *“any interest in any activity of a third party that has a relationship or a potential relationship with the University as a result of which I may receive direct or indirect commercial benefit”*. He went on: *“However, I currently am exploring spheres of Tourism and Hospitality, Private Schooling, Consulting and Property Development”*.

27.3 The defendant made no further declarations of interest since 2020.

27.4 As a senior director, the defendant owed the plaintiff a fiduciary duty of loyalty, trustworthiness and good faith. In addition, his employment contract contained implied, alternatively, tacit terms that:

27.4.1 He was obliged to perform his duties diligently, with the care and skill which can reasonably be expected of a person with his knowledge and experience,

27.4.2 He was obliged to act in good faith, including the duty to work honestly and to desist from any form of nepotism or favouritism,

27.4.3 He was obliged to act within his authority and comply with the University's rules and policies,

27.4.4 He was obliged to desist from any form of collusion or unfair business practices,

¹¹ Pleadings Vol. 2, pp 289 - 292

27.4.5 He was obliged to promote honesty and integrity and look after and act in the best interests of the University,

27.4.6 He was obliged to protect the interests of the University, including by not making any secret profits at the University's expense and/or placing himself in a position where his own interest conflicts with his duties.

27.5 The relationship between NSFAS and the University is governed by the NSFAS Act and the agreement between them.¹² Several clauses in the agreement require the University to account to NSFAS for funds allocated to the institution and its students, while other provisions suggest the institution may incur liability to NSFAS for misused or misappropriated funds. The following clauses are relevant:

[8.9] Universities must submit accurate and complete data to NSFAS within the time frames set. If the data is incorrect or incomplete and results in students that are funded that should not be funded, or a student being paid in excess of the actual cost of study, the excess is for the institution's own account.

[15.11] The Parties agree that, where errors or deliberate misrepresentations are found on the part of the institution, that results in a student being overpaid, or being funded that should not have been funded, NSFAS will recover all monies disbursed erroneously, including any allowances directly from the institution..."

[16.2] Where incorrect information is provided by an institution (whether in error or deliberately) which results in NSFAS making erroneous

¹² Plaintiff's Trial Bundle Vol. 2 pp 188 – 208

funding decisions or paying a student incorrectly, the institution is liable for those costs.

27.6 The University, through its Student Affairs department, administered an accreditation process for external service providers which provide privately owned student accommodation (“POSA”) to students whom the University could not accommodate. Accredited POSAs may offer the University’s students accommodation in terms of their accreditation.

27.7 The defendant, in his capacity as Senior Director: Student Affairs, managed and oversaw the Student Affairs department. He was required to oversee the University’s dealings with student residences, including POSAs.

27.8 The POSA office, which was part of Student Affairs, coordinated the physical inspections required for the accreditation of POSAs.

27.9 Accredited POSAs must comply with the minimum requirements imposed by statute, i.e. the Policy on Minimum Norms and Standards for Student Housing at Public Universities¹³ (the “Minimum Norms and Standards”) and the University’s POSA Policy¹⁴ (the “POSA Policy”).

27.10 In 2021, the defendant submitted a memorandum¹⁵ to the Management Executive Committee (the “MEC”) through which he proposed that the MEC approve a deviation from the POSA Policy. One of the reasons advanced for the deviation was that the current policy *“has serious challenges which have a material impact on the efficiency and integrity of the business and process...”*.

¹³ Published in GN R897 GG 39238. See Plaintiff’s Trial Bundle Vol. 1 pp 79 – 107

¹⁴ Defendant’s Trial Bundle pp 39 – 69

¹⁵ Pleadings Vol. 1 pp 171 – 173

27.11 On or about 15 October 2021, the MEC approved the proposed deviation which substituted clause 9 of the POSA Policy.¹⁶

27.12 Thus, the accreditation process for the 2022 academic year was governed by the POSA Policy and the deviation therefrom. The accreditation process for the 2022 academic year envisaged:

27.12.1 The advertising of the need for POSA service providers,

27.12.2 The applicants for accreditation would seek accreditation of specific properties, and seek accreditation for a specific number of beds,

27.12.3 The applicants, whether owners of the property or operators of the property, and the properties themselves would be subject to an evaluation that would consider, among other things, proof of ownership (or occupancy), relevant documents from the Companies Intellectual and Property Commission, and any other requirements,

27.12.4 All documents in support of accreditation would be evaluated by the Bid Evaluation Committee ("BEC"),¹⁷

27.12.5 The properties would be physically inspected to confirm the accuracy of the information in the application form (including the

¹⁶ Pleadings Vol. 1 pp 167 – 169

¹⁷ It is common cause that the defendant was part of the Bid Evaluation Committee, and he participated in assessing the POSA applications during 2022. Refer to Plaintiff's Request for Admissions. Besides the defendant, the Bid Evaluation Committee also included the Executive Director: Expenditure. See clause 9.2.1.7 Pleadings Vol. 1 p168

bed count) and compliance with the relevant legal and regulatory requirements.

27.12.6 The inspections would be conducted by four different departments, namely Student Affairs, Occupational Health and Safety, Protection Services, and Property Management.

27.12.7 Following the inspections, three reports are generated, viz the so-called POSA report from the Student Affairs department, a report from the Occupational Health and Safety department, and a report from the Protection Services department. All three reports must recommend accreditation. The reports are submitted by the BEC to the Tender Committee¹⁸ which would either reject or approve accreditation (subject to the conclusion of a memorandum of agreement with the applicant for accreditation).

27.13 Notwithstanding the deviation, the defendant was still required to comply with his duties, including those identified in para. 27.4, in relation to:

27.13.1 The management and implementation of the accreditation process for POSAs,

27.13.2 His dealings with the Tender Committee,

27.13.3 His declaration of conflicts of interest,

27.13.4 His dealings with POSA service providers,

¹⁸ It was common cause that the defendant was not part of the Tender Committee during 2022. Refer to Defendant's Request for Admissions.

27.13.5 His disclosure to, and accounting for, the University for any monies paid to him directly by POSA service providers.

27.14 Prior to defendant's dismissal, the University had contracted with, and/or was contracted with, and/or had the potential to contract with the following POSA service providers:

27.14.1 Mahlatse Investments has as its director, or representative, Mr Stanley Nkele ("Mr Nkele"),

27.14.2 Mahlatse Properties whose directors, or representatives, are Mr Siphile Nhlane Khoza ("Mr Khoza") and Mr Nkele,

27.14.3 PS and Sons Accommodation (Pty) Ltd ("PS and Sons") whose directors or representatives include Mr Khoza.

27.15 During October 2021, the University advertised the Expression of Interest (RFP 41/2021) inviting interested POSA service providers to apply. On 15 November 2021, the tender process closed.

27.16 On 15 November, Mr Nkele submitted documentation in response to RFP 41/2021 in respect of two properties on behalf of Mahlatse Investments located at 35 Jorissen Street, Braamfontein ("Jorissen Street property") and 34 Bertha Street, Braamfontein ("Bertha Street property"). Collectively, they are the "two properties".

27.17 On 30 November 2021, the BEC evaluated the submitted documents for the Jorissen Street property, though there is no evidence to suggest that the BEC evaluated the documents for the Bertha Street property.

27.18 On 19 December 2021, Ms Malebo of the Tender Office emailed Mr Nkele various documents including the application forms, criteria for accreditation and procedures for accreditation. On 24 December, Mr Nkele emailed Ms Malebo various documents including completed application forms in respect of the two properties.

27.19 On 21 January 2022, the defendant sent an email to the chairperson of the BEC at the time, Mr. Trevor Van Noord.¹⁹ In his email, the defendant makes several telling comments in relation to the accreditation process:

27.19.1 He refers to his duty to communicate with the inspection teams to identify the properties to be inspected,

27.19.2 He refers to his need to “direct” the inspection teams,

27.19.3 He suggests that the inspection teams have been reporting to him,

27.19.4 He has the “*duty to manage and account for the process and the outcomes*”.

27.20 On 19 January, the two properties were allegedly inspected by Student Affairs, Occupational Health and Safety, Protection Services and Property Management. They recommended the two properties for accreditation.²⁰ The inspection reports reflect that Mr Goodman Mathonsi, as the POSA Administrative Assistant, attended both inspections.

¹⁹ Plaintiff’s Trial Bundle Vol. 4 pp546 – 547

²⁰ See inspection report for 34 Bertha Street is at Plaintiff’s Trial Bundle Vol. 3 pp448 – 462 and that for 35 Jorissen Street is at pp463 - 477

27.21 On 18 February 2022, the defendant, through a report from the BEC, presented the two properties to the Tender Committee for approval.

27.22 On 20 February 2022, the Tender Committee provided round robin approval for various properties, including the two properties. The accredited bed capacity for the Jorissen Street property was 748, and for the Bertha Street property it was 693.

27.23 On 21 February 2022, Ms Malebo emailed Mr Nkele and advised him that the two properties were accredited, subject to the conclusion of a memorandum of agreement.

27.24 On 28 February 2022, the defendant emailed Mr Matukane, the Senior Director: Financial Governance and Revenue, and confirmed that the two properties had been approved and could be processed for payment.

27.25 On 3 March 2022, the Tender Committee convened for a formal sitting and confirmed that round robin approval had been given in respect of the two properties.²¹

27.26 On 18 March, Ms Van Wyk of UJ emailed Ms Elmarie Britz, the Manager of Operations and Customer Support at Fundi Capital (Pty) Ltd ("Fundi") and attached a list of accredited POSA service providers. Fundi is the payment merchant which facilitates payment of funds from the University to POSA service providers. The two properties were included on the list.

²¹ The minutes of the Tender Committee meeting noted "*that the bid evaluation evaluated all applications in accordance with requirements*". See Plaintiff's Trial Bundle Vol 3 p535

27.27 On 18 March, Mr Nkele emailed Ms Mokgobinyane of the Tender Office a completed memorandum of agreement in respect of the Bertha Street property.

27.28 Pursuant to the accreditation of the two properties, Fundi entered into a merchant agreement with Mahlatsi Properties.²² The agreement included an implied term that the parties would act in good faith, and that Mahlatsi Properties would charge only for the students it accommodated.

27.29 During August, the University appointed Nexia SAB&T (“Nexia”) to investigate the 2022 accreditation process.

27.30 On 4 September, Mr Nkele emailed Mr Mathonsi, the POSA inspector who inspected the two properties, and advised him that the bed capacity of the two properties was less than half of what was reflected against their code. He also advised that some students had signed lease agreements with Mahlatse Investments but were not residing there. Mr Mathonsi replied to the email and copied the defendant.

27.31 On 4 October 2022, Ms Makinta, the Executive Director: Expenditure, compiled the POSA – Awarding report.²³ She recognised that the defendant sat on the Technical Evaluation Panel and led the accreditation process.²⁴ By reference to clauses 9.1.5 and 9.1.7 of the deviation, Ms Makinta pointed out that the BEC was required to consider the inspection panels' reports.

27.32 On 4 November 2022, several students engaged in a protest outside the Jorissen Street property demanding R500,00 per student - monies the

²² Plaintiff's Trial Bundle Vol. 5 pp740 – 772

²³ Plaintiff's Trial Bundle Vol. 2 pp267 - 282

²⁴ Plaintiff's Trial Bundle Vol. 2 at p271

landlord had allegedly promised them. The defendant emailed Dr Vukuza, his line manager, advising that the students' demands were incoherent but that the matter should be brought to the investigators' attention.

27.33 Fundi, based on the accredited capacity of 1441 beds of the two properties, made payment of R17 106 614,10 to Mahlatsi Properties and/or Mahlatse Investments between March 2022 and October 2022.²⁵

27.34 Following the Nexia investigation, the University commissioned a more in-depth investigation into the accreditation process through ENS Attorneys.

27.35 Through the investigations, the following became evident: -

27.35.1 The documentation submitted by service providers in respect of the two properties did not meet requirements,

27.35.2 In respect of the Jorissen property, although a lease agreement did exist between the owner (Dunwell Properties) and Mahlatse Investments, there were other parties to the lease – Phomolo Residence and PS and Sons.

27.35.3 In respect of the Bertha Street property, there was no lease agreement between the owner (Dunwell Properties) and Mahlatse Investments. The only lease is between Phomolo Residence and PS and Sons.

²⁵ Pre-trial minute at para 3.7.8

27.35.4 The application forms for the two properties were incomplete, and several compulsory documents fell short of requirements or were absent.

27.35.5 For the Jorissen Street property, Mahlatse Investments applied for 748 beds (which the inspection confirmed), but the investigation revealed the true bed capacity was 125 beds.

27.35.6 For the Bertha Street property, Mahlatse Investments applied for 693 beds (which the inspection confirmed), but the investigation revealed that the true bed capacity was 174 beds.

27.35.7 It was unclear if Protection Services inspected either of the two properties and, if so, who conducted it.

27.35.8 Despite there being adverse findings in respect of Occupational Health and Safety for the two properties, such findings were not sent to Mahlatse Investments, and there was no evidence that the properties were compliant upon accreditation.

27.36 It is common cause that the defendant received several payments into his personal bank account directly from Mahlatsi Properties and/or Mahlatse Investments and/or directly from Mr Khoza. These payments include the following:

27.36.1 On 3 March 2022, the defendant received an amount of R30 000,00 with "*Siphiwe K*" as a reference;

27.36.2 On 7 April 2022, the defendant received confirmation that R29 000,00 had been paid by Mahlatsi Properties to Mitchell

House Preparatory School in respect of school fees for the defendant's son;

27.36.3 On 29 October 2022, the defendant received an amount of R9 000,00 with "SK" as a reference;

27.36.4 Between 1 March 2021 and 27 March 2024, the defendant received (from Mahlatse Investments and/or other POSA service providers) 366 payments amounting to R3 238 896,06.²⁶

27.37 Despite receiving the payments, the defendant failed at any stage to declare his outside business activities, his relationship and dealings with Mr Khoza (or any of the entities related to him), Mr Nkele (or any of the entities related to him) or his dealings with any POSA service providers.

Identity of the witnesses

[28] The plaintiff called Ms Ntombizodwa Faith Hlatshwayo, Mr Mthetheleli Jafta, Mr Christiaan Powrie, Ms Elmarie Britz, Mr Jaco Spies, Mr Siphamandla Makhaya and Ms Suad Jacobs. Mr Spies and Ms Jacobs testified as expert witnesses.

[29] The defendant called Ms Mukhathutshelwa Ngobeni, Mr Tebogo Enock Mmethi and the defendant himself, Mr Andries Helani.

²⁶ This is common cause – see para. 3.8.4 of the pre-trial minute.

See also para 60 of defendant's statement of response, where he states: "*Without accepting wrongdoing or waiving his rights, and in light of him not having financial resources to pursue the case and to provide for his family, the Defendant agrees to abandon the dismissal case, and to pay an amount of R3 238 896. 06 less than the amounts which are not linked to Mahlatse Investments, SA Mahlatsi Properties and Development, Nonie Rashama and PS and Sons.*" The plaintiff argues that this is an admission of liability for the amount of R3 238 896,06 less the amount of R486 000,00 which is linked to Mahlatse Investments and related entities.

The plaintiff's witnesses

Testimony of Ms Ntombizodwa Hlatshwayo

[30] Ms Hlatshwayo was formerly enrolled at the University and funded by NSFAS. Funded students receive an accommodation allowance or a travel allowance. Students cannot receive both. The fixed annual travel allowance is R7 500,00.

[31] During 2020 and 2021, she resided in the University's on-campus residence, for which she received an accommodation allowance. During 2022, she decided to stay at home. Accordingly, from that time, she was entitled to a travel allowance but not an accommodation allowance.

[32] During 2022, NSFAS delayed payment of the travel allowance. Two individuals contacted Ms Hlatshwayo, one of whom was a "Mr Chuck" (who she was later informed was Mr Khoza), and advised her to register at a Mahlatse residence. Mr Chuck promised her that she would receive a monthly travel allowance of R1 700,00 if she registered with the residence. She agreed to do so.

[33] Ms Hlatshwayo was told to upload a lease agreement with the Mahlatse residence onto the University's U-Link portal, which she did. In addition, she was added to a WhatsApp group called "MA REZ" that included other students.

[34] Thereafter, Ms Hlatshwayo was paid a lump sum amount of R8 500,00 during June 2022, and payments of R1 700,00 during July, August, September and October 2022.

[35] During November 2022 (when Fundi stopped payments to Mahlatse Investments and/or Mahlatsi Properties), Ms Hlatshwayo was asked to email the University stating that she had been evicted from the Mahlatse residence.

She sent the email, knowing this was false. She had never stayed at the Mahlatse residence at any time during 2022.

- [36] After graduation, she experienced a crisis of conscience and decided to confess. Accordingly, on 20 November 2025, she emailed the University to confess that she had deceived it.²⁷ In her email, Ms Hlatshwayo stated: *“In 2022, my former NSFAS bursary covered my accommodation fees that time by paying to the Mahlatse residence, but I never stayed there the whole academic year of 2022...I’m not sure if this was illegal, corruption or not. If it was illegal, I repent, and I’m sorry for being a partaker.”*

Testimony of Mr Mthetheleli Jafta

- [37] He works as a security officer for the University.
- [38] On 19 January 2022, he was instructed to conduct physical inspections of various properties in Soweto, together with two other colleagues. After completing the inspections in the afternoon, he was told that two other properties (the Jorissen Street and Bertha Street properties) still needed inspection, but it would take time to transport him to Braamfontein and back.
- [39] To avoid further inspections, his colleagues handed him security checklists and suggested that he write his name there, which he did. He did not sign the checklists, and his signature, which now appears on the checklists, was forged. He did not enter any other information on the checklists when he entered his name, and no one entered any information on the checklists in his presence. He did not inspect the two properties.

²⁷ Plaintiff’s Trial Bundle Vol. 13, pp 2236 – 2237

[40] Mr Jafta accepted that it may constitute fraud when someone forged his signature, but he has not opened any case for fraud.

Testimony of Mr Christiaan Powrie

[41] He is a senior forensic investigator engaged by Nexia and experienced in fraud and corruption investigations.

[42] During August 2022, the University approached Nexia to investigate the POSA accreditation process.

[43] He was asked to conduct a physical bed count at the two properties, and he did so with a colleague. The University officials, who had allegedly conducted the original inspection, were supposed to attend with them but failed to arrive. The physical inspection was therefore carried out in their absence.

[44] When they arrived at the Jorissen Street property, they met with three individuals managing the building, including a certain Ms Yumna Mohamed. She told them that it was strange that they were there because UJ had no students residing at the property. Furthermore, Ms Mohamed stated that the property could not accommodate the number of beds the University had accredited it for. She also stated that Mahlatse Investments did not own or manage the property. Dunwell Properties owned and managed it. Mr Powrie conducted a physical inspection of the property, moving floor by floor. He found only 125 beds and found that the property could not accommodate the 748 beds for which it had been accredited. Mr Powrie could not find any students who were studying at UJ.

[45] Then Mr Powrie and his colleague inspected the property at Bertha Street, again moving floor by floor. They found only 174 beds there and concluded that

the property could not accommodate the 693 beds, for which it had been accredited. Mr Powrie found only one student who was studying at UJ. It was unclear from his testimony whether that student resided there under a lease with Mahlatse Investments, but this is unlikely in all the circumstances.

Testimony of Ms Elmarie Britz

[46] She is employed by Fundi as its Head of Operations. During 2022, she was its Manager for Operations and Customer Support. Previously, she had worked for the University as its Manager: Student Finance, working with NSFAS funds. Ms Britz confirmed that for several years, including the periods in question, NSFAS granted bursaries, not loans.

[47] UJ students apply to NSFAS for funding. When NSFAS agrees to fund a student, it pays the funds to the University, which must be used in accordance with the agreement between the University and NSFAS.²⁸ She explained, by reference to section 20(2) of the NSFAS, that the relationship is one in which the institution “administers” NSFAS funds.

[48] The University does not disburse the funds directly. It uses Fundi to distribute the funds to students and accredited merchants. Fundi is an agent of UJ, operating under a service level agreement.²⁹ UJ pays Fundi a 6% fee on monies disbursed to merchants.

[49] Ms Britz further explained that funded students receive a card, with funding being allocated to different “pockets” (e.g. food, accommodation). Students swipe the card at accredited merchants, which authorises Fundi to pay the merchant. Fundi pays the accredited merchants twice weekly.

²⁸ Plaintiff’s Trial Bundle Vol. 2 pp188 – 208

²⁹ Plaintiff’s Trial Bundle Vol. 2 pp209 – 247

[50] During 2021, following an investigation, Ms Britz concluded that PS and Sons was engaged in fraudulent conduct using bogus leases. On 27 September 2021, Ms Britz emailed her investigation report³⁰ to the defendant and other UJ employees but received no response. In her report, Ms Britz identified Mr Nkele as the name on the bogus leases, and she identified the email address used to commit the fraud as Siphiwe90@yahoo.com. She also identified one of the fraudulent invoices as emanating from “Siphiwe N Khoza Accommodation”.

[51] Thereafter, Ms Britz received complaints from students allegedly residing at PS and Sons and Siphiwe N Khoza Accommodation. She followed up on her earlier report by emailing Mr Mmethi and copying the defendant.

[52] On 1 March 2022, the defendant advised the University not to accredit PS and Sons due to the concerns raised by Ms Britz. However, he did not flag Siphiwe N Khoza Accommodation, nor did he flag Mr Khoza himself.

[53] After the Tender Committee accredited the merchants, the University sent Fundi a list of accredited merchants, including Mahlatse Investments. On behalf of Fundi, she signed a merchant agreement with Mahlatsi Properties, with Mr Nkele acting as Mahlatsi Properties’ representative.

[54] By reference to the Student Analysis³¹ between March and October 2022, Fundi paid Mahlatsi Properties and/or Mahlatse Investments R17 093 771,80. This excludes the 6% fee to which Fundi is entitled, which Fundi received. On 27 October 2022, due to the ongoing investigations into the accreditation process, Fundi stopped further payments.

³⁰ Plaintiff’s Trial Bundle Vol. 13 p2177

³¹ Plaintiff’s Trial Bundle Vol. 13 p2212

Testimony of Mr Jaco Spies

[55] As previously mentioned, Mr Spies testified as an expert.³² He is a chartered accountant and a director of Facct Forensic Consulting, with more than 30 years of experience in forensic accounting. The defendant accepted that he was entitled to testify as an expert.

[56] He drafted the flow of funds report³³ which he confirmed in his evidence. To draft the report, he analysed various bank accounts including those of the defendant, Mahlatsi Properties, Mahlatse Investments, Messrs Nkele and Khoza. Through subpoenaed bank accounts, he identified the source and recipients of various payments reflected in those accounts.

[57] Mr Spies testified that, on his analysis of the bank accounts, Fundi paid R17 093 771,80 to Mahlatsi Properties and/or Mahlatse Investments between March and October 2022.³⁴

[58] He testified that the defendant was paid R457 000,00 by deposit into his bank accounts, between 2 March and 12 November 2022, by Mr Khoza and Mahlatse-related entities.³⁵

[59] Mr Spies found a significant synchronicity between when Fundi made payments (to Mahlatsi Properties and/or Mahlatse Investments) and when the defendant received payments (from Mr Khoza, Mahlatse Investments, or Mahlatsi

³² See notice of expert evidence at Plaintiff's Trial Bundle Vol. 15 p2299 – 2300

³³ Plaintiff's Trial Bundle Vol. 15 pp2313 – 2358

³⁴ Plaintiff's Trial Bundle Vol. 15 pp2322, para 5.1, see also appendix C in Vol. 16 p2382 - 2383

³⁵ Plaintiff's Trial Bundle Vol. 15, p2324 – table 2. The defendant did not dispute that any of these payments were made to him, or that they were made by Mr Khoza or Mahlatse-related entities.

Properties).³⁶ Payments to the defendant occurred within days of Fundi paying Mahlatsi Properties and/or Mahlatse Investments.

[60] In addition, Mr Spies identified payments from Khoza-related bank accounts to Mr Mmethi, Mr Mathonsi³⁷ and Ms Pilenyane.³⁸ Notably, Messrs Mmethi and Mathonsi, who worked in Student Affairs, reported to the defendant.

[61] Mr Spies identified numerous payments to 141 students in 2022, amounting to R2 203 292.00, made from the bank accounts of Mahlatsi Properties, Mahlatse Investments, PS and Sons and Mr Khoza.

Testimony of Mr Siphamandla Makhaya

[62] Mr Makhaya testified that he is a senior lecturer at the University and sits on its Tender Committee, which approved the accreditation of the two properties in 2022.

[63] On 18 February 2022, the Tender Committee received a report, signed by the defendant, containing an Excel spreadsheet listing 129 properties recommended for accreditation. The report recommended accrediting the property at Bertha Street for 693 beds and the property at Jorissen Street for 748 beds.³⁹

[64] On 20 February 2022, the Tender Committee provided round robin approval for the accreditation of the 129 properties, including the two properties. The Tender Committee was unaware of any irregularities relating to the two properties; for

³⁶ Plaintiff's Trial Bundle Vol. 15 pp2324 – 2325 – table 3 of the flow of funds report

³⁷ Mr Mathonsi was employed in Student Affairs and involved with conducting the physical inspections in respect of the two properties.

³⁸ Ms Pilenyane was employed as the manager of NSFAS funds and involved with payments to POSA merchants.

³⁹ Plaintiff's Trial Bundle Vol. 3 pp 517 – 521 (with the two properties identified at p520).

example, that the true bed count differed significantly from the number of beds it had accredited. The Tender Committee was unaware that the defendant was receiving monies from Mr Khoza and service providers. If he had been aware of these issues, he would have ensured that the Tender Committee did not accredit the two properties.

[65] Mr Makhaya confirmed that, in deciding to accredit the two properties, the Tender Committee relied on the defendant's report. As Project Leader, the defendant drafted and signed the final report recommending accreditation of the two properties. The Tender Committee did not conduct its own inspections because this was supposed to have been done in the inspection phase and evaluated by the BEC. The report the defendant sent to the Tender Committee represented that the inspections had occurred, the bed numbers confirmed, and the requirements for accreditation satisfied.

[66] On 3 March, the Tender Committee convened and confirmed the round-robin approval that had earlier been taken.

Testimony of Ms Suad Jacobs

[67] The University appointed ENS to further investigate allegations of misconduct and corruption in the accreditation process. ENS appointed Ms Jacobs as its lead investigator.

[68] Ms Jacobs has 26 years of forensic experience and has served with the National Prosecuting Authority, the Special Investigating Unit, and Deloitte. Her expertise was not challenged.⁴⁰

⁴⁰ See Notice of Expert Evidence, Plaintiff's Trial Bundle Vol. 13 pp 2059 – 2060

[69] The investigation by ENS was prompted by a whistleblower, who revealed that several UJ employees - among them the defendant - had received kickbacks for assisting non-compliant POSA providers to obtain accreditation in 2022.⁴¹

[70] Ms Jacobs interviewed the defendant on 14 February 2024. The transcript of that interview was tendered into evidence without any objection as to its accuracy. During the interview, the defendant stated that he knew Mr Khoza was involved with PS and Sons⁴² but did not know he was involved with Mahlatse Investments until Nexia informed him.⁴³

[71] Ms Jacobs described the defendant as an important figure in the accreditation process. She explained that, at the defendant's request, the accreditations were run as a tender exercise, unlike in earlier years when Student Affairs would have managed the entire process.

[72] Despite the deviation, as a senior manager and as a member of the BEC, the defendant remained central to the accreditation process. The defendant received the inspection results (compiled by his subordinates) and prepared the final report for the Tender Committee. As Project Leader, save for decisions taken at the Tender Committee, the defendant managed the entire accreditation process. This was evidenced by his own email.⁴⁴

[73] She criticised the BEC. No evidence showed that the BEC evaluated the documents for Bertha Street; if it had, it could not have recommended accreditation. The documents for the Jorissen Street property were, in her view, equally deficient.

⁴¹ Plaintiff's Trial Bundle Vol. 11 pp 1830 – 2014

⁴² Plaintiff's Trial Bundle Vol. 11 p1950

⁴³ Plaintiff's Trial Bundle Vol. 11 p1952

⁴⁴ Plaintiff's Trial Bundle Vol. 4 pp546 – 547; see also para 28.19 above

[74] She noted that Nexia's investigation revealed a true bed capacity of 174 at the Bertha Street property and 125 beds at the Jorissen Street property — a total of 299 beds. Accreditation for 693 and 748 beds at the two properties should never have been granted. In her opinion, Mr Mathonsi, who conducted the inspections, colluded with Messrs Nkele and Khoza to inflate the accredited bed numbers. Bank statements showed that Mr Mathonsi received payments from Mr Khoza.

[75] The investigation⁴⁵ by ENS uncovered several payments to the defendant including amounts of R30 000,00; R29 000,00 and R9 000,00 from Mr Khoza or Mahlatsi Properties.

[76] The timing of the payments to the defendant suggests they were made to induce him to assist in accrediting non-compliant properties, and to reward his unlawful conduct. The first direct payment - R70 000,00 - was made on 2 March 2022,⁴⁶ just days after the Tender Committee first approved the accreditation of the two properties. The further payment of R30 000,00 followed on 3 March, shortly after the Tender Committee confirmed its earlier round-robin approval.

[77] During the interview, the defendant gave the following explanations for the payments:

77.1 He had purchased a property located at Marloth Park from Mr Mugwena and sold it to Mr Khoza for R220 000,00. However, despite the statutory requirements⁴⁷ that such transactions be recorded in writing, he could produce neither a deed of sale nor proof that the property had ever been transferred to him or to Mr Khoza.

⁴⁵ See Investigation Report: Plaintiff's Trial Bundle Vol. 1 pp 1-49

⁴⁶ Plaintiff's Trial Bundle Vol. 15 p2324 (See Flow of Funds Report by J Spies)

⁴⁷ See Alienation of Land Act No. 68 of 1981

77.2 He borrowed money from Mr Khoza because of severe financial hardship, undertaking to provide proof of repayment - which he never did.

[78] Ms Jacobs testified that, as an employee of a higher education institution, the defendant was statutorily obliged to file an annual declaration of interest, a duty also embedded in his employment contract. Apart from the 2020 declaration, he failed to submit any further declarations. However, even the 2020 declaration did not disclose his dealings with Mr Khoza, nor that Mr Khoza and his entities were POSA service providers.

[79] The defendant knew, or reasonably ought to have known, that Messrs Khoza and Nkele were involved with fraudulent activities in relation to the POSA scheme given that, as early as September 2021, the defendant received Ms Britz's report detailing the fraud committed by these individuals through PS and Sons. Yet the defendant did not flag them, or their involvement with Mahlatse Investments and Mahlatsi Properties.

Defendant's witnesses

Ms Mukhathutshelwa Ngobeni

[80] Ms Ngobeni is the Senior Manager: Student Finance at UJ and responsible for administering NSFAS and other bursaries. She explained that a memorandum of agreement governs the relationship between NSFAS and the University. With reference to the agreement, she explained that the University must administer NSFAS funds correctly; it cannot claim for students who should not have been funded, and if errors or misrepresentations appear in the University's claims submitted to NSFAS, the University bears the risk.

- [81] Funded students must complete a consent form stating whether they commute to UJ, live on campus, or reside at a POSA. If they reside at a POSA, they must upload a lease agreement and an invoice onto the U-Link portal. Student Finance officials review these documents to confirm the POSA provider is accredited and that the address on the invoice matches the accredited list.
- [82] Fundi, she explained, disburses student allowances on UJ's behalf, managing and disbursing NSFAS and other bursary funds. Fundi and the University systems are integrated: Fundi can tell when the University has loaded allowances onto the system. The University submits claims to NSFAS through a dedicated portal.
- [83] POSA service providers have no direct relationship with NSFAS. They have a commercial relationship with the University through the accreditation process, while students apply directly to NSFAS for funding.
- [84] Ms Ngobeneni confirmed that she, and the Student Finance office generally, were aware from at least 2021 of fraudulent practices in the POSA environment whereby bogus leases and invoices were submitted for payment.

Mr Tebogo Mmethi

- [85] Mr Mmethi was the POSA coordinator within Student Affairs and a member of the BEC. His role was to evaluate applications, arrange physical inspections for shortlisted properties, collate the inspection reports, and submit them to the defendant. He stated that different teams conducted the inspections of the two properties than those scheduled.
- [86] Mr Mmethi described the BEC's work as a tick-box exercise - checking whether the correct documents had been completed and submitted, without examining

them for compliance or authenticity. He conceded the BEC had not evaluated any documents relating to the Bertha Street property.

[87] Initially he denied any interest in this dispute but later acknowledged that the University is claiming damages from him in separate proceedings, and the outcome of this dispute could affect the claim against him.

[88] He admitted that he was aware, from September 2021, of the fraudulent activities of PS and Sons. He had received multiple complaints from students and from Ms Britz, showing that students were being manipulated into signing bogus leases and creating bogus invoices. He was responsible for receiving and investigating such complaints and reporting to his manager, the defendant.

[89] Under cross-examination, he was questioned about deposits totalling R240 000,00 paid into his account from individuals or entities which the University alleged were service providers. Mr Mmethi admitted the deposits but claimed that they related to his involvement with a football club and its activities, including a football tournament. This was thin on detail.

[90] Mr Mmethi confirmed that the defendant paid him R2 000,00 in 2024, which he said was for petrol after he had collected the defendant following a car accident.

[91] He confirmed that the defendant was the Project Leader and had prepared the final report to the Tender Committee.

Testimony of the defendant

[92] He was the Senior Director: Student Affairs until his dismissal in 2024.

[93] He attempted to distance himself from the accreditation process by testifying that:

93.1 In 2022, at his own request, management moved the accreditation process from Student Affairs to Procurement to safeguard the integrity of the process and incorporate the diverse skills required for the tender process. The deviation reduced his role and powers because he was no longer chair of the evaluation panel but an end-user in the process. Following the deviation, the “process owner” was the Executive Director of Finance, Ms Sarah Makinta.

93.2 He was not a member of the inspection panel, and the inspection reports were submitted directly to Mr Mmethi. He conceded that the bed capacity for the two properties was incorrect but asserted that he did not know this. He had no oversight role over the inspections.

93.3 Although he sat on the BEC, he was not its chair; Ms Makinta chaired, or Mr Trevor Van Noord in her absence.

93.4 The BEC was split into four groups, each conducting a tick-box exercise. He did not see or assess the documents Mahlatse Investments submitted.

93.5 His role on the BEC was limited to collating the inspection reports from various departments and submitting them to his line manager, Dr Vukuza.

93.6 He admitted that he did not check whether the BEC had evaluated the two properties.

[94] He received Ms Britz's September 2021 report which identified Messrs Khoza and Nkele as engaging in fraudulent conduct. He knew that Mr Khoza owned PS and Sons, which Ms Britz had flagged for fraud. He admitted that, while he did flag PS and Sons, he did not flag Mr Khoza or Mr Nkele. When asked why he did not flag those individuals, he testified that he acted on the advice of the Office of the General Counsel ("OGC"). He did not describe the nature of the advice given or the person who allegedly gave it.

[95] He prepared two reports for the Tender Committee (though it is unclear whether he submitted the first report). The first report, which he alone signed, stated that "*the accreditation process, particularly the inspection phase, had a very (sic) close monitoring in terms of applying the policy on privately owned student accommodation.*" That sentence was removed from the second and final report. The defendant denied removing the sentence because he knew it was false. Nevertheless, the defendant could not explain why he had removed the sentence.

[96] He did not scrutinise the list of properties recommended for accreditation, though he prepared the final memorandum to the Tender Committee.

[97] He admitted that, if he had disclosed the payments to him or his association with Mr Khoza, the Tender Committee would not have accredited the two properties.

[98] He did not dispute the accuracy of the flow of funds report presented by Ms Spies but denied that any of these payments constituted kickbacks or bribes. He admitted receiving the numerous payments identified from Mr Khoza and/or Mahlatsi Properties.

[99] He testified that he had borrowed money from Mr Khoza because of his financial difficulties, to help him pay lobola and for his wedding. He sold the

Marloth Park property (which he bought from Mr Mugwena) to Mr Khoza to raise money. He requested and received a loan from Mr Khoza to help him pay for his child's school fees, in the sum of R29 000,00. Mr Khoza, he explained, was his friend; they met in 2019 on a holiday trip to Marloth Park organised by Mr Mugwena.

[100] He admitted receiving R30 000,00 from Gezani Investments, an accredited service provider, but maintained this was a personal issue and that he was not required to disclose it to UJ. The declaration of interest form, he argued, did not require him to declare loans from service providers made to him in his personal capacity. He did not disclose any of the abovementioned payments to the University or the Tender Committee.

[101] He denied that the tender he had made in his statement of response amounted to an admission of guilt; he simply lacked the funds to litigate.

Defendant's defences

[102] In the pre-trial minute, the court is required to decide whether the claim against the defendant should be dismissed for the following reasons:

102.1 The plaintiff failed to prove any breach of his contractual obligations,

102.2 The defendant was not required to disclose his dealings with Mr Khoza, Mahlatsi Properties, or other service providers, as these were private,

102.3 During the 2022 accreditation process, the defendant performed only an administrative role while the decision-making rested with his line manager, Dr Vukuza, and the Tender Committee,

[103] The defendant submitted that while most of the monies paid to Mahlatse Properties or Mahlatse Investments belonged to NSFAS, some were bursaries from others. Further, he argued that no cession exists between NSFAS and the defendant, and that NSFAS made no claim against the University. It is trite that the factual and legal issues before the court are those in the pre-trial minute, which reflects the scope of the disputes that the parties have placed before the court for determination. The court need not determine issues that are not before it, however interesting they may be.⁴⁸ Despite this, in contractual claims where the plaintiff seeks damages, it must prove its damages. Accordingly, while I make no findings on factual issues raised during argument alone, I must still consider whether the plaintiff has proved its damages and, if so, the quantum.

[104] The defendant's defences, referred to in para 102, are canvassed in the context of the legal issues which arise.

Factual disputes

[105] The cross-examination of the plaintiff's witnesses was, for the most part, brief.

[106] Significant aspects of the testimony of Mr Christiaan Powrie, Ms Elmarie Britz, and Mr Jaco Spies went unchallenged. The defendant did not put to Mr Powrie that any UJ students resided at the two properties. He did not challenge the evidence that the bed count at the two properties was falsified. He did not put to Ms Britz, Ms Jacobs or Mr Makhaya that, during the accreditation process, he was unaware that Mr Khoza was a service provider or involved with Mahlatse Investments. He did not put to Mr Makhaya that he only played an administrative role. He did not dispute Mr Makhaya's evidence that the two properties would not have been accredited if the Tender Committee was aware

⁴⁸ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para [15]; *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) at paras [13] and [14]

of all the facts. He did not deny that any of the payments Mr Spies testified were made to him, or that Mr Khoza and service providers made them. Nor did he dispute that several of the payments were made during the accreditation process.

[107] It is trite that if a point in dispute is left unchallenged in cross-examination, the court may accept the unchallenged evidence as correct.⁴⁹ Thus, I accept the unchallenged evidence of the abovementioned witnesses.

[108] Nevertheless, I must still resolve any irreconcilable versions that do present. To do so, I must consider the witnesses' credibility, reliability, and the probabilities.⁵⁰ As Margo J put it in *S v Civa*⁵¹:

“The evidence must be weighed as a whole, taking account of the probabilities, the reliability and opportunity for observation of the respective witnesses, the absence of interest or bias, the intrinsic merits or demerits of the testimony itself, any inconsistencies or contradictions, corroboration, and all other relevant factors.”

[109] For the reasons set out below, the factual disputes, though limited, which did present themselves must be resolved in plaintiff's favour. Before explaining this, it is important to note that all the evidence was weighed, in the context of the probabilities, the reliability of the witnesses, the presence or absence of inconsistencies, corroboration, and all other relevant factors. In brief, the reasons why the limited factual disputes were resolved in the plaintiff's favour are:

⁴⁹ *President of the Republic of South Africa v South African Rugby Football Union and Others* 2000 (1) SA 1 at paras [62] and [63]

⁵⁰ *Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para [5]

⁵¹ 1974 (3) SA 844 (T) at 846

109.1 Although the probabilities are explored in greater detail later, it suffices to mention that the inherent probabilities weighed heavily in favour of the plaintiff. This negatively affected the defendant's credibility. For instance, the defendant's version that he did not know Mr Khoza was involved with Mahlatse Investments was improbable. This was his friend, from whom he was borrowing money, and to whom (on his version) he was selling a property. The defendant clearly had insight into Mr Khoza's business dealings. The defendant's version that he believed that the declaration of interests did not apply because he accepted monies in his personal capacity is not only improbable but remarkable. The defendant is a skilled and educated man. He knew that the purpose of the declaration was to avoid a conflict between his personal interests and his fiduciary duties to the University. The defendant's version that he purchased a property, and then sold that same property to Mr Khoza, is also improbable. There is no evidence of such a sale, though the sale of property is required by statute to be in writing. These versions are so far-fetched that they diminished his credibility.

109.2 The testimony of the plaintiff, and his witness, Mr Mmethi, could not be considered unbiased given their interest in the matter.

109.3 Though our law does not always require corroboration, it goes without saying that the defendant's version could have been strengthened had he called witnesses, such as Messrs Khosa, Mugwena⁵² or Nkele. It was not contended that they were unavailable. Plainly they could have helped elucidate the facts. The defendant's failure to call them, one of whom he calls his friend, warrants an inference that they would have presented evidence adverse to his case.⁵³

⁵² Mr. Mugwena, also an employee of the University, filed an affidavit relating to the alleged sale of property to the defendant. See Plaintiff's Trial Bundle Vol. 12 p2015

⁵³ See *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A)

109.4 The defendant testified last, which gave him an opportunity to tailor his evidence.⁵⁴ He gave no explanation for that decision. By testifying last, he could tailor his evidence to ensure consistency with Ms Ngoben's and Mr Mmethi's testimony.

Legal issues and analysis

[110] Whether this Court has jurisdiction to hear and determine this dispute is beyond question. Section 77(3) of the BCEA is clear on the matter and, to the extent that there were ever difficulties relating to the interpretation of the section, the Labour Appeal Court settled them in *Rand Water v Stoop and Another*.⁵⁵

Breach of the employment contract?

[111] In broad terms the plaintiff alleges that the defendant breached his employment contract by: failing to comply with the POSA Policy and the Minimum Norms and Standards, failing to perform his duties diligently and exercise due care and skill, failing to act in the best interest of the plaintiff, colluding with service providers, taking bribes and making secret profits occasioned by his position or influence in the accreditation process, failing to declare his personal, commercial and financial interests which were, or could be, in conflict with the interests of the plaintiff.

[112] The plaintiff submits that the defendant was contractually obliged to recommend suitable POSA service providers and ensure they were accredited in compliance with the POSA Policy and the Minimum Norms and Standards. That the plaintiff failed to do so was common cause. The facts relating to this issue, many of which are common cause, make this relatively easy to resolve:

⁵⁴ Mullins & Da Silva Morris: Technique in Litigation 6th Ed (2012) at 185

⁵⁵ (2013) 34 ILJ 576 (LAC)

112.1 The defendant was the most senior person in the Student Affairs department. Until the deviation, the Student Affairs department managed the accreditation process and was responsible for ensuring compliance with the POSA Policy and the Minimum Norms and Standards. Following the deviation, the Student Affairs department, or the officials from that department, continued to play an important role.

112.2 It was common cause that key individuals on the inspection panel, who were formally engaged in the Student Affairs department, reported to the defendant. As a senior manager in the BEC, the defendant played an influential role. The defendant informed the chairperson of the BEC that he was managing the process and that the inspection teams reported to him.⁵⁶

112.3 It is common cause that he was the Project Leader.

112.4 The defendant drafted the final report for submission to the Tender Committee through which he identified the entities that complied with the POSA Policy and the Minimum Norms and Standards. The Tender Committee was dependent on his advice.

[113] On the probabilities, if the defendant had no duty to recommend suitable POSA service providers and ensure they were properly accredited, one would have expected him to have distanced himself from the process throughout and remain uninvolved. He did not do that. Instead, he declared that he was managing and accountable for the process. In the circumstances, I find that the defendant was obliged to recommend suitable POSA service providers and ensure they were accredited in compliance with the POSA Policy and the Minimum Norms and Standards. He failed to discharge this duty.

⁵⁶ Plaintiff's Trial Bundle Vol. 4 pp546 – 547

[114] The plaintiff alleges that the defendant failed to perform his duties diligently and exercise due care with skill reasonably expected of a person with his knowledge and experience. This too is relatively straightforward. First, the defendant was a senior managerial employee, engaged as a Senior Director. Despite holding this senior position and being aware of the high levels of fraud within the POSA scheme, he failed to flag Mr Khoza as a director of PS and Sons, an entity Ms Britz had flagged for fraud. In addition, he failed to flag Mahlatse Investments, whose representatives included Mr Nkele (who was also actively involved with PS and Sons). The defendant knew that his failure to inform the University could cause it financial harm but nevertheless decided not to do so. He had no need to consult the OGC, and I doubt he did. His evidence that he received advice from the OGC was not only improbable but also hearsay. Accordingly, I find that the defendant's failure to flag these individuals and entities constituted a breach of his duties to conduct his duties diligently, with the care and skill expected of him given his knowledge and experience.

[115] The plaintiff alleges that the defendant was obliged to evaluate the documents submitted to the BEC for accreditation, including those relating to the two properties. While the defendant admits that he did not evaluate any documents relating to the two properties, he says he was not obliged to do so. Instead, according to him, his role was administrative – and limited to “collating” the documents. With respect, as I explain below, this version is bizarre and must be rejected:

115.1 The applicants for accreditation submitted their documents to the BEC,

115.2 The primary function of the BEC was to assess the documents for compliance with the accreditation requirements.⁵⁷ This is clear from the deviation.

⁵⁷ See clause 9.1.4.1 of the deviation. Pleadings Bundle Vol. 1 at p167

115.3 The defendant was one of the most senior managers on the BEC. This was clear from the composition of the BEC, reflected in the deviation.⁵⁸

115.4 The defendant himself represented that he was managing the process in the BEC,

115.5 The defendant was the Project Leader.

115.6 The defendant was responsible for preparing the final report (in which he indicated which properties met the requirements for accreditation) to the Tender Committee.

[116]The plaintiff alleges that the defendant failed in his duty to exercise any oversight regarding the inspections of the two properties. The defendant admits that he did not oversee the inspections. His defence appears to be contextual. He argues that he was not a member of the inspection panels, and the inspection reports were submitted directly to Mr Mmethi. I cannot accept his submission. First, he was the most senior employee in the Student Affairs department, and one of the most senior managers in the BEC. He was the line manager of at least two employees central to the inspections. He represented that he managed the process, directed the inspection teams, and received their reports. He was the Project Leader. The BEC's primary function was to evaluate the applications, including the inspections. In these circumstances, the defendant cannot possibly contend that he played only an administrative role. I find that the defendant was obliged to exercise oversight of the inspections but failed to do so.

⁵⁸ See clause 9.2.1 of the deviation. Pleadings Bundle Vol. 1 at p168

[117]The defendant maintains that he had no decision-making powers in the Tender Committee. This is beside the point. The Tender Committee relied heavily on his report and recommendations. In the BEC, the defendant wielded considerable influence. The BEC's role was central to the integrity of the process. The BEC had to assess all documents and reports for compliance with accreditation requirements. At that level, the defendant was duty-bound to assess the applicants and exclude those who did not meet the accreditation requirements. At that level, the defendant had decision-making powers.

[118]The plaintiff alleges that the defendant failed to act in the plaintiff's best interests, among other things, because he did not declare his relationships with service providers, their directors, or representatives. It is unnecessary to consider whether the defendant stood in a position of a fiduciary to the plaintiff. That was common cause. This concession, by the defendant, was properly made. That concession flowed from the seniority of the defendant, the position of trust which he occupied, and the measure of discretion he held in relation to the affairs of his employer. Several common cause facts are relevant to the issue. It was common cause that the defendant did not disclose to the University that he was friends with a director of one of its service providers, Mr Khoza. It was common cause that the defendant did not disclose the monies he received from Mr Khoza, Mahlatsi Properties, or any other service provider. He failed to declare, on his version, his commercial dealings with a service provider by selling a property to Mr Khoza. It was common cause that the defendant submitted a declaration of interest only in 2020, though he was required to do so annually. There, he declared that he was "*exploring spheres of Tourism and Hospitality, Private Schooling, Consulting and Property Development*".

[119]On the common cause facts, it seems clear that the defendant failed to act in the plaintiff's best interests and failed to declare his relationships with service providers, their directors, and representatives.

[120] The defendant maintained that the monies he received from service providers⁵⁹ were received in his personal capacity and did not need to be declared. This version is rejected, as I now explain:

120.1 His explanation contradicts the terms of the declaration which requires disclosure of all interests that do, or could potentially, create conflicts between his interests and those of the University. Clearly the declaration was drafted as broadly as possible.

120.2 The purpose of the declaration is to ensure that the University is apprised of any conflicts of interest, or potential conflicts of interest, which could impact the defendant's performance of his duties. There can be little doubt that an employee's acceptance of money from an entity with a commercial relationship with his employer is a conflict of interest which could impact the performance of his duties.

120.3 In his only declaration, he declared that he intended to explore spheres of tourism and hospitality, private schooling, consulting and property development. The defendant understood that these broad commercial endeavours may potentially bring his interests into conflict with those of the University. His version that he did not perceive any conflict is contrived and is rejected.

[121] It is alleged that the defendant breached his contract by making secret profits at the plaintiff's expense.

121.1 Mr Spies' evidence, which was uncontested, showed that the defendant received numerous payments from service providers. These were: R70 000,00 on 2 March 2022, R30 000,00 on 3 March 2022, R21 000,00

⁵⁹ Such as Mr Khoza, Mahlatsi Properties and Gezani Investments

on 14 April 2022, R200 000,00 on 3 May 2022, R57 000,00 on 13 May 2022, R20 000,00 on 6 August, R9 000,00 on 29 October 2022, R50 000,00 on 12 November 2022. These payments total R457 000,00.

121.2 Mahlatsi Properties paid him R257 000,00. PS and Sons paid him R21 000,00. And Mr Khoza paid him R179 000,00.

121.3 In addition, Mahlatsi Properties paid R29 000,00 to Mitchell House Preparatory School where the defendant's son attends school.

121.4 I note that the defendant accepted R21 000,00 from PS and Sons in April 2022, although he was aware, from at least September 2021, that it was engaged in fraud. Furthermore, Mr Khoza was a director of PS and Sons.

121.5 These payments were made by individuals and service providers engaged in the POSA scheme, where the defendant held a managerial position and wielded influence. The payments began shortly after Mahlatse Investments was approved as an accredited merchant and ended shortly after payments to Mahlatsi Properties and/or Mahlatse Investments stopped. None of these relationships and payments was disclosed to the plaintiff. The defendant's attempt to explain the payments was unsatisfactory.

121.6 The most natural inference, which is consistent with all the proved facts, is that the payments constituted bribes for the defendant's help in ensuring that Mahlatse Investments and its two properties were accredited. Thus, by using his position and influence to secure profits, at his employer's expense, the defendant breached his fiduciary duties.

[122] Next, I must consider whether the defendant colluded with the non-compliant service providers to defraud the University.

Fraudulent misrepresentation?

[123] In *Stoop and another v Rand Water*⁶⁰ at para 85, Basson J (as she then was) summarised the requirements for fraudulent misrepresentation as follows: the representor must make a factual representation by omission or commission, knowing it is false, and that representation must have induced the representee to act in a certain way. *Rand Water* clarified that a false representation occurs where the representor knows it is false, has no belief in its truth, or acts recklessly or carelessly as to whether it is true or false. As already mentioned, a fraudulent misrepresentation may occur by commission or omission. In *BMW (SA) (Pty) Ltd v Van der Walt*⁶¹ the Labour Appeal Court held that where there is a “*calculated silence in the face of a duty to speak, one has to do with that species of fraudulent misrepresentation known as fraudulent concealment or fraudulent non-disclosure*”.

[124] It is clear the defendant had a duty to disclose his relationship with the service providers and their representatives, and a duty to disclose the monies they paid him. By failing to declare these relationships or interests during 2021 and 2022, he engaged in fraudulent non-disclosure. His defence that he was not required to disclose these relationships, or his receipt of monies from service providers, because they were personal must be rejected.

[125] The defendant's conduct throughout the accreditation process involved several fraudulent misrepresentations. I mention only a few. He actively represented to the BEC that he was managing the inspection process. In his report, he represented to the Tender Committee that the BEC had properly evaluated the application forms and scrutinised the inspection results. He represented to the Tender Committee that the two properties complied with the statutory requirements and the POSA Policy, and they should therefore be accredited for 1441 beds.

⁶⁰ (2014) 35 ILJ 1391 (LC)

⁶¹ (2000) 21 ILJ 113 (LAC) at para [7]

[126] It is reasonable to infer that he made these representations knowing that they were false. Inferential reasoning requires that the inference be consistent with all the proved facts, and not merely selected parts. The inference must be the more natural or plausible conclusion from all those that are conceivable when measured against the probabilities.⁶²

[127] Before drawing the inference, I considered all the proved facts. I set out the most important below. The defendant was a senior manager in the BEC - and the Project Leader. The defendant represented to others that he was managing the accreditation process, including the inspections. Despite this representation, he failed to evaluate the application forms relating to the two properties, and he failed to oversee the inspections of the two properties. He received large sums of money from service providers, or their representatives, who were directly or indirectly involved with the two properties. He made no declarations of interest in 2021 or 2022. He failed to disclose the monies he received from service providers or those linked to them. He could not adequately explain why large sums of money were paid to him. Aside from the defendant, many students and several other employees also received monies for their role in defrauding the University through the POSA scheme. This suggests a complex, coordinated scheme to defraud the University, rather than isolated, innocent transactions by the defendant. In the circumstances, the most natural inference is that the defendant knew his representations were false. He was a willing and active participant in a scheme to defraud the University.

⁶² See *South African Post Office v De Lacy and Another* 2009 (5) SA 255 (SCA) at para [35]

Did plaintiff prove damages and, if so, what is the quantum thereof?

[128] The appropriate test for the measure of damages is summarised as follows:

“The measure of damages is to put the innocent party in the position such party would have occupied if the fraudulent misrepresentation had not been made, not to put such party in the position he or she would have been in if the misrepresentation had been true. The former is the delictual measure of damages which seeks to compensate the innocent party for loss inflicted (sometimes called the negative interesse), and the latter is the contractual measure which seeks to compensate for what the party would have gained if the contract had been fulfilled (sometimes called the positive interesse)”.⁶³

(own emphasis)

[129] Ms Britz testified, with reference to the Student Analysis,⁶⁴ that between March and October 2022, Fundi paid to Mahlatsi Properties R17 093 771,80. This excluded the 6% fee which Fundi was paid. Mr Spies confirmed, by reference to the bank statements⁶⁵ that Fundi paid to Mahlatsi Properties R17 093 771,80 between March and October 2022. The defendant did not deny that Fundi paid this amount to Mahlatsi Properties, nor did he deny that this amount excluded the 6% fee (R1 091 091,82).⁶⁶ Thus, the total amount paid by the University for the two non-compliant properties was R18 184 863, 62.

[130] In the plaintiff’s heads it contends that it suffered patrimonial loss in this amount on two bases: first, that this is a contingent liability to NSFAS and second, that the University received no value for the monies disbursed. In my view, the issue of contingent liability does not arise. As administrator of the funds, the University must account to NSFAS. Further, NSFAS is entitled to such funds,

⁶³ Christie’s Law of Contract in South Africa (LexisNexis 8th Ed) p362

⁶⁴ Plaintiff’s Trial Bundle Vol. 13 p2212

⁶⁵ Plaintiff’s Trial Bundle Vol. 15 pp2313 – 2358

⁶⁶ The total damages claimed is the amount paid to Mahlatsi Properties (R17 093 771, 80) together with the 6% fee (R1 091 091, 82) which amounts to R18 184 863, 62.

whether pursuant to its right to recover misappropriated funds or its overall ownership of those funds.

[131]The evidence demonstrates that the defendant accepted bribes to help Mahlatse Investments obtain accreditation, though Mahlatse Investments was not entitled to such accreditation. To achieve his objective, the defendant made a series of misrepresentations aimed at inducing the University to accredit Mahlatse Investments, to which the defendant knew it was not entitled.

[132]If the defendant had not assisted Mahlatse Investments through his fraudulent misrepresentations, in breach of his employment contract, the University would not have diminished its estate by R18 184 863,62 - R17 093 771,80 paid to Mahlatse Investments and R1 091 091,82 paid to Fundi. Accordingly, the correct measure of damages is the total monies the plaintiff was hoodwinked into parting with - R18 184 863,62.

Did the breach cause the damages?

[133]As to whether the plaintiff's damages flow naturally and generally from the kind of breach of contract in question, our law does not require a likelihood of such loss occurring, but a realistic possibility.⁶⁷ In *International Shipping Co (Pty) Ltd v Bentley*⁶⁸ Corbett CJ explained the issue as follows:

"The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to

⁶⁷ *Thoroughbred Breeders' Association of South Africa v Price Waterhouse* full citation at fn2. at para 49

⁶⁸ 1990 (1) SA 680 (A) at 700F-G

whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so ...”

(own emphasis)

[134] However, the court must also ensure that the defendant is not caused undue hardship. This was explained in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*⁶⁹ as follows:

“The fundamental rule in regard to the award of damages for breach of contract is that the sufferer should be placed in the position he would have occupied had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party To ensure that undue hardship is not imposed on the defaulting party the sufferer is obliged to take reasonable steps to mitigate his loss or damage. . . . and, in addition, the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach...”

(own emphasis)

[135] The factual cause of the plaintiff's damages is the fraudulent misrepresentations made by the defendant in breach of his employment contract. By breaching his employment contract, the defendant created a realistic possibility that the plaintiff would incur the damages proved.

[136] The test for legal causation is whether a reasonable connection exists between the breach and the harm done.⁷⁰ In my view, the plaintiff's damages flow

⁶⁹ 1977 (3) SA 670 (A) at 687 C-F

naturally from the kind of breach in question here, and a reasonable connection exists between the breach and the damages. Save for the defendant's breach of his employment contract, the plaintiff would not have granted accreditation to the two properties, and the plaintiff would not have diminished its estate by R18 184 863,62. By awarding the plaintiff its full damages, there can be no undue hardship to the defendant. Individuals who steal public funds may not use equitable principles in our common law as a shield. Corruption is a malignant cancer that erodes our social and moral fabric.⁷¹ Like all cancer, it must be excised, not rewarded.

Costs

[137] This is a contractual claim brought under the BCEA, and costs should follow the result; therefore, the defendant should be ordered to pay the costs of the trial, including the costs of its application to amend its pleadings and its application to postpone the trial.

Conclusion

[138] In the result, I make an order as follows:

1. The defendant is ordered to pay the plaintiff the amount of R18 184 863,62 in respect of the damages it suffered as a result of the defendant's breach of his employment contract,

⁷⁰ *Lee v Minister for Correctional Services (Treatment Action Campaign & others as Amici Curiae)* 2013 (2) BCLR 129 (CC) at para 68

⁷¹ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA) at 82

2. The defendant is ordered to pay the plaintiff's costs of trial, including the costs of its applications to amend its pleadings and postpone the trial.

RN Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Plaintiff:

Adv F Boda SC

Instructed by ENS Attorneys

For the Defendant

Adv Nolwazi Mabaso and Thabo Motlounq

Instructed by Morakile Tibane Inc