

**REPUBLIC OF NAMIBIA**



**IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: HC-MD-CIV-ACT- CON-2019/02012

In the matter between:

**AUGUSTINUS KATITI**

**PLAINTIFF**

and

**NAMIBIA INSTITUTE OF PATHOLOGY LTD**

**DEFENDANT**

**Neutral Citation:** *Katiti v Namibia Institute of Pathology Ltd* (HC-MD-CIV-ACT-CON-2019/02012) [2024] NAHCMD 150 (5 April 2024)

**CORAM:** PRINSLOO J

**Heard:** 2 November 2021, 4 November 2021, 14 February 2022, 1 August 2022 - 5 August 2022, 21 November - 25 November 2022, 19 January 2023, 8 May - 10 May 2023, 14 August - 16 August 2023, 23 October 2023.

**Delivered:** 5 April 2024

**Flynote: Action Proceedings** – Plaintiff’s claim premised on enforcement of clause 12.5 of employment contract – Mutually destructive versions – Each party bears the onus to discharge the evidentiary burden resting on it on a balance of probabilities. The plaintiff successfully discharged the onus resting on him.

**Summary:** The plaintiff, Augustinus Katiti, issued summons against his erstwhile employer, the Namibia Institute of Pathology Ltd (NIP). The plaintiff’s claim is premised on an attempt to enforce clause 12.5 of his employment contract entered into with NIP on 1 April 2014. In terms of clause 12 of the contract, certain restraint of trade restrictions would apply against the plaintiff for a period of two years after the termination of his position as CEO. The defendant defended this action and, in turn, raised several counterclaims against the plaintiff.

*Held that* the versions before the court are mutually destructive. Each party bears the onus to discharge the evidentiary burden resting on it on a balance of probabilities.

*Held that* the first audit of PwC, dated 7 December 2018, regarding the ST Freight matter, made it clear that the senior officials involved did not perform due diligence. As a result, disciplinary proceedings were recommended against Ms Kaupirura, Mr Kaura, and Mr Mbahijona.

*Held further that* no findings of wrongdoing or recommendations were made concerning the plaintiff.

*Held that* in a second forensic report compiled by PwC dated 23 January 2019. This report did not identify any wrongdoing on the part of the plaintiff.

*Held that* PwC, with all the documents at its disposal during the investigation, did not point out non-compliance on the part of the plaintiff.

*Held that* there is no basis whatsoever to hold the plaintiff liable for the amounts claimed in respect of the ST Freight matter. There was no breach of fiduciary duties by the plaintiff, and this claim stands to be dismissed.

*Held that* no evidence was provided to suggest that the furniture purchase resulted in a loss for the defendant.

*Held further* that PwC's investigation also dealt with the Roma Kitchens matter but only recommended disciplinary action against the Chief Financial Officer for improper record keeping and administration but did not refer to any loss suffered by the defendant. As a result, the court is of the view that there is no merit in the defendant's claim for any amount, nor was there any breach of the plaintiff's fiduciary duties. This claim, therefore, stands to be dismissed.

*Held that* the disinvestment was done to comply with the obligations of NIP, namely the payment of salaries, creditors, and taxes. There is no evidence before this court to suggest that the plaintiff's actions caused any losses to the defendant.

*Held further that* the issue of the disinvestment of the funds served before the Audit, Risk and ICT Committee of NIP and thereafter was considered and disposed of by the Board at a meeting held on 24 March 2017. This matter was thus resolved. Therefore, the claim against the plaintiff regarding the disinvestment of funds is without merit and stands to be dismissed.

*Held that* no evidence was presented in court to the effect that the Board believed that the NIP incurred any losses as a result of the appointment of the three employees. Additionally, there was no evidence suggesting that the Board was of the view that the plaintiff should be liable for the salaries and benefits of these employees for a period of 12 months.

*Held furthermore that* in the court's view the argument that this decision by EXCO caused a fundamental breach by the plaintiff of his fiduciary duties holds no water and stands to be dismissed.

*Held that* to now belatedly argue that the Board did not approve the employment contract, inclusive of clause 12.5, is without merit. The one person who would have been in the best position to shed light on the discussions by the Board in this regard is Dr Shuuluka, who chose not to testify.

*Held further that* there is no evidence before this court that Mr Kapere, during the course of his negotiations with the plaintiff, went beyond the limits of his authority.

*Held that* NIP, via its officials, drafted the employment contract, which was signed by Mr Kapere in his capacity as chairperson. This binds the defendant to the agreement as a whole and not just certain clauses thereof. The court accepts that the parties intended to insert this specific clause in the agreement.

*Held further that* the defendant's version that the Board did not approve clause 12.5, is without merit.

*Held that* the definition of remuneration in the Labour Act is distinguishable from remuneration in the context of the Public Enterprises Governance Act, as remuneration in terms of the Labour Act refers to all payments in money or kind arising from the employment of the employee. In terms of the Public Enterprises Governance Act, performance and incentive payments stand separate from annual guaranteed pay, and in the context of the Act, the latter appears to be the remuneration. In the court's view, the payment of the restraint clause does not fall within guaranteed pay/remuneration.

*Held that the* averment that there were no protectable interests that would require a restraint clause was not developed further during the trial. *Held further that* there is no basis on the facts or law to find that the restraint clause was against public policy.

*Held that* regarding the approval by the Portfolio Minister, there can be no doubt that the appointment of the plaintiff was presented to Cabinet by the Minister of Health and Social Services, and it was endorsed. The Portfolio Minister sits in Cabinet, and therefore, the only inference to be drawn is that the plaintiff's appointment was made with the concurrence of the Portfolio Minister, inclusive of his remuneration levels / payments and benefits.

*Held that the* plaintiff's claim was for his full package, which included his total guaranteed pay as well as his other benefits. This, in the court's view, cannot be correct as it is clear that the intention was that the total guaranteed pay would be in line with the Directive. Therefore, the two years guaranteed pay at 65% of his total package would amount to N\$2 494 328.92 and not N\$3 837 429.12 as claimed.

*Held furthermore that* the plaintiff must succeed in his claim.

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## ORDER

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### Main Claim:

The plaintiff's claim is granted in the following terms:

1. Payment in the amount of N\$2 494 328.92;
2. Interest on the aforementioned amount at the prescribed rate of 20% per annum a tempora morae from 31 August 2018 to the date of final payment thereof.

### Counterclaim:

3. The defendant's counterclaim is dismissed.

### Costs ad main and counterclaim:

4. The defendant is liable for the costs of the plaintiff. Such costs to include the costs of one instructing and one instructed counsel.
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## JUDGMENT

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PRINSLOO J:

### Introduction

[1] The plaintiff, Augustinus Katiti, an adult male, issued summons against the Namibia Institute of Pathology Ltd (NIP),<sup>1</sup> which was established in accordance with the Namibia Institute of Pathology Act 15 of 1999. NIP is located at Hosea Kutako Drive, Windhoek North, Windhoek. I will refer to the parties in this judgment as they are in the claim in convention.

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<sup>1</sup> I will refer to the Namibia Institute of Pathology Ltd interchangeably as NIP or defendant during this judgment.

## Background

[2] The plaintiff's case can be summarised as an attempt to enforce clause 12.5 of his employment contract entered into with NIP on 1 April 2014. In terms of clause 12 of the contract, certain restraint of trade restrictions would apply against the plaintiff for a period of two years after the termination of his position as CEO.

[3] In turn, considering the restraint imposed, the plaintiff would be paid a once-off amount for each year of restraint.

[4] Clause 12.5 of the employment contract reads as follows:

'12.5 In consideration for the restraint imposed herein above, the Company shall for the duration of the restraint determined and agreed upon in clause 12.1 above, pay to the Chief Executive Officer on the date of termination of the Contract of Employment a once-off amount equal to the Chief Executive's Total Guaranteed Pay for each year of restraint, as per clause 6.1 above'.

[5] The defendant defended this action brought by the plaintiff and, in turn, raised several counterclaims against the plaintiff.

## Pleaded case

[6] On 1 April 2014, the plaintiff and the defendant, represented by the erstwhile chairperson of its Board of Directors ('the Board'), the late Mr Mandela Kapere, entered into a written agreement entitled 'Contract of Employment' ('the employment contract').

[7] The employment contract, which sets out the following material terms of the agreement between the parties, provided inter alia that:

- a) The plaintiff would be employed by NIP as its Chief Executive Officer on a fixed-term contract from 1 April 2014 to 31 March 2019;
- b) During his employment with NIP, the plaintiff would be entitled to a 'Total Guaranteed Pay' in the sum of N\$1 500 000 per annum (excluding performance and incentive-based benefits), which would be subject to a salary increment annually. Such an increment would be negotiated between the CEO and the Board.<sup>2</sup>
- c) In terms of clause 12 of the agreement, for a period of two years after termination of the plaintiff's employment with NIP, the plaintiff would be subjected to a restraint of trade clause;
- d) As set out above, in terms of clause 12.5, NIP would be obliged to pay the plaintiff a once-off amount equal to two years of the plaintiff's 'Total Guaranteed Pay'.

[8] It is further pleaded that the plaintiff complied with his obligations regarding the restraint of trade clause. As a result, the defendant is obliged to pay the plaintiff a once-off amount of N\$3 837 429.12 in consideration for the restraint imposed. However, being in breach of the employment contract, the defendant failed to pay the plaintiff this sum. The plaintiff, therefore, claims the sum above plus interest and costs.

[9] NIP's pleaded defence stands on three distinct legs. Firstly, that the provisions of clause 12.5 of the employment contract constitute "remuneration" or a "service benefit" in terms of s 22(3) of the Public Enterprises Governance Act 2 of 2006 (now repealed), and that for want of compliance therewith (and in particular the concurrence of the Portfolio Minister), clause 12.5 is invalid *ab initio*.

[10] Secondly, the NIP Board of Directors did not approve the contents of clause 12.5 of the employment contract and pleaded that the Board never made a decision in this regard and, therefore, disputes that the clause is enforceable.

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<sup>2</sup> At the time of the termination of the plaintiff's services as at 31 August 2018 this guaranteed pay increased to N\$1 918 714.56.

[11] Thirdly, NIP pleaded that clause 12.5 of the employment contract is against public policy and that its enforcement would not be in the public interest. Accordingly, the clause has no legal consequences.

[12] In the alternative, NIP pleaded that should there be no basis for the above pleaded defences, the termination of the plaintiff's employment was based upon clause 11.1.3 of the employment contract, relating to documented acts of dishonesty, fraud or gross negligence by the CEO in connection with the performance of his duties at NIP. Furthermore, in terms of clause 11.1.3, no further compensation beyond the cancellation date of the contract was payable to the plaintiff other than accrued benefits or those required by law. NIP pleaded that compensation for the restraint of trade did not fall into either of these categories.

#### *NIP's Counterclaims*

[13] In its amended counterclaim, the defendant pleaded that in terms of the plaintiff's contract of employment with NIP as its CEO, "the parties knew" that:

- a) The plaintiff would devote his full time, ability and attention to the business of the defendant and would further, at all times faithfully and to the best of his ability, promote and extend the business of the defendant.
- b) The employment relationship imposed a duty on the plaintiff to act in the defendant's best interests, and as a result thereof, the plaintiff owed a fiduciary duty to the defendant.
- c) As such, should the plaintiff fail to act bona fide in the furtherance of the interests of the defendant, this would entitle the defendant to terminate the contract of employment and;
- d) As a result, the defendant would probably suffer a loss and would be entitled to compensation to be placed in the same position it would have been had the plaintiff complied with the conditions of the employment contract.

[14] NIP claims that the plaintiff breached his fiduciary duties and engaged in certain wrongful acts without any authority or approval from the Board. The NIP's directors only



became aware of these wrongful acts in July 2017 when they received the internal audit report.

[15] NIP's counterclaims can be summarised as follows:

a) In the first claim, NIP pleaded that on 08 September 2016, the plaintiff caused and/or allowed NIP to effect the payment to ST Freight Service CC ('ST Freight') in the sum of N\$1 882 550 for the purchase of vehicles for usage by the said ST Freight to render transport services to NIP. These services would be rendered at a fee of N\$211 600 per month (including VAT) from 01 October 2016 to 31 March 2017, amounting to N\$1 269 600. NIP pleaded that the said payment was without any basis in law and/or agreement between it and ST Freight, obliging NIP to make such payment in favour of ST Freight. NIP pleaded that it suffered a total loss of N\$3 152 150.

b) In the second claim, NIP pleaded that during June 2016, February, and July 2017, the plaintiff caused Roma Kitchens to be paid N\$8 101 025 to procure furniture and fittings at the NIP head office. NIP pleaded that the payment contravened the Procurement policies, Delegation of Powers policy, Service Level Agreement, and Contract policy.

c) The third claim relates to the disinvestment of N\$7.9 and N\$10 million, respectively, in which NIP alleges that the decision to disinvest was either made by the plaintiff or he caused the decision to be made. NIP pleaded that the economic loss suffered by it was the sum of N\$2 056 285.22, which is the return interest for three (3) years at the rate of 5.16 per cent per annum.

d) The fourth claim deals with the positions created on the organogram of NIP by the plaintiff. NIP pleaded that the costs of the created positions amounted to N\$ 2 742 169.99 per annum. It should be noted that the defendant chose to limit its claim to twelve (12) months only.

[16] In summary, NIP prays for judgment against the plaintiff as follows:

1. Payment in the sum of N\$3 152 150 in respect of claim 1;
2. Payment in the sum of N\$8 101 025 in respect of claim 2;
3. Payment in the sum of N\$2 056 285. 22 in respect of claim 3;
4. Payment in the sum of N\$2 742 169.99 in respect of claim 4.
5. Interest thereon at the rate of 20% per annum from the date each cause of action arose.
6. Cost of suit.
7. Further and/or alternative relief.'

### *Replication*

[17] In replication, the plaintiff contested the defendant's allegations and specifically denied that clause 12.5 is invalid under s 22(3) of the Public Enterprises Governance Act when read in conjunction with the Directives issued in terms thereof. The plaintiff disputed the claim that the restraint of trade payment provided for in clause 12.5 constitutes "remuneration" and/or "other service benefits" as referred to in s 22(3) of the Act. The plaintiff further pleaded that approval was obtained from the Board of Directors with the agreement of the Portfolio Minister. Alternatively, even if it is found that no such approval was given, the defendant is estopped from denying Mr Mandela Kapere's authority to enter into the employment contract on behalf of NIP.

[18] The plaintiff further replicated that he denied committing any acts of dishonesty, fraud or gross negligence while performing his duties. He also pleaded that he could not respond to the allegations properly, as NIP terminated his disciplinary hearing unilaterally in August 2018. The plaintiff contended that he was, upon termination of the agreement, entitled to benefits accrued or required by law, which included the payment due as per clause 12.5 of the employment contract and that clause 11.1.5 of the agreement states that such benefits must be paid to the plaintiff if the defendant unilaterally terminates his services.

### *Plea to the amended counterclaim*

[19] The amended counterclaim of the defendant was challenged by way of the plaintiff's plea. The plaintiff denied the averments of the defendant. In amplification of the denial, the plaintiff pleaded that:

a) The defendant relied on the express terms of the plaintiff's employment contract and the fiduciary duty allegedly owed to the defendant under common law. Thus, the defendant's claim is based on a breach of contract and not on the breach of a general fiduciary duty in delict.

b) The terms of the contract relied upon by the defendant are contained in clause 5 of the contract of employment and can be summarised as follows:

- a. the plaintiff was to perform duties usually associated with the office of the CEO and as set out in his job description, together with such other duties as may be prescribed by the Board of Directors (clause 5.1);
- b. devote his full time, ability and attention to the business of the defendant during normal business hours and thereafter when necessary (clause 5.2);
- c. at all times faithfully, industriously and to the best of his ability perform all duties that may be required from him by virtue of his position as CEO (clause 5.3);
- d. use his best endeavours to promote and extend the business of the defendant, protect its interests, and generally safeguard its goodwill, property and assets (clause 5.4);
- e. and be responsible to the Board for effectively managing all staff matters and implementing all codes and procedures (clause 5.5).

c) The plaintiff thus denied that NIP can rely upon a general breach of fiduciary duty when the plaintiff's obligations arise from the express terms of his employment contract.

[20] The plaintiff denied the alleged wrongful acts as pleaded by NIP and, in amplification, pleaded as follows:

- a) Claim 1: In respect of ST Freight, where a loss of N\$3 152 50 is claimed, payments were made by utilising funds advanced by the President's Emergency

Preparedness Fund for Aids Relief (PEPFAR) as well as through the Centre for Disease Control and Prevention (CDC), both funded by the United States Government. Therefore, as a result, NIP did not suffer any loss due to these acts, even if it is established that he approved payments for the purchase of the vehicles, which the plaintiff denied.

- b) Claim 2: Concerning payment for furniture to Roma Kitchens, where the loss claimed is N\$8 101 025.11, the plaintiff pleaded that he did not cause NIP to make the payment for the procurement of furniture and fittings for the NIP head office. He pleaded that the decision to purchase the furniture and fittings was made by the defendant's Executive Committee ('EXCO') within the limits of the budget approved by the Board for purchasing the furniture and fittings. There was thus no violation of policies and procedures. The plaintiff pleaded that, in any event, NIP suffered no loss as it enjoys the use of furniture and fittings in its head office.
- c) Claim 3: Concerning the disinvestment from the defendant's Old Mutual Investment account with a loss claimed of N\$2 056 285.22, the plaintiff pleaded that the Chief Financial Officer prepared a request for the withdrawal of the N\$10 million and N\$7.9 million in November 2016 and June 2017 respectively for payment of salaries. The plaintiff admitted that he approved these withdrawals. In both instances, the withdrawals were presented to the Audit, Risk and ICT Committee of NIP and considered and disposed of by the Board at a meeting held on 24 March 2017 and 27 September 2017, respectively. The plaintiff pleaded that these amounts were withdrawn to meet the urgent operational needs of the defendant, which had to be financed out of a drawdown from NIP's investments due to the situation at the time. Therefore, the plaintiff denied that he caused any loss or damages to the defendant.
- d) Finally, in respect of claim 4, wherein NIP claims the CEO created positions on the organogram of the defendant and the appointment of staff, causing a loss of N\$2 742 169.99.46, the plaintiff pleaded the appointments were necessary and were approved by the Board on 28 November 2017. The plaintiff denies these claims.

### The litigation history

[21] This was a protracted trial stretching over many days. When the trial commenced on 2 November 2021, the plaintiff confirmed the contents of his witness statement deposed to under oath as provided for in rule 18(2)(p) of the Rules of Court. He was not cross-examined, and the plaintiff closed his case. No evidence was led on behalf of the defendant in opposition to the main claim.

[22] An application for absolution from the instance followed, which was dismissed.<sup>3</sup> Hereafter, evidence was led by the defendant in support of its counterclaims against the plaintiff. The plaintiff testified in rebuttal of the defendant's case.

### Evidence adduced

#### *The main claim*

[23] The plaintiff did not call any additional witnesses to support his claim, and as indicated, there was no cross-examination regarding the main claim. The evidence of the plaintiff in support of his claim is briefly as follows:

[24] The plaintiff stated that he was appointed as the CEO of NIP on a five-year contract from 01 April 2014 to 31 March 2019. He stated that the employment contract was negotiated with and signed by Mr Mandela Kapere, the chairperson of NIP's Board of Directors at the time. When the agreement was signed on 1 April 2014, Mr Kapere signed as chairperson of the Board, being duly authorised thereto.

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<sup>3</sup> *Katiti v Namibia Institute of Pathology Ltd* (HC-MD-CIV-ACT-CON-2019/02012) [2020] NAHCMD 54 (11 February 2022).

[25] In this regard, the plaintiff referred to clauses 14.1 and 16 of the Agreement, which read as follows:

#### '14 AUTHORITY AND INSTRUCTIONS

14.1 NIP and the Chief Executive Officer each represents and warrants that each has legal authority to enter into this contract and is not prohibited or restricted from doing so by any governance documents or resolutions of NIP or any agreement or obligation of the Chief Executive Officer to a third party, including a former employer or employee.

#### 16. ENTIRE AGREEMENT

This Contract constitutes the entire agreement between the parties and contains all agreements between them with respect to the subject matter thereof. It also supersedes any and all this agreements or contracts, either oral or written, between the parties with respect to the subject matter thereof. This Contract may not be changed orally but only by an agreement in writing signed by NIP and the Chief Executive Officer.'

[26] The plaintiff stated that the defendant drafted the employment contract and offered him a valid, legally binding and enforceable contract before he assumed his duties as the CEO of NIP. When they negotiated the employment contract, Mr Kapere created the impression that he was mandated by the Board as, in some instances, he would agree or not agree to the provisions in specific clauses subject to further consultation with the Board. The clauses in which Mr Kapere needed further direction from the Board were specifically clauses 5.1 (duties and responsibilities), 6.2, 6.3 and 6.5 of the contract, the latter clauses related to remuneration and benefits. The plaintiff submitted the draft contract to confirm his statement in this regard.<sup>4</sup> However, clause 12.5 (restraint of trade clause) was never raised as an issue to be discussed with other board members.

[27] The plaintiff submitted that his appointment was duly confirmed with a letter stating that the Board of Directors of NIP approved his appointment as CEO. Cabinet also endorsed the appointment per Decision No. 1<sup>st</sup>/11.02.14/012. The Minister of

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<sup>4</sup> Annexure AK 20 to the plaintiff's witness statement.

Health and Social Services made the submission to Cabinet. In addition, the Minister of Public Enterprises is a member of the Cabinet. Hence, he attended Cabinet meetings, meaning that the plaintiff's appointment (including remuneration levels and benefits) was therefore made in concurrence with the Portfolio Minister.

[28] According to the plaintiff, no issues were raised regarding his employment contract until it was discussed during a Board CEO Performance Review Committee meeting on 17 March 2017, when the CEO's performance had to be assessed and reviewed for the 2015/2016 financial year.

[29] At that stage, clause 12.5 (the restraint of trade clause) was not yet the subject of discussion. During the meeting, a practising attorney, Mr Frans Kwala, raised three issues regarding the plaintiff's employment contract. The issues raised were a) the plaintiff's leave days that were considerably more than the days stipulated in the Labour Act, b) the alignment of the contract to the Performance Management Policy and the Excellence Reward Policy, and c) that NIP, as the employer, has the right to unilaterally change the plaintiff's contract of employment if he should refuse to any changes to his contract.

[30] The Performance Review Committee resolved that the plaintiff's employment contract would be honoured for the period under review but that he would be engaged to review it to ensure that it aligns with the relevant policies under discussion.

[31] According to the plaintiff, the issue of his employment contract again surfaced during his performance assessment and review for the 2016/2017 financial year. During the meeting of the Board CEO Performance Review Committee on 20 September 2017, Mr Kwala contended that the plaintiff's employment contract was unlawful and that the Board could prepare an addendum to amend the unlawful contract, which addendum would be valid irrespective of whether the plaintiff signed it or consented to it.

[32] The plaintiff stated that he was concerned about these assertions and directed a memorandum to Dr Diina Shuuluka, the chairperson of the Board at the time, wherein he raised his concerns about what Mr Kwala said regarding his employment contract.

[33] This memorandum came up for discussion during the board meeting on 26 September 2017, and it was resolved that the Board would obtain a legal opinion on the legality of the plaintiff's employment contract. The plaintiff states that his contract was eventually discussed during the board meeting on 28 November 2017, and it was resolved when Dr Shuuluka informed the Board that the previous NIP Board approved the contract and that it should be respected.

[34] According to the plaintiff, the issue of his contract never came up for discussion again until the unlawful and unilateral termination of his employment with NIP.

[35] The plaintiff testified that the chairperson of the Board sent him a letter dated 17 May 2018, asking for information about specific allegations of misconduct made against him. He provided a detailed response and documentary evidence that refuted the allegations. However, he was suspended on 18 June 2018, and disciplinary proceedings began on 2 July 2018. Despite this, his employment contract was unilaterally terminated on 31 August 2018, before the scheduled disciplinary proceedings on 3 to 5 September 2018 and 29 to 31 October 2018.

[36] The plaintiff stated that the disciplinary hearing was never concluded, and as a result, he was denied the opportunity to prove his innocence. The reasons advanced for the termination of the plaintiff's services were as follows:

'The aforesaid decision was amongst others, informed by your unscrupulous conduct to persistently seek political intervention to obtain your reinstatement and/or cessation of disciplinary action taken against you, and conducting your purported defence in the media as opposed in the hearing, and causing unreasonable delay in finalisation of the disciplinary hearing.'

[37] The plaintiff denies that any documented acts of dishonesty, fraud, or gross negligence were ever proven against him by the defendant despite having had the opportunity to do so during the disciplinary hearing. The plaintiff submitted that terminating his disciplinary hearing two months into the proceedings and then citing



unreasonable delay on his part as a reason, was a farce. He submitted that the real reason for terminating his employment contract became clear during an extraordinary board meeting held on 30 August 2018.

[38] During this meeting, it was recorded that: 'Muluti concluded that it is in the best interest of NIP to terminate Katiti's employment contract as per the aforesaid clause to avoid paying Katiti as per the restraint of trade clause that he viewed as unlawful and not in the best interest of NIP. Once Katiti's employment contract is terminated as per clause 11.1.3, NIP will not be liable to pay Katiti N\$3m imposed on NIP by the restraint of trade clause.'

[39] The plaintiff submitted that the unlawful refusal by the defendant to pay his restraint of trade benefit is not because of the illegality of clause 12.5 of the contract but based on the flawed premise that terminating his employment contract would invalidate any legal obligation to pay the restraint of trade benefits.

[40] The plaintiff further stated that NIP is placing reliance on clause 11.1.3<sup>5</sup> for the termination of his employment contract to avoid liability to pay the restraint of trade benefits. According to the plaintiff, the interpretation of clause 11.1.3 originated from a legal opinion<sup>6</sup> provided to NIP wherein it was surmised that the termination of the plaintiff's contract would be in the best financial interest of NIP and would curtail legal costs. The plaintiff is adamant that no legal arguments were provided that the provisions of clause 12.5 of the contract were unlawful, invalid, not determined by the Board, not approved by the Board, not determined by the Portfolio Minister, or that any of the clauses were against public policy.

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<sup>5</sup> '11. TERMINATION OF CONTRACT

11.1.3 Documented acts of dishonesty, fraud or gross negligence by the Chief Executive Officer in connection with the performance of his duties to NIP, with those acts disclosed to the Chief Executive Officer, with the Chief Executive Officer accorded the opportunity in writing or in person (at the Chief Executive Officer's option) to NIP, and with the Chief Executive Officer no further compensation beyond the cancellation date other than benefits accrued or required by law.'

<sup>6</sup> Opinion drafted by Muluti and Partners attached as AK 27 to the plaintiff's bundle.

[41] In conclusion, the plaintiff stated that his employment contract provided that NIP shall pay him the restraint of trade benefits on the date of termination of his contract, irrespective of termination by effluxion of time or in any other way whatsoever. In this regard, the plaintiff relies on clause 12.1<sup>7</sup> of the contract. The plaintiff also referred the court to clause 11.1.5 of the contract, which pertinently deals with the unilateral termination of the CEO's duties, which reads as follows:

'11.1.5 NIP unilaterally terminating the Chief Executive Officer's duties as Chief Executive Officer, subject to the following provisions:

11.1.5.1 Such action shall require a majority vote of the Board of Directors of NIP and become effective upon written notice to the Chief Executive Officer or at such later time as may be specified in the said notice. After such termination, all rights, duties and obligations of both parties shall cease;

11.1.5.2 NIP shall pay the Chief Executive Officer a severance payment equivalent to the Total Guaranteed Pay as per clause 6.1 above, for each remaining year of service in terms of this Contract of Employment. In addition, the Company shall pay to the Chief Executive Officer restraint of trade benefits in terms of clause 12.5 below, and the Chief Executive Officer shall accept such sums in full discharge of all claims whatsoever. Such termination shall constitute a valid reason and fair procedure as contemplated in terms of the Labour Act.'

[42] The defendant paid a severance amount equivalent to the remainder of the employment contract term but refused to pay the restraint of trade benefit provided for in terms of the contract. According to the plaintiff, these restraint of trade benefits are equally payable upon termination of the contract, and this benefit was thus payable on the day of termination of the contract. As a result, he would be entitled to the relief claimed.

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<sup>7</sup>12. RESTRICTIONS AFTER TERMINATION

12. For a period of two (2) years after the termination of the Chief Executive Officer's employment hereunder, whether by effluxion of time or in in any other way whatsoever, the Chief Executive Officer shall not on behalf of himself or any other person canvass or solicit orders from any person or firms who shall at any time during the continuance of his/her employment hereunder have been a customer of the company.'

[43] As indicated earlier in the judgment, the plaintiff was not cross-examined on his evidence, and it thus concluded the plaintiff's case.

*The counterclaim in detail*

[44] The defendant presented five witnesses to support its counterclaim. To discuss the defendant's case, I will first identify the witnesses and briefly overview their positions in NIP when the claims arose. Not all the witnesses' evidence relates to all the defendant's claims, and therefore, I will address each counterclaim and the evidence of the relevant witnesses accordingly, where applicable.

[45] The following witnesses were called:

- a) Gibson Imbili, the central witness in the defendant's case, has been employed with NIP as Company Secretary and Legal Advisor since October 2013.
  - a. His primary responsibilities as Company Secretary are<sup>8</sup>:
    - i. to be responsible for providing the full spectrum of company secretarial services covering all aspects of the NIP Board and its legislative and regulative procedures;
    - ii. to manage the general organisational/coordination requirements between the Board, Management and/or any other stakeholder to ensure compliance and effective Board functioning;
    - iii. to deal with all general administration, documentation and support services related to the Board and its functioning for and within the NIP.
  - b. As legal advisor, Mr Imbili's primary responsibilities were, among other things:
    - i. to provide legal advice and/or inputs on contractual-related matters before they are finally approved;
    - ii. draw up contracts/MOUs in consultation with the line managers and other stakeholders;

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<sup>8</sup> Annexure AKK 58 to the plaintiff's witness statement to the counterclaim.

- iii. provide legal advice to Management and the Board, and serve as a link between NIP and Company lawyers.
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- b) Lourencia Howaes has been employed as NIP's Procurement Officer since March 2015. As Procurement Officer, Ms Howaes would mainly oversee and supervise the procurement functions and report to the Senior Manager of Finance. The Procurement Section is responsible for the procurement of goods and services for NIP.
  - c) Nancy Angula has been the Manager: Process Analysis and Business Improvement since November 2016. Before being appointed the Manager: Process Analysis and Business Improvement, Ms Angula was appointed as the Personal Executive Assistant to the CEO and held that position from 2010 to 2015. As Personal Executive Assistant, she performed administrative functions within the CEO's office. These functions included but were not limited to preparing reports, monitoring and controlling the office budget and liaising with the executive management and other stakeholders. Ms Angula also served as the Secretary to the Executive Committee of NIP (EXCO).
  - d) Saima Shikongo has been an Assistant Procurement Officer since August 2015; before being appointed Assistant Procurement Officer, Ms Shikongo held the position of Executive Secretary to the Chief Strategy and Business Development Officer, Ms Jennifer Kaupirura. Her responsibilities at that time were mainly to provide administrative support to the department, including booking meetings, making venue arrangements and taking minutes if she attended such meetings.
  - e) Sakues Kamati was employed by NIP as a Senior Manager of Finance from February 2015 and held the position of Acting Chief Financial Officer from June 2018. Mr Kamati served as a Principal Investigator for PEPFAR Donor funds to NIP since 2015.

[46] Mr Katiti, the plaintiff, testified in his defence against the defendant's counterclaims.

*Claim 1: ST Freight*

[47] In February 2016, Ms Shikongo was directed by Ms Kaupirura to arrange a meeting with Mr Stanley Thomas, the owner of ST Freight, to discuss potential business opportunities with NIP. She complied with these directions, but this meeting only materialised on 1 September 2016.

[48] In the interim, a meeting of the Management Tender Committee was called for 9 August 2016, and Ms Howaes, prepared the minutes for the meeting. Mr Kamati attended this meeting and confirmed that during the meeting, Ms Kaupirura tabled a request to exempt the IT Infrastructure and Specimen Transportation Logistics Management Program to transport specimens from health facilities in the various regions to the NIP Laboratories. The reason for the request for exemption from the tender process was the limited time frame due to the accelerated PEPFAR COP 15 budget. The presentation to the Tender Committee indicated that quotations were obtained from three entities, and ST Freight was recommended at a total cost of N\$2 800 960. Ms Kaupirura assured the attendees that she would ensure that the vehicle ownership would be transferred to NIP.

[49] The Tender Committee granted the exemption from the tender process. It resolved that the Head of the Business Unit would select and appoint suitable service providers.

[50] During his testimony, Mr Kamati explained that according to the Procurement Policy, the tender process must be followed if the procurement's value exceeds N\$300 000. However, the policy allows for an exemption if the user department believes that inviting tenders is impractical or not in the best interest of NIP. In such cases, the Tender Committee's prior authorisation is necessary to call for quotations or make arrangements for the procurement, supply of goods or services, or disposal.

[51] He further testified that the Procurement Policy, in certain instances, made provision for emergency procurement but did not apply if the cause of the emergency was a potential loss of funds at the end of the financial year due to underspending or lack of adequate planning.

[52] Mr Kamati explained that there were PEPFAR donations available to NIP for the extension of HIV/AIDS, STI and TB Laboratory activities available from 1 April 2015 to 29 September 2016. He received a communication from the CDC representative on 30 June 2016, which indicated that NIP had to commit and spend the money by the middle of August or, at the latest, the middle of September 2016, and if the funds were not spent, 90 days after September, it had to be returned to the US Treasury.

[53] On 30 August 2016, Ms Kaupirura, via email, invited Mr Thomas to a meeting with the finance team on 1 September 2016. According to the email, the team would consist of the CEO, Mr Katiti; Mr Harold Kaura, the Chief Operating Officer (COO); Cleophas Mbahijona, the Chief Financial Officer (CFO); and the Financial Manager, Mr Sakeus Kamati. Ms Shikongo was tasked with forwarding the meeting invite to the said team.

[54] Ms Shikongo testified that the meeting took place as planned and was chaired by the plaintiff. Mr Mbahijona and Mr Kamati were also present, while Mr Thomas and Ms Maggy Mbako represented ST Freight. However, Ms Kaupirura did not attend the meeting. Mr Imbili testified that he also attended this meeting. It should, however, be noted that his name does not appear on the minutes as an attendee.

[55] During the meeting, it was recorded that NIP would provide funds to ST Freight to buy vehicles, which would be registered under ST Freight's name for three years. Ownership would thus be vested in ST Freight and not NIP. It was also agreed that the branding on the vehicles would be that of ST Freight. It was further resolved that there would be a service-level agreement between NIP and ST Freight regulating the

agreement. Mr Kamati was tasked to obtain quotes for four 4x4 vehicles with specific specifications.

[56] Mr Kamati confirmed his attendance at the meeting and testified that although the presented minutes were unsigned, he acknowledged the plaintiff's attendance. Additionally, he confirmed that the minutes accurately reflected the discussions during the meeting.

[57] Mr Kamati stated that from September 2016 to 31 March 2017, NIP paid ST Freight an amount of N\$3 152 150, consisting of N\$1 882 550 for the startup costs for the four regions and N\$1 269 600 (made up of N\$211 600 for six months from 1 October 2016 to 31 March 2017) as a monthly service fee. The N\$1 882 550 was transferred from the PEPFAR account to ST Freight's account on the instructions of Messrs Mbahijona and Kaura.

[58] All these payments were made without a Service Level Agreement, which was only signed on 19 April 2017. NIP and ST Freight, however, signed a memorandum of understanding (MOU) on 1 September 2016. Ms Kaupirura, Mr Mbahijona, and Mr Kaura signed the MOU on behalf of NIP.

[59] On the procurement of the vehicles and services with PEPFAR funds, Mr Kamati testified that NIP's Procurement Policy was applicable in so far as procurement of services and goods from PEPFAR funds as NIP's policy in this regard was stricter, hence the involvement of the Tender Committee.

[60] Mr Kamati testified that he learned that Ms Kaupirura had already contacted ST Freight in February 2016. Considering the facts in hindsight, the Tender Committee should not have granted the exemption.

[61] During this evidence, Mr Imbili stated that according to the MOU dated 1 September 2016, NIP would assist ST Freight with purchasing vehicles and start-up

capital but was not obligated to pay any additional amount to ST Freight. However, monthly payments were made to ST Freight under the plaintiff's supervision. Mr Imbili believed that the plaintiff was aware of these payments, as he received relevant email correspondence, replied to them, and gave the go-ahead for the transaction to proceed.

[62] He further claimed that the total paid to ST Freight from October 2016 to March 2017 amounted to N\$3,152,150. These funds were paid to ST Freight to transport specimens from various regions on behalf of the defendant whilst using vehicles purchased with NIP's funds. He claimed this breached NIP's procurement policies and procedures and its Delegation of Powers Guidelines. He testified that NIP suffered a loss in the sum of N\$3,152,150 and that the plaintiff had a duty to prevent this loss but failed to do so. On this basis, the plaintiff must be held liable for the payment of this sum claimed by NIP.

[63] In response to the defendant's allegations on the ST Freight transaction, the plaintiff testified that the NIP Board was duly informed of the matter during the meeting held on 24 March 2017. In addition, the plaintiff testified that NIP has no legal standing concerning this claim as the vehicles were approved and purchased by a third party, ie the CDC, with its funds.

[64] The plaintiff further testified that there were compulsory monthly progress meetings between the CDC employees and defendant employees regarding the PEPFAR-funded activities.

[65] The court was also referred to a multitude of documents relating to ST Freight transactions, and some of the documents of noticeable importance in respect of this claim are the following:

- a) The first forensic audit report, dated 7 December 2018, dealt exclusively with the ST Freight matter.<sup>9</sup>

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<sup>9</sup> Annexure AKK 13 to the plaintiff's witness statement to the counterclaim.



- b) The second forensic audit report, dated 23 January 2019, dealt with investment, procurement of goods and works, consultancy and non-consultancy services, and procurement of Head Office equipment and laboratory equipment/services.<sup>10</sup>
- c) The legal opinion from Khadila Amoomo Legal Practitioners.<sup>11</sup>
- d) CDC meeting minutes, wherein CDC representatives confirmed that it was acceptable that NIP paid funds to ST Freight to purchase vehicles to reach remote areas rather than NIP purchasing the vehicles and handing them over to ST Freight to use in the contract.<sup>12</sup>

[66] The plaintiff testified that in none of the aforementioned documents was he implicated in any wrongdoing on his part, nor was the defendant able to identify any evidence supporting its case.

### *Cross-examination*

#### *Mr Imbili*

[67] With respect to the ST Freight issue, Mr Imbili confirmed the following:

- a) He was not directly involved in all the meetings related to ST Freight. He only obtained information about the ST Freight transaction through meeting minutes pertaining to ST Freight and procurement transactions at NIP.
- b) ST Freight was not financed via NIP funds but rather via PEPFAR funds, and he was unaware of how the PEPFAR funds were accounted for.
- c) Ms Gloria Shailemo, a PEPFAR technical advisor, could approve the disbursement of funds from PEPFAR to NIP.
- d) the assets acquired via PEPFAR funds belonged to the CDC unless donated to NIP at the end of a specific program or project. Additionally, the assets purchased with PEPFAR funds were accounted for separately and did not appear in NIP's audited financial statements.

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<sup>10</sup> Annexure AKK 14 to the plaintiff's witness statement to the counterclaim.

<sup>11</sup> Annexure AKK 12 to the plaintiff's witness statement to the counterclaim.

<sup>12</sup> Annexure AKK 29 to the plaintiff's witness statement to the counterclaim.

- e) there is no evidence that the NIP Board approved a budget for the CDC program. However, he emphasised that the NIP Board established the procurement rules for PEPFAR/CDC activities.
- f) there is no evidence that the plaintiff was a signatory on the bank accounts holding the CDC funds.
- g) the forensic auditors who had examined the dealings at NIP related to STF had not discovered or reported any fraudulent dealings.
- h) there is no evidence that the plaintiff approved or facilitated payments regarding the PEPFAR/CDC funds to ST Freight. Mr Imbili, however, in amplification, stated that EXCO approved it and the plaintiff is part of EXCO.
- i) the plaintiff did not sign the MOU with ST Freight, nor did he have any evidence that the plaintiff instructed officials to do so.
- j) plaintiff never approved invoices, debit notes, purchase orders, payment requisitions, or any request to transfer funds regarding STF.
- k) the minutes of a meeting with the CDC reflect that a member of the CDC confirmed that it was acceptable “that NIP paid funds to ST Freight to purchase vehicles to be able to reach these remote areas”.

[68] When it was put to Mr Imbili that the plaintiff was not involved in managing the PEPFAR/CDC funds, he then sought to link the plaintiff to the management of the funds by stating that Mr Katiti was a member of the defendant’s management team.

[69] When confronted about whether PEPFAR funds were restricted to activities approved by the CDC under their work plan, Mr Imbili declined to comment. He further declined to comment on the question of whether PEPFAR funds could only be used for activities approved by the CDC under their work plan.

*Mr Kamati*

[70] The plaintiff confirmed that the CDC officials were aware of the procurement method for transporting the laboratory specimens concerning ST Freight. He further testified that he had concerns about signing off on the procurement with respect to ST

Freight because he had reservations about the ownership of the vehicles by ST Freight. He confirmed a meeting with the CDC concerning the purchase of the vehicles in respect of ST Freight, which he attended on 1 September 2016, where CDC indicated that they agreed with the purchase of the vehicles. Mr Kamati followed up on this and sourced quotations from Pupkewitz Nissan.

*Mr Katiti*

[71] The plaintiff persisted with his defence of lack of locus standi raised in respect of claim one. On questions by Mr Makando, the plaintiff testified that NIP cancelled the MOU and instituted criminal charges against ST Freight as the vehicles were bought for the benefit of NIP. Thus, it was unnecessary for the CDC to give directions in this regard.

[72] The plaintiff further insisted that no wrongdoing could be attributed to him regarding the ST Freight transaction but conceded that the PwC report was limited in that he was not interviewed during the forensic audit. At the time of the PwC investigation, he was already suspended.

[73] The plaintiff further testified that he did not breach any policy and procedure regarding the ST Freight transaction. He stated that the contract was never presented to him for signature, and the fact that he did not sign the contract was neither a breach of the delegation of powers guidelines nor of his employment contract, which provided that he had the authority to sign on behalf of NIP in the ordinary course of business.

[74] When confronted with the meeting on 1 September 2016 with the ST Freight representatives, the plaintiff stated that he did not attend the meeting. The plaintiff was further confronted with his evidence that the Board was appraised of the ST Freight transaction but that this was only done on 24 March 2017. In this regard, the plaintiff testified that there was no board of directors during the transaction and the initial payment. These issues were discussed during the board meeting on 24 March 2017,

but no ratification was sought for the transaction as it was not an issue for the Board to consider. The witness persisted with his point that the money regarding the ST Freight transaction was managed in terms of a cooperating agreement with CDC and not done in terms of NIP policies.

*Claim 2 Roma Kitchens*

[75] Ms Angula attended an EXCO meeting on 10 February 2016, for which she prepared the meeting minutes. The purpose of the meeting was to discuss the furniture for the NIP's head office, but the chairperson decided not to discuss it since it had already been discussed in a previous meeting with the architects. On 9 March 2016, another meeting was held to discuss the fittings and fixtures of the head office. During the meeting, Ms Kaupirura presented furniture options from three different companies - Office Economics, SWACO, and Italy. The EXCO members agreed to source the new head office furniture from Italy (via its South African branch) and directed that further quotations be obtained.

[76] Then, on 27 April 2016, during a further EXCO meeting, it approved the quotation of Roma Kitchens for €367 121 less the amount of €24 002.82 for transport, installation and supervision (at the exchange rate on 27 April 2016). The witness testified that she attended and minuted a meeting of EXCO on 15 June 2016 wherein EXCO approved an invoice from Roma Kitchens for the amount of N\$1 897 923.61 for the built-in furniture, including transport, installation and supervision. The plaintiff signed off on the minutes of the meeting.

[77] Ms Angula testified that she could not locate the signed minutes of the meetings dated 9 March and 27 April 2016 but confirmed that the minutes are a true reflection of what transpired at the proceedings.

[78] Ms Angula testified that she did not know whether EXCO could approve quotations and invoices in terms of NIP's Procurement Policies and Procedures. The

witness testified that she also served on the NIP Head Office Furniture Committee, which EXCO established, and this committee was responsible for liaising with the architects to ensure that the head office was fitted with furniture. She testified that Roma Kitchens was selected based on its experience in previous projects with First National Bank, Agribank and the MVA Fund on furniture procurement. After benchmarking these institutions, the committee suggested Roma Kitchens as a preference for NIP's head office furniture.

[79] Mr Kamati testified that he attended the Tender Committee on 11 May 2016. During the meeting, Ms Kaupirura advised that EXCO had approved the final quotation for Roma Kitchens for N\$5 574 370.15, and she requested the Tender Committee to grant an exemption for the transaction. The Tender Committee, however, declined to concede to the request of Ms Kaupirura since EXCO already approved it. It was the Tender Committee's view that this matter was brought to it for note-taking only and that the decision was taken by a higher body than itself.

[80] Mr Kamati stated that he was unaware of Procurement's involvement in obtaining quotations from Roma Kitchens or any other potential supplier.

[81] On 27 June 2016, the Tender Committee meeting was called upon to consider the submissions regarding the joinery work for the new NIP head office. However, the Committee did not make any decision due to insufficient information presented to them. Ms Kaupirura sent an internal memo to the Tender Committee, requesting an exemption from the tender process for procuring furniture joinery service for NIP from Roma Kitchens on a round-robin basis. The majority approved the application based on the EXCO decision during the round-robin process. Mr Kamati and Mr Imbili abstained from voting.

[82] According to Mr Kamati, NIP paid Roma Kitchens N\$7 569 134.30 for the head office furniture and joinery.

[83] Ms Howaes testified that she attended an extraordinary Tender Committee meeting on 27 June 2016 in her capacity as secretary. During the meeting, Mr Mbahijona informed the attendees that Roma Kitchens had been appointed to supply furniture to the NIP head office, provide materials, and supervise the joinery project. The committee opted not to make any decisions regarding an open or closed tender, as there was no proper submission for exemption from the tender process.

[84] Mr Imbili testified that the plaintiff had no authority to approve procurement in excess of N\$1 000 000 in terms of the Delegation of Powers Guidelines of NIP. Regarding the Procurement Policies and Procedures, EXCO did not have the power to approve invoices nor procure goods and services on behalf of NIP. As a result, the appointment of Roma Kitchens to supply furniture and services to NIP violated NIP policies as their contract was awarded without a competitive bidding process. According to Mr Imbili, NIP did not receive fair value for its money and, as a result, suffered a loss in the amount claimed, and the plaintiff must be liable for the loss.

[85] Mr Imbili further testified that on 27 April 2016, EXCO, headed by the plaintiff, approved a quotation of Roma Kitchens in the amount of N\$5,574,370.15. On 15 June 2016, EXCO agreed and approved an invoiced amount of N\$1,897,923.61 from Roma Kitchens to supply built-in furniture, including the transportation and installation of the furniture. It was further his evidence that the Tender Committee refused to grant exemption to EXCO for the purchase of furniture but agreed to the supply of furnishings.

[86] The plaintiff in turn testified that the Board was informed on 24 March 2017 during a Board meeting of the Roma Kitchens contract, and the Board noted and acknowledged that the NIP Head Office furniture had been procured from Italy and was delivered. The plaintiff submitted that NIP had beneficial and exclusive use of the fittings and furniture since the purchase and delivery of the furniture. The furniture is accounted for as NIP's assets and is accordingly disclosed in NIP's Statement of Financial Position for the 2016/2017 and 2017/2018 financial years.

#### *Cross-examination*

[87] According to Mr Imbili, he gathered his knowledge regarding the matter from the available documentation and meeting minutes. While he had no direct knowledge about the procurement process, he believed the available source documents were sufficient to form an opinion.

[88] Mr Imbili affirmed that the furniture was essential for the head office's operations. He also confirmed that a budget of just over N\$11 million was prepared for procuring the furniture, which was included in the defendant's capital budget for 2016/2017. Additionally, he verified that the defendant did not have a Board in place when procuring the furniture.

[89] He further testified that the furniture was procured based on the advice and recommendations of a consultant, the architect Mr Mutua, appointed for this purpose. Management sourced quotations from several suppliers, including Roma Kitchens.

[90] He conceded that it was recorded during the Board meeting on 13 October 2017 that the furniture was procured per NIP's Procurement Policy and Procedure. However, he testified that he found it strange that EXCO found it necessary to usurp the authority of the Procurement Committee and the process followed in this regard. He, however, accepted that EXCO was the highest decision-making body with no Board in place.

[91] Mr Imbili further conceded that after a thorough forensic investigation by PwC Auditors, it was recommended that NIP consider taking disciplinary action against the Chief Financial Officer, who had failed to ensure the proper record keeping of financial documents and the proper administration of the procurement functions.

[92] When asked about the losses suffered by NIP regarding claim two, Mr Imbili was unable to provide any evidence as to how the purchase of furniture and fittings from Roma Kitchens resulted in the defendant's loss.

*Mr Katiti*

[93] The plaintiff confirmed that no board was in place when sourcing the furniture and fittings from Roma Kitchens but denied that neither he nor EXCO violated any procurement policies. He further denied that EXCO was involved in sourcing quotations as there was a NIP Head Office Furniture Committee who was tasked with fulfilling this duty in consultation with the architect.

[94] He testified that EXCO merely approved the expense as there was no board of directors at the time. He further testified that the decision was necessary as the building was under construction, and the issues entailed more than just furniture.

[95] The plaintiff denied that a service-level agreement regarding the purchase of the furniture was required and further stated that if such an agreement was needed, it had to be drafted by the legal department of NIP.

[96] On the issue of whether NIP received fair value, the plaintiff testified that the total procurement was N\$7 885 891, which was, in effect, N\$3 201 441 below budget, resulting in a savings of almost 30 per cent. That, in the plaintiff's view, was a clear indication of fair value. He further pointed out that NIP has used the furniture daily from the date of purchase to date.

*Claim 3: Disinvestment of the Old Mutual investment*

[97] Regarding claim 3, Mr Imbili testified that on 22 November 2016, the plaintiff approved disinvestment of N\$10 million of NIP's investment held at Old Mutual Unit Trust. He testified that on 20 June 2017, the plaintiff approved a further disinvestment of N\$7.9 million. Mr Imbili stated that the approval by the plaintiff violated NIP's Investment Policies and Procedures because only the Investment Committee or the Board could make such a decision. In addition thereto, there was a breach of NIP's Delegations of Powers Guidelines.



[98] Mr Imbili testified that NIP had a full Board when the disinvestment decision was taken. Hence, Board approval was necessary. He was of the view that despite the fact that the defendant was in pressing need of funds to meet its obligations, there was no justification for not complying with policies.

[99] Mr Imbili further testified that if the funds were not disinvested, then NIP would have earned interest on the said investment in the amount of N\$2 056 285.22 at a rate of 5.6 per cent per annum for a period of three years.

*Mr Katiti*

[100] The plaintiff's response to this claim is that the Board was duly informed of the disinvestment of the N\$10 million at the board meeting held on 29 June 2017. Mr Katiti testified that the Board was equally informed about the disinvestment of N\$7.9 million at the board meeting on 27 September 2017.

[101] The plaintiff stated that the defendant invests any excess funds that are not required for its immediate operational needs in accordance with the Investment Policies and Procedures. However, the plaintiff also revealed that even though a draft policy framework has been in place since July 2013, it has not yet been approved by the defendant's Board of Directors or the Minister.

[102] The plaintiff testified that the decision to reinvest, withdraw or not to reinvest funds upon their expiry or maturity mainly depends on the defendant's liquidity position to meet its short-term financial obligations, such as paying salaries and purchasing necessary laboratory supplies.

[103] The plaintiff testified that no new investments were made since April 2015 due to slow or non-payment by the Ministry of Health and Social Services. Investment totalling N\$563.8 million, was withdrawn to finance critical operational activities. The Chief Financial Officer withdrew N\$10 million held in a unit trust account at Old Mutual to pay

salaries for November 2016. Similarly, N\$7.9 million was withdrawn for salaries for the month of June 2017.

[104] As background facts the plaintiff testified that the Chief Financial Officer recommended to him through an internal memorandum that the N\$10 million reserve funds held in a unit trust account at Old Mutual be withdrawn to pay the salaries for November 2016. The Chief Financial Officer further explained that after paying salaries, creditors and the Inland Revenue at the end of October 2016, the defendant would have depleted the reserves at the call account at Bank Windhoek. The withdrawal of the N\$10 million was presented to the Audit, Risk and ICT Committee of NIP and thereafter considered and disposed of by the Board at a meeting held on 24 March 2017. He testified that he informed the Board at this meeting that the investments had reached maturity and were not reinvested but used to settle suppliers' outstanding accounts and pay for critical operations and activities.

[105] Similarly, the N\$7.9 million invested and withdrawn was for salaries for June 2017. He explained that he concurred with the Chief Financial Officer's recommendation to disinvest the funds, although in reality, the Chief Financial Officer had already transferred the funds on 19 June 2017. This transaction was also reported at the Audit, Risk, and ICT meeting, and on 27 September 2017, the Board considered and disposed of it.

[106] He further referred to the fact that the PwC forensic audit mentioned no wrongdoing on his part. The PwC report recommended only that disciplinary action be considered against the Chief Financial Officer because he was the person overall accountable for the effective management and control of financial resources, and there had been non-compliance with the Investment Policies.

*Cross-examination*

*Mr Imbili*

[107] On questions from Mr Corbett, Mr Imbili confirmed that he was not responsible for managing investments. This responsibility fell under the Financial Management department at NIP. Mr Imbili admitted that he could not deny that the disinvested amount was part of a more significant sum of N\$563 million, which was not reinvested due to urgent operational expenses. He suggested that Mr Kamati would be better suited to answer questions regarding the disinvestment of funds. Mr Imbili did not provide any evidence on how the amount of N\$2 056 285.22 was calculated, except that a rate of 5.61 per cent was used.

*Mr Katiti*

[108] The plaintiff emphasised that he did not make any withdrawals, and the memorandums received from Chief Financial Officer, Mr Mbahijona, which he approved, amounted to an approval of a request. He stated that the Chief Financial Officer still had to comply with applicable processes and policies with which the latter was duly acquainted. There was thus no need for him to endorse the memorandum that the approval was subject to compliance with the investment policies, as it was a given.

[109] The plaintiff denied that he violated any investment policies or that there was any wrongdoing on his part. He agreed that the N\$7.9 million was transferred before he approved the request of the Chief Financial Officer. He was, however, not aware of this state of affairs, and it only came to his knowledge when he had regard to the audit report of September 2017. The findings of wrongdoing in this regard were limited to the Chief Financial Officer, who faced disciplinary proceedings as a result.

[110] When confronted with the alleged loss of interest on the disinvested funds, Mr Katiti testified that Mr Imbili is not a financial expert and that, to his knowledge, no actuary report quantifies the defendant's claim.

*Claim 4: Creating positions on the NIP's organogram without authority*

[111] Mr Imbili stated that the plaintiff made appointments without the Board's approval. He stated that only the Board has the authority to create new positions, however, the plaintiff's actions resulted in the appointment of individuals and the determination of their salaries without the Board's approval. This led to NIP being obligated to pay these employees the amount of N\$1,250,963.63 over a period of 12 months. Consequently, Mr Imbili believes the plaintiff should be held accountable for repaying the amount claimed.

[112] In response to the allegations on claim four, the plaintiff responded that the Board was duly informed about the creation of the positions at a meeting held on 24 March 2017, and the Board resolved at the meeting of 28 November 2017 that these positions were approved by the Board Committee on Human Capital and the Board. He testified that the Board was duly informed in the CEO's Quarterly Operational Report of all the decisions taken during the period that NIP did not have a board of directors.

#### *Cross-examination*

##### *Mr Imbili*

[113] Mr Imbili testified that EXCO approved the positions but that EXCO did not have the authority to create the positions. Even though no Board existed at the time and the Delegation of Power policy was silent on how decisions should be made without the Board, Mr Imbili persisted with his position that the appointments were not sanctioned. He could not point to any decision from the defendant's Board other than the one which approved the positions retrospectively.

##### *Mr Katiti*

[114] The plaintiff testified that he signed the approval for the appointments but was not involved in the recruitment process. He testified that the Board would create positions in the organisational structure, but there was no Board in place at the time. Therefore, EXCO had to attend to it. The plaintiff testified that at the time, it was not

clear when the new Board would be appointed, and importantly, NIP had to be accredited for its laboratory services. All three positions, which are support functions, were required for NIP to pass the accreditation process. He testified that NIP could not render laboratory services without accreditation. Therefore, in his view, he had to make a decision that would be in the best interest of NIP and clear any non-compliance before the accreditation by SANAS.

[115] He stated that EXCO approved the positions. Thereafter, during the Board meeting held on 24 March 2017, the Board recommended all positions proposed by Human Capital, except those of Business Development and Supply Relations Officer. This meant that the appointments made by EXCO were subsequently approved by the Board when it was constituted at a later date.

[116] On the claim amount regarding the creation of the positions on NIP's organogram, the plaintiff testified that he does not know how the claim was quantified as Mr Imbili is not a Human Resource official. He further testified that there was no evidence that the Board took the view that the defendant had suffered any loss due to the appointment of the three employees.

*Mr Imbili's evidence in respect of the plaintiff's claim*

[117] Even though no witness testified in opposition to the main claim of the plaintiff, the defendant advanced the evidence of Mr Imbili in order to rebut the plaintiff's claim of payment in the amount of N\$3 837 429.12 in consideration for the restraint imposed.

[118] Mr Imbili stated that he had attended a Board meeting on 31 March 2014, where the plaintiff's employment at a remuneration of N\$1.5 million with a performance bonus was unanimously approved. He further testified that the Board did not approve any additional remuneration or service benefits in favour of the plaintiff and certainly not clause 12.5 of the employment contract.

[119] Mr Imbili contended that remuneration and service benefits, or any other benefits, can only be valid if such benefits were approved by the Board and the Portfolio Minister as required by s 22(3) of the Public Enterprises Governance Act.

[120] He further stated that although drafting the plaintiff's employment contract was part of his job description, the task was assigned to others without consulting him.

[121] In his capacity as company secretary, he attended Board meetings, and in his presence during the meetings he attended, there was no discussion or approval of clause 12.5 of the plaintiff's contract of employment. Mr Imbili further testified that he did not see any approval or concurrence by the Portfolio Minister regarding clause 12.5 of the employment contract. On this basis, he testified that clause 12.5 was not approved by the Board and thus invalid from the beginning and is therefore unenforceable in law.

[122] Mr Imbili believed that the presentation of the plaintiff's appointment to Cabinet or its publication in the newspaper had no bearing on the matter. Neither Cabinet nor the newspaper has anything to do with the remuneration and service benefits of the CEO of a State-owned enterprise. He argued that since NIP is a public enterprise, paying the claimed amount would be against public policy. In addition, Mr Imbili referred to clause 11.1.3, which he believed was the basis for the termination of the plaintiff's employment and also formed the basis for the counterclaims.

#### Submissions by the parties

[123] The respective counsels have filed extensive and well-argued heads of arguments in this matter, and the court wishes to express gratitude for their industry herein. However, due to the magnitude of the arguments, the court cannot replicate them in this judgment and will merely highlight some aspects thereof. I also do not intend to address their arguments on the points of law raised. Instead, I will incorporate those arguments in discussing the legal principle hereunder. The mere fact that I do not refer to specific issues that were argued does not mean that I did not consider them.

*On behalf of the Plaintiff*

[124] On the plaintiff's claim, Mr Corbett contended that there was no evidence to support the defendant's defence against the plaintiff's claim, nor does it sustain a counterclaim against the plaintiff.

[125] Mr Corbett pointed out that the defendant elected not to cross-examine the plaintiff but instead applied for absolution from the instance. As a result, some of the evidence of the witnesses called on behalf of the defendant addressed issues on the plaintiff's claim as opposed to the counterclaim.

[126] He submitted that the evidence on the plaintiff's claim stands uncontested, and, therefore, the effort of the defendant's witnesses to address their defence to the main claim should be afforded little weight because that case was not put to the plaintiff, who had no opportunity to respond to it in the context of the main claim.

[127] Mr Corbett argued with respect to the main claim that the plaintiff was not the author of the employment contract, and therefore, the *contra proferentem* rule should be applied to the agreement. This means that the party who presented the wording of the contract is responsible for any ambiguity in its language. The reason behind this rule is that if the wording is unclear, the person who wrote it should be the one to suffer the consequences, as they had the ability to make it clear.

[128] Furthermore, Mr Corbett argued that if any ambiguity exists, the plaintiff's interpretation of the parties' intention should prevail concerning the relevant clauses of the contract. It is a fundamental principle of contract construction that parties carefully choose the words they use to express their intentions precisely and exactly. Additionally, it is presumed that no person writes something they do not intend to write, which is also a foundational principle of interpreting any document. This rule ensures that no person should go against their own actions.

[129] In short, it is presumed that a document is what it appears to be. If the defendant wants to challenge the validity of the restraint of trade provisions or any claims that the agreement is illegal, they have the burden of providing evidence to support their claims. However, the defendant has not provided any evidence in this regard. Therefore, the restraint of trade clause is valid and enforceable on the evidence before the Court.

[130] Mr Corbett made extensive submissions regarding the plaintiff's claim. I do not intend to repeat them, but I will refer to them during my discussion of the plaintiff's claim.

[131] On the counterclaims of the defendant, Mr Corbett argued as follows:

*ST Freight*

131.1 The CDC approved the procurement process and the identification of ST Freight to be funded for providing transportation of laboratory specimens. The CDC's auditors also indicated no issues with the disbursement of funds, and the plaintiff was not involved in making these decisions or payments to ST Freight. The defendant's auditors found no wrongdoing on the plaintiff's part, and the defendant's board sought a legal opinion, which also found no wrongdoing by the plaintiff. The recommendation was to take disciplinary action against other employees.

131.2 The defendant's board commissioned a forensic audit by PwC Auditors, which did not identify any wrongdoing on the plaintiff's part regarding the MOU signed with ST Freight or the incurrence of unapproved financial costs for the defendant. The auditors did not identify any loss suffered by the defendant due to the MOU signed with ST Freight. The only recommendation was to consider disciplinary action against other employees.

131.3 Despite all of this, the defendant instituted a counterclaim against the plaintiff and not against the employees who were identified for disciplinary action. This conduct suggests that the proceedings against the plaintiff were vindictive, especially given that the funds were of the CDC and not held by the defendant. There can be no suggestion



of any loss suffered by the defendant regarding the STF matter, which should have been clear to the defendant and Mr Imbili, who is legally trained. Nonetheless, the defendant chose to pursue this frivolous counterclaim against the plaintiff.

#### *Roma Kitchens*

131.4 PwC conducted a thorough investigation into the procurement of furniture and fittings for the head office, and disciplinary action was recommended only against the Chief Financial Officer and no one else. The auditors did not find any evidence of loss suffered by the defendant. The only complaint was against the Chief Financial Officer for failing to ensure proper record keeping of financial documents and administration of procurement functions. Therefore, there is no merit in the defendant's claim that the plaintiff is liable for the sum of N\$7 569 134.30 or any amount whatsoever.

#### *Disinvestment of funds*

131.5 After analysing the evidence presented on the disinvestment of funds, it is clear that the plaintiff had no involvement in the decision to disinvest. Moreover, it was the practice of NIP not to reinvest funds due to continuous financial problems in meeting their obligations to pay salaries, creditors, and the Receiver of Revenue. This made it evident that the failure to pay the salaries of the staff would have caused significant disruption at the company. There is no evidence to suggest that the plaintiff's actions caused any loss to the defendant, and no loss was referred to in the PwC report. Additionally, none of the witnesses who testified on behalf of the defendant provided any basis for the claimed loss of N\$2 056 285.22 or any other amount. Based on this, it must be concluded that the claim against the plaintiff based on the disinvestment of funds has no merit.

### *Creating positions on the NIP Organogram*

131.6 EXCO made appointments in the absence of the Board in an instance where the Delegation of Powers Policy did not specify the powers to be exercised by the Board in its absence. There is no evidence to suggest that the defendant did not need the appointed positions or that the appointed individuals were not qualified. The matter was reported to the Board at its meeting on 24 March 2017 and was subsequently discussed by both the Board and the Human Capital Committee. Ultimately, the positions were approved by both the Committee and the Board. There is no evidence that the Board believed the defendant had suffered any loss due to the appointments, nor is there any evidence suggesting that the plaintiff is responsible for their salaries and benefits for a 12-month period. There is, accordingly, no merit to this claim relating to the creation of positions and the appointment of staff into those positions.

### *On behalf of the Defendant*

[132] Regarding the plaintiff's claim Mr Makando submitted that the plaintiff failed on a balance of probabilities to establish a case against the defendant. He submitted that the dismissal of the plaintiff's claim would be the only outcome that would be in the interest of justice. In support of this argument, Mr Makando advanced the following grounds:

- i) Payment in terms of clause 12.5 of the contract was and still is a remuneration and/or a service benefit. Therefore, for clause 12.5 to be valid, it required approval by the Board and concurrence of the Portfolio Minister.
- ii) There is no evidence to suggest compliance with the Public Enterprises Governance Act. Therefore, payment under clause 12.5 is ultra vires the Act and Government Notice No 174 of 12 August 2010. No evidence was provided evidencing the Board's approval of clause 12.5.
- iii) The cancellation or termination of the plaintiff's employment was predicated on clause 11.1.3 of the contract of employment, and thus NIP was absolved from paying any amount to the plaintiff, except that which had been accrued or which was lawfully due to him, and
- iv) Estoppel is not available to the plaintiff in light of the illegality of clause 12.5.

[133] Mr Makando submitted that the evidence of Mr Imbili pertinently disputed the plaintiff's claim predicated on clause 12.5 of the employment contract. He submitted that Mr Imbili's position remained that there was no concurrence by the portfolio minister. Therefore, clause 12.5 fell outside the scope of the State Owned Enterprises Act and Directives and is thus unenforceable. He further contended that the plaintiff failed to lay a basis for enforcing the restraint of trade clause and submitted that as the law stands in Namibia, there are no parallel benefits extended to a CEO of a state-owned enterprise other than what the Public Enterprises Governance Act prescribes.

[134] Mr Makando further argues that clause 12.5 of the plaintiff's employment contract is illegal because it pertains to payment after the termination of the plaintiff's employment contract. Additionally, Mr Makando argues that if the Board did not approve the clause with the Minister's concurrence, it is unlawful. He asserts that the clause is unlawful as its enforcement would achieve an unlawful objective, which is not allowed under the Act's remuneration scheme.

[135] Therefore, based on a strict interpretation of clause 12.5, it is evident that any payment made would violate public policy, rendering it unenforceable. Alternatively, since the plaintiff's employment was terminated as per clause 11.1.3 of the employment contract, the defendant is not obligated to pay any amount to the plaintiff.

[136] Mr Makando submitted that the counterclaims are based on the plaintiff's breach of his fiduciary duty, which he owed to NIP and its Board. The fiduciary duty relied upon by the defendant is outlined in clause 5 of the plaintiff's contract of employment. In this regard, Mr Makando emphasised that the defendant's counterclaim is premised on contract and not delict. It is trite law that when a party to a contract from whom performance is due either refuses to perform his promise or does not perform his duties satisfactorily, he commits a breach of contract. In a suitable case, he may be ordered to pay damages.

[137] According to Mr Makando, the counterclaim and testimonies from the defendant witnesses revealed a pattern of the plaintiff violating NIP's policies. He argued that the plaintiff was either directly responsible for the decisions that led to the claims or influenced them. Furthermore, the plaintiff took no measures to prevent NIP from suffering losses.

[138] Mr Makando argued that the plaintiff's claim that NIP did not have any signed policies but only draft policies is false. The evidence provided by the defendant's witnesses demonstrates this. The plaintiff's employment contract obligated him to contract on behalf of the company in the ordinary course of business. However, he failed to do so regarding claims 1 and 2.

[139] Additionally, the plaintiff claims that he did not make or cause any decision to be made about all counterclaims. He attributed the responsibility to his subordinates, the Tender Committee, and EXCO, stating that they should have ensured compliance with the policies. However, according to Counsel, this argument cannot stand.

### *ST Freight*

[140] In respect of the ST Freight case, Mr Makando argued that despite being a CEO with delegated authority, the plaintiff failed to fulfil his responsibilities and caused a loss to NIP. The plaintiff admitted to not signing the necessary contracts, violating clause 14.2 of his employment contract. Furthermore, he neglected to protect the interests of NIP, its property, and assets, as required by clauses 5.4 and 5.5 of his contract. This breach of duty was compounded by his failure to manage staff members and effectively ensure policy compliance. As a result, the plaintiff breached the fiduciary duties he owed to NIP. These facts make it clear that the plaintiff's actions were inexcusable and that he should be held accountable for his breach of fiduciary duties.

### *Roma Kitchens*

[141] Mr Makando submitted that the plaintiff was involved in the Roma Kitchens claim. This is clear from the fact that during an EXCO meeting on 15 June 2016, the plaintiff approved an invoice from Roma Kitchens and signed related quotations in respect of the furniture procurement. The plaintiff further violated NIP policies by approving the exemption from tender procedures for the procurement of joinery services on 12 July 2016, which contravened the delegations of powers guidelines. These guidelines set the threshold to N\$1 million. Additionally, the plaintiff did not comply with the Contract and Service Level Agreement Policy that prohibited any payment to a service provider without a properly executed contract. Mr Makando referred to the plaintiff's cross-examination, during which the plaintiff claimed that the project manager had an agreement in place. However, there was no involvement of the alleged manager or evidence of the purported agreement. Therefore, due to the plaintiff's conduct, NIP was denied the opportunity to participate in a competitive bidding process. This resulted in the fact that NIP does not know whether the amount of N\$7 569 134.30 paid in respect of claim 2 for the furniture was a fair one. All that is before the court in this regard is the word of the plaintiff that this was a reasonable amount.

[142] Therefore, it was contended that the plaintiff did not protect the defendant's interests and, for that reason, had also breached his employment contract. His liability with respect to claim 2 was duly established.

#### *Disinvestment of the Old Mutual Investment*

[143] Mr Makando submitted that the plaintiff did not deny the withdrawal of the amounts in question, and he conceded that he was not a member of the Investment Committee and could, as a result, not approve the disinvestment. The plaintiff placed blame at the door of the Chief Financial Officer for non-compliance with the relevant policy, yet as the CEO, he failed to confirm that Mr Mbahjiona complied with the said policy.

[144] The withdrawal of the amounts is common cause. However, the plaintiff disputed the computation of the claimed sum. The plaintiff further pointed out that there were discrepancies with regard to the pleaded loss and what was testified about during the trial. Mr Makando, however, contended that whatever is pleaded may be cured by evidence. Therefore, if the court finds liability on the part of the plaintiff, then the court should also accept what was testified about, which is the sum of N\$2 056 285.22, which constitutes the actual damage suffered by the defendant.

*Creation of positions on the NIP Organogram*

[145] Mr Makando contended that the only two issues in dispute in respect of this claim are, firstly, whether those positions created were necessary appointments and, secondly, whether they were approved by the Board of Directors on 28 November 2017.

[146] The parties had agreed that in terms of the policy for creating positions on the organogram, only the board had the authority to do so. However, the board didn't create these positions; EXCO did. The plaintiff's averment that the creation of the positions resulted from an emergency concerning laboratory accreditation. Mr Makando submitted that there was no link between the created positions and the laboratory accreditation, and there was no justification or emergency for the appointments. According to Mr Makando, the plaintiff failed to produce any document in support of this allegation, and as a result, the court should not accept this evidence.

[147] Mr Makando contended that even if the board had ratified EXCO's decision, it wouldn't have complied with the policy and delegation of authority guidelines. It's irrelevant that the remuneration was paid in exchange for the employee's labour. The appointments resulted in NIP having to pay N\$1 250 963.64 to those employees for twelve months, and now seeks to recover that amount from the plaintiff.

[148] Mr Makando argued that the plaintiff had committed a fundamental breach of his fiduciary duties. As a result, the plaintiff should be liable to the defendant for the claimed amounts in respect of the counterclaim and costs of suit.

#### Issues for determination

[149] Regarding the plaintiff's claim, the question for determination is whether the interpretation of clause 12.5 of the employment contract is enforceable on a contextual interpretation.

[150] Whether the plaintiff acted in breach of his fiduciary duties to the defendant and whether it resulted in the losses pleaded by the defendant, ie. the counterclaims.

#### Evaluation of the evidence

##### *General*

[151] From the onset, it is important to point out that the plaintiff was not cross-examined regarding the main claim. The cross-examination was regarding the counterclaim. Mr Corbett submitted that, as a result, the plaintiff's evidence should be accepted as uncontested. Mr Makando was, however, of the view that the defendant met the plaintiff's case squarely during the defendant's case (plaintiff in reconvention) as Mr Imbili pertinently dealt with the invalidity of clause 12.5 of the employment contract.

[152] It is important to remember that the defendant's counterclaim is a claim in its own right, and it is a matter of convenience for the main claim and counterclaim to be adjudicated simultaneously.

[153] In Erasmus Superior Court Practice,<sup>13</sup> the learned author stated as follows:

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<sup>13</sup> Erasmus *Superior Court Practice* 13th Service Edition at B1-164.

'It does not infrequently happen that a defendant not only defends the action but also has an action of his own to bring against the plaintiff. This cross-action may arise out of the same transaction that gave rise to the plaintiff's claim or may be quite separate and distinct from it. In both cases it is desirable that the defendant, instead of being required to institute a separate cross-action with his own summons, and which proceeds eventually to a separate trial and judgment, should be allowed to link his action with the plaintiff's action so that in a proper case the two actions may be heard together, and so that the judgment in the two may be pronounced at the same time . . . A claim in reconvention is, therefore, a convenient surrogate for an independent action.'

[154] In my view, there are merits in the remarks of Mr Corbett. There was no evidence advanced in defence of the plaintiff's case. A defence, as the name suggests, is the defendant's opportunity to defend the allegations made in the plaintiff's particulars of claim. There was neither cross-examination nor evidence produced in rebuttal of the plaintiff's claim in convention. This fact cannot be reasoned away. This does not mean there is no evidence before the court, as Mr Imbili testified at length during his evidence on the counterclaim, also concerning the main claim. During his evidence, he testified about clause 12.5 of the plaintiff's employment contract. The question is, however, what value can be attributed to the evidence advanced during the claim in reconvention in an attempt to refute the main claim (claim in convention).

#### *The witnesses*

[155] The plaintiff was the sole witness in his case. He substantiated his case with documentary evidence. As a witness, the plaintiff made a favourable impression on this court. His evidence was clear and concise, and he knew his case back to front.

[156] The plaintiff provided a comprehensive and detailed account of his involvement with the four claims which form the basis of the counterclaim. He supported his explanation with extensive documentation. Although there were some areas where his explanations were not necessarily perfect, in the context of being a CEO of an institution like NIP, he cannot be expected to know about every transaction or dealing concluded



during his term of office. Less-than-perfect answers do not make a witness an untruthful witness.

[157] Five witnesses testified on behalf of the defendant with respect to the counterclaim. Mr Imbili was the main witness who testified on behalf of the defendant. It is also against the evidence of Mr Imbili that the plaintiff was the most critical. Mr Imbili had limited personal knowledge with respect to many of the issues and had to base his evidence solely on documents at his disposal.

[158] Despite his best intentions, Mr Imbili did not make a good impression as a witness. He was often argumentative and speculative, causing him to remain under cross-examination for days on end.

[159] The remaining witnesses, Mesdames Angula, Shikongo, Howaes, and Mr Kamati, provided evidence limited to the claims relating to ST Freight and Roma Kitchens. The aforementioned ladies' evidence did not take the matter further. They were involved in scheduling meetings and attending to the minutes. Unsigned minutes were presented to the court, and the evidence was that the signed minutes appeared to be lost.

[160] Mr Kamati shed more light on the ST Freight transaction, and his evidence cannot be faulted. He confirmed that the defendant's Procurement Policy makes provisions for emergency procurement. I understood Mr Kamati to say that Ms Kaupirura acted unprocedurally by contacting ST Freight during the procurement process. He further testified that since the defendant's Procurement Policy was stricter than that of the CDC, the defendant's Procurement Policy should have been applicable. However, the plaintiff and defendant are not in agreement in this regard.

[161] Critically important witnesses in this matter would have been the erstwhile chairpersons of the Board. Unfortunately, Mr Mandela Kapere passed away. The late Mr Kapere negotiated the plaintiff's employment contract. His successor was Dr Diina Shuuluka. Dr Shuuluka also served on the Board when the plaintiff was appointed and was the chairperson of the Board at the time of the plaintiff's suspension and

subsequent dismissal. Therefore, Dr Shuuluka would have intimate knowledge of the proceedings and the allegations relating to the plaintiff.

[162] Despite extensive efforts by the defendant's legal practitioner, the defendant could not secure Dr Shuuluka's attendance in court. Several subpoenas were issued for Dr Shuuluka. However, from the status report dated 16 January 2023 filed on behalf of the defendant, it was clear that Dr Shuuluka did her best to evade service of the subpoena by changing addresses and refusing to pick up her mobile phone. Dr Shuuluka deposed to a witness statement in 2020 in terms of the rules of Court. It is, therefore, unclear why she would avoid testifying in court. This would, however, justify an adverse inference to be drawn by this court.

#### *Mutually destructive versions*

[163] The versions before the court are mutually destructive. Our courts have often approved and applied the trite test to resolve disputes of this nature, as set out in the following passage from *SFW Group Ltd And Another v Martell Et Cie And Others*:<sup>14</sup>

'The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That, in turn, will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or what was put on his behalf, or with established fact and his with his own extra-curial statements or actions; (v) the probability or improbability of particular aspects of his version; (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. . .'

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<sup>14</sup> *SFW Group Ltd and Another v Martell Et Cie And Others* 2003 (1) SA 11 (SCA) at page 14H – 15E.

[164] The above authority lays bare that if a matter cannot be resolved on probabilities, the court can consider the credibility of witnesses to determine which of the two versions should be preferred. In this process, the court can have regard to the candour and demeanour of witnesses, self-contradiction or contradiction with the evidence of other witnesses who are supposed to testify about the same event or where the evidence presented contradicts an established fact.<sup>15</sup>

### Onus

[165] Each party was liable to discharge the onus resting on it on a balance of probabilities with respect to their claims.

### Discussion of the counterclaim

[166] I intend to deal with the counterclaim first. The defendant argues that the plaintiff, in breach of his fiduciary duty and further without any authority or approval of the defendant's board, perpetrated certain wrongful acts as set out in the counterclaim.

[167] The defendant places reliance on the express terms of clause 5 of the plaintiff's employment contract which imposes contractual obligations on the plaintiff that look like fiduciary duties and can be summarised as follows: the plaintiff was to perform duties usually associated with the office of the CEO and as set out in his job description, together with such other duties as may be prescribed by the Board of Directors; devote his full time, ability and attention to the business of the defendant during regular business hours, and thereafter when necessary; at all times faithfully, industriously and to the best of his ability perform all duties that may be required from him by virtue of his position as CEO; use his best endeavours to promote and extend the business of the defendant and protect its interests and generally safeguard its goodwill, property and

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<sup>15</sup> *Shiweda v Tweya Trading CC and Others* (HC-MD-CIV-ACT-CON-2020/04741) [2023] NAHCMD 101 (9 March 2023) para 58.

assets; and be responsible to the Board for the effective management of all staff matters and the implementation of all codes and procedures.

[168] Allegations of unlawful conduct were raised in May 2018, and the plaintiff was invited to comment on the allegations against him, to which he responded in writing. However, over and above inviting the plaintiff's comments, the NIP Board also sought legal advice from Kadhila Amoomo Legal Practitioners and sourced independent forensic audits from PwC.

[169] The first PwC audit, dated 7 December 2018, in respect of the ST Freight matter made it clear that no due diligence was performed by the senior officials involved with the matter. The audit references several non-compliances committed by entities within the structure of operations of NIP and recommends that disciplinary proceedings be lodged against Ms Kaupirura, Mr Kaura, and Mr Mbahijona. No findings of wrongdoing or recommendations were made concerning the plaintiff.

[170] A second forensic report by PwC dated 23 January 2019. This report, yet again, did not identify any wrongdoing on the part of the plaintiff. The court understands that PwC was unable to interview the plaintiff, yet with all the documents at its disposal during the investigation, PwC did not point out non-compliance on the part of the plaintiff.

[171] The defendant relies heavily on the plaintiff's purported non-compliance with NIP policies and procedures.

[172] This report recommended that NIP's management finalise the draft of NIP Procurement and the Delegation of Powers Policies to ensure they align with the Public Procurement Act. What is noteworthy is that the Delegation of Powers Policy was not approved by the Board. It is interesting in that the later report of January 2019, PwC indicates that the NIP Procurement policy was approved in May 2014. This is contradictory and supports the plaintiff's averment that the defendant relies on draft

policies that have not yet been approved. The relevant approval(s) does not form part of the record.

### *ST Freight*

[173] In respect of the ST Freight transaction it is clear, contrary to the defendant's argument, that the plaintiff never signed the MOU or the SLA. The argument that the plaintiff must have known about the MOU and that Ms Kaupirura was not in town on the date of signature holds no water because the fact remains that Ms Kaupirura signed it and was later held accountable for it.

[174] It appears that Ms Kaupirura initiated the transaction and sought the relevant exemptions. The signed minutes that would purportedly show the plaintiff's involvement in the transaction are not before the court and are disputed by the plaintiff. The onus rested on the defendant to make out its case in this regard.

[175] The defendant claims the sum of N\$3 152 150 from the plaintiff in respect of the ST Freight matter, yet these funds were PEPFAR funds made available by the CDC, which were kept in a separate account to which the plaintiff had no access. These assets acquired through the PEPFAR funds remained the assets of the CDC unless donated to the defendant at the conclusion of the specific program or project. The plaintiff testified that the assets purchased with the PEPFAR funds did not appear in the audited financial statements of the defendant but were accounted for separately.

[176] Additionally, CDC was aware of this transaction in which NIP paid funds to ST Freight to purchase vehicles to reach these remote areas and raised no objection to it.

[177] Unfortunately, Mr Imbili did not pursue the matter further as he did not have direct knowledge of all the underlying meetings related to ST Freight. However, he did acknowledge that ST Freight's activities were not funded by the defendant's funds but rather by PEPFAR. He was unwilling to commit himself to the issue that the

disbursement of PEPFAR funds was audited separately and that the auditors would have detected any irregularities in the allocation of funds.

[178] In my view, there is no basis to hold the plaintiff liable for the amounts claimed in respect of the ST Freight matter. The plaintiff breached no fiduciary duty, and this claim stands to be dismissed.

### *Roma Kitchens*

[179] During Mr Imbili's evidence, the defendant changed its stance by claiming that NIP did not receive fair value for purchasing furniture for its head office. However, no evidence was provided to suggest that the purchase resulted in a loss for the defendant.

[180] The furniture procurement was done within the budget through a competitive process, resulting in savings of almost 30%. Ms Angula, who served on the Office Furniture Committee, which was responsible for liaising with the architects to ensure that the head office was fitted with furniture, testified that Roma Kitchens was selected based on its experience in previous projects with First National Bank, AGRIBANK and the MVA Fund in respect of furniture procurement. After benchmarking these institutions, the committee referenced Roma Kitchens for NIP's head office furniture.

[181] Mr Imbili confirmed that the furniture was necessary for the head office to function. He also confirmed that a budget of just over N\$11 million was approved for the furniture acquisition. He further confirmed that the defendant had no Board in place at the time of the procurement. As a result, EXCO was the highest decision-making body. He testified that the furniture was procured based on the advice and recommendations made by a consultant appointed for this purpose, the architect Mr Mutua.

[182] The plaintiff confirmed this evidence by stating that an agreement existed with the architect even before he was appointed CEO, in which the architectural firm would engage the service providers related to the project.

[183] The plaintiff denied the allegation of being in breach of the policy and stated that according to the Procurement Policy, if a requisition has been prepared and a quotation has been obtained, then for non-consumable items costing over one million from approved suppliers, the Head of Department (HOD) and the Chief Executive Officer (CEO) may approve the quotation.

[185] PwC's investigation also dealt with the Roma Kitchens matter but only recommended disciplinary action against the Chief Financial Officer for improper record keeping and administration. It did not refer to any loss suffered by the defendant.

[186] As a result, I am of the view that there is no merit in the defendant's claim for any amount, nor was there any breach of the plaintiff's fiduciary duties. This claim, therefore, stands to be dismissed.

#### *Disinvestment of the Old Mutual funds*

[187] The parties disagreed on whether the Investment Policies and Procedure relied upon by the defendant were approved, as there is no board resolution accepting this policy, nor did the chairperson of the Board sign the policy. Nor is there any confirmation that the policy was approved by the Minister of Finance and the applicable line Minister.

[188] It is important to note that there are two instances of disinvestment of funds. The Chief Financial Officer provided a recommendation, which the plaintiff then approved in his capacity as CEO. However, there were established procedures that this official was required to follow after receiving such approval. The plaintiff was criticised for not directing that his endorsement is subject to compliance with the policy. The Chief Financial Officer is the highest-ranking official in the finance department and should have known what compliance was required. I am of the view that the plaintiff did not fail in his duty when he accepted that the Chief Financial Officer would comply with the relevant procedure.

[189] The disinvestment was done to comply with NIP's obligations, namely, the payment of salaries, creditors, and taxes. There is no evidence before this court suggesting that the plaintiff's actions caused any losses to the defendant.

[190] Mr Imbili testified that if the investment remained with Old Mutual, NIP would gain N\$2 056 285.22 in interest calculated at a rate of 5.61%. No expert evidence was presented on the impact the disinvestment would have had if the funds had remained with Old Mutual, nor was there any quantification of the defendant's loss. Mr Imbili was of limited assistance in this regard as he conceded that he is not a financial expert and does not have a background in investments or disinvestments of funds.

[191] The issue of the disinvestment of the funds served before the Audit, Risk and ICT Committee of NIP and thereafter was considered and disposed of by the Board at a meeting held on 24 March 2017. This matter was thus resolved.

[192] Therefore, I must conclude that the claim against the plaintiff regarding the disinvestment of funds is without merit and stands to be dismissed.

*Creating positions on the NIP's organogram without authority*

[193] The final claim relates to the creation of positions on NIP's organogram. The plaintiff conceded that this is a function of the Board but stated that no board was constituted at the time.

[194] The plaintiff testified that these positions were created by EXCO because the accreditation of NIP was imminent, and there was no indication of when the Board would be constituted. The court accepts that the plaintiff failed to present any documentation regarding the accreditation, but this fact was never disputed.



[195] When the appointments were made, no Board existed, and the Delegation of Power Policy did not specify how decisions should be made in the absence of the Board. Mr Imbili continuously claimed that the appointments were not authorised. He could not provide any other decision from the defendant's Board except the one that approved the positions retrospectively. During the Board meeting held on 24 March 2017, the Board resolved to recommend all positions proposed by Human Capital, except those concerning Business Development and the Supply Relations Officer. This meant that the appointments made by EXCO were subsequently approved by the Board when it was constituted at a later date.

[196] I find it interesting that no evidence was presented in court to the effect that the Board believed that the NIP incurred any losses due to the appointment of the three employees. Additionally, there was no evidence suggesting that the Board was of the view that the plaintiff should be liable for these employees' salaries and benefits.

[197] In my view, the argument that this decision by EXCO caused a fundamental breach by the plaintiff of his fiduciary duties holds no water and stands to be dismissed.

#### Discussion of the plaintiff's claim

##### *The termination of the plaintiff's employment contract and application of clause 11.1.3*

[198] The plaintiff was subjected to disciplinary proceedings regarding issues now framed as counterclaims. However, after obtaining legal advice, the NIP Board abandoned the disciplinary hearings scheduled for continuation on 3 - 5 September 2018 and 29 - 31 October 2018. The plaintiff was literally dismissed overnight on the strength of clause 11.1.3.

[199] The advice on which the Board acted militates against the reasons advanced for abandoning the disciplinary hearing, i.e. unscrupulous conduct and unreasonable delay. From the minutes of the extraordinary board meeting held on 30 August 2018, it is clear

that the Board was swayed by the fact that dismissal on the strength of clause 11.1.3 would absolve the defendant from paying any amount to the plaintiff except those which had accrued or that which was lawfully due to him. There was thus clear avoidance on the part of the Board to comply with the restraint of trade clause.

[200] Clause 11.1 of the agreement lists five instances in which the defendant can terminate the agreement. These include mutual agreement, serious misconduct by the CEO, documented acts of dishonesty, fraud, or gross negligence, the CEO's inability to continue due to ill health, and unilateral termination by the defendant.

[201] The defendant is waving clause 11.1.3 as if it is a free pass to evade the liability arising from clause 12.5; however, the sub-clause hereunder states the contrary.

[202] Clause 11.1.5.1 sets out the process to be followed in the event of unilateral termination of the CEO's service, and critical to a unilateral termination is clause 11.1.5.2, which provides that:

'NIP shall pay to the Chief Executive Officer a severance payment equivalent to the Total Guaranteed Pay as per clause 6.1 above, for each remaining year of service in terms of this Contract of Employment. In addition the Company shall pay to the Chief Executive Officer restraint of trade benefits in terms of clause 12.5 below, and the Chief Executive Officer shall accept such sums in full discharge of all claims whatsoever. Such termination shall constitute a valid reason and fair procedure as contemplated in terms of the Labour Act.' (my emphasis)

#### *Validity of clause 12.5 of the employment contract*

[203] The opposition to the plaintiff's claim is that the defendant is a public enterprise entity that is statutorily established and that the State Owned Enterprises Act and the Public Enterprise Governance Act limit its powers concerning the appointment and remuneration of its Chief Executive Officer. The benefits under clause 12.5 of the plaintiff's employment contract, regardless of whether it be remuneration or otherwise, are beyond or outside the said powers of the defendant. It follows, therefore, that clause

12.5, which the plaintiff seeks to enforce, is foreign and therefore ultra vires the Act and the remuneration directives No 174 of the State Owned Enterprises.

[204] It is further the defendant's position that clause 12.5 of the plaintiff's employment contract constitutes remuneration or service benefit and that for it to be valid, it should have complied with the provisions of s 22 (3) of the Public Enterprises Governance Act. In terms of that section, any form of payment or fringe benefit should have been approved by the board and the portfolio minister. In the current instance, NIP maintains that the approval and concurrence by the minister are absent.

[205] Therefore, the legal context for enforcing the restraint of trade clause must be considered. The interpretation of s 22(3) of the Public Enterprises Governance Act and the relevant clauses of the agreement are critical to the defendant's defence.

[206] This matter involves the principles governing the interpretation of statutes and other documents and the parties agreed that the contextual approach was set out in *Total Namibia v OHM Engineering and Petroleum Distributors*.<sup>16</sup> In *Total Namibia*, the Supreme Court referred to the approach followed in the construction of text and cited the Supreme Court of Appeal judgment in the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*,<sup>17</sup> as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to

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<sup>16</sup> *Total Namibia v OHM Engineering and Petroleum Distributors* 2015 (3) NR 733 (SC).

<sup>17</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

insensible or unbusiness like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used.' (emphasis added)

[207] Our Supreme Court also referred to the approach in England and concluded that:<sup>18</sup>

'What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of the word is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.' (emphasis added)

[208] Mr Corbett argued that the words used in a contract should be interpreted in their ordinary meaning, that clauses 11 and 12 of the agreement are clear and unconditional, and that the defendant's argument against it would be unjust. He emphasised that the plaintiff did not draft the agreement, so the *contra proferentem* rule applies. This means the party who authored the contract should suffer if ambiguity exists. Therefore, the defendant should suffer the consequences as it had the power to make it plain.

[209] Support for this view is found in *Damaraland Builders CC v Ugab Terrace Lodge CC*,<sup>19</sup> wherein the court referred to established rules that may assist in construing what the intention of the contracting parties was if some inconsistency or ambiguity exists in a contract. The court held that 'in such cases of ambiguity, courts sometimes apply the *quod minimum* rule and the *contra proferentem* rule. . . according to the *contra proferentem* rule words of doubtful meaning in a contract are constructed against the party who formulated or framed the terms'.

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<sup>18</sup> Supra at footnote 17.

<sup>19</sup> *Damaraland Builders CC v Ugab Terrace Lodge CC* 2012 (1) NR 5 (HC) at 13B para 10(f).

[210] Our law presumes that any person who writes something intends it to be so. This fundamental principle applies to the interpretation of any document and ensures that no one goes against their own actions. Essentially, it is believed that a document is what it claims to be. Since the defendant questions the validity of the restraint of trade provisions, it has to prove otherwise. This could be done by providing evidence, which the defendant chose not to provide. The same applies to any claims that the agreement was illegal.

[211] The wording of clause 12.5 of the employment contract was never an issue between the parties. When the plaintiff and Mr Kapere engaged in negotiations, a draft contract was exchanged between the parties, and although there were other clauses that Mr Kapere wanted to discuss with the Board, it did not include clause 12.5. The first time that clause 12.5 was raised was in 2017 when Mr Kwala questioned the legality of the clause. This was not taken any further at that time. When the clause was brought up for discussion by the Board, the chairperson, Dr Shuuluka, directed that the contract and its terms, which the previous Board approved, should be honoured.

[212] In this regard, it would be expected that as a member of the Board during Mr Kapere's negotiation of the agreement with the plaintiff and the Board's approval of the contract, she would have been the first to bring up the issue of clause 12.5 with the new Board. However, she did not mention that clause 12.5 was never discussed or approved by the previous Board. Instead, she directed the new board to honour the contract approved by the previous Board.

[213] Mr Imbili is adamant that the Board did not discuss this clause during the meeting that he attended. However, it would appear that Mr Imbili was not as informed as he thought he was or as much as he wanted to be. As NIP's legal advisor, he was not even approached to draft the contract or to consider the terms thereof. It is also not clear why Mr Imbili did not study the employment contract at the time of the plaintiff's appointment or that he insisted on receiving a copy thereof, given that he was in the meeting on 30 March 2014 when the plaintiff's appointment was approved.

[214] To now, years after the fact, argue that the Board did not approve the employment contract, inclusive of clause 12.5, is without merit. The one person who would have been in the best position to shed light on the discussions by the Board in this regard is Dr Shuuluka, who chose not to testify. I am not convinced that the board of an institution such as NIP would not have scrutinised the contract of the CEO and that the alarm would not have been raised if the restraint clause was not supposed to form part of the agreement. There is also no evidence before this court that Mr Kapere, during his negotiations with the plaintiff, went beyond the limits of his authority. In any event, clause 14 of the contract warrants that NIP had legal authority to enter into the contract and was 'not prohibited or restricted from doing so by way of any governance documents or resolutions of NIP'.

[215] Through its officials, NIP drafted the employment contract, which Mr Kapere signed as chairperson. This binds the defendant to the agreement as a whole and not just specific clauses thereof. The court must accept that the parties intended to insert this specific clause in the agreement.

[216] The defendant contended that neither Mr Kapere nor any other director, then or now, have the authority to bind the defendant regarding clause 12.5. This argument does not hold water as the defendant's Articles of Association in clause 59 provides that:

'All acts done at any meeting of the Directors or of an executive or other committee of the Directors, or by any person acting as a Director shall, notwithstanding that it shall afterward be discovered that there was some defect in the appointment of the Directors or person acting as aforesaid, or that they or any of them were disqualified or had vacated office or were not qualified to vote be as valid and effectual as if every such person had been duly appointed and was qualified to be and to act and vote as a Director.' Emphasis provided

[217] This clearly indicates that the defendant's Board of Directors' actions will have a binding effect on the defendant.

[218] For the above reasons, I find the defendant's version that the Board did not approve clause 12.5 to be without merits.

*The interpretation to be afforded to section 22(3) of the Public Enterprises Governance Act and its application to clause 12.5 of the agreement*

[219] Unfortunately, the finding that the defendant's Board authorised the plaintiff's employment contract, which included clause 12.5, is not the end of the current enquiry. The next issue is to consider the restraint clause in the context of s 22(3) of the Public Enterprises Governance Act. Thus, does the restraint clause constitute remuneration or a service benefit? If it is either one of the two, it would fall within the provisions of s 22(3).

[220] Section 22(3) of the Public Enterprises Governance Act provides that:

'(3) The remuneration and other service benefits of the chief executive officer and other management staff of a State-owned enterprise must be determined by the Board of the State-owned enterprise with the concurrence of the Portfolio Minister, with due regard to any directives laid down by the Council under section 4.' (emphasis added)

[221] Mr Makando argued that the plaintiff, as a CEO of NIP, was appointed under s 22(1) of the NIP Act, which states "...upon such terms and conditions as the Board, subject to s 22(3) of the Public Enterprises Governance Act, 2006, may determine...". In terms of this section, all the *remuneration* and *other benefits* are to be determined by the board with the minister's concurrence. Mr Makando believes that if the peremptory terms of s 22(3) are not complied with, it would result in a nullity.

[222] Counsel further submitted that it is clear that s 22(3) does not provide for any other stand-alone payments, such as restraint payments. Remuneration and benefits are limited to those set out in the section read with the Directives. The restraint

payment, as encompassed in the plaintiff's contract, does not resort to the list of benefits catalogued in s 4 (1)(d)(iii) and (v) of the Governance Act.

[223] Contrariwise, Mr Corbett argued that the terms "remuneration" and "other service benefits" are not defined in the Act. Mr Corbett referred to the Directive issued in relation to remuneration levels for CEOs by way of Government Notice No. 174 of 12 August 2010, which established specific remuneration for CEOs. This Directive, according to Counsel, refers to remuneration bands that are in respect to "Total Guaranteed Pay" (per annum), excluding performance and incentive-based pay.

[224] He contended that on a proper interpretation of the Directive, it is evident that the remuneration band relates to:

- a) Firstly, total guaranteed annual pay. This would be remuneration which the CEO received on an annual basis whilst in employment, dispersed on a monthly basis, and
- b) Secondly, the Directive does not refer to the total package to be received by the CEO since it expressly excludes performance and incentive-based pay. This means that, in effect, these issues would be the subject of negotiations between the parties regarding the overall package for a CEO.

[226] Therefore, the question is whether the restraint clause is remuneration or other service benefits, and if not, what would it be?

### *Remuneration*

[227] The ordinary meaning of remuneration involves 'a *quid pro quo*, reward for services rendered or some other consideration given'.<sup>20</sup> However, where the word is used in legislation, the context in which it is used may determine the full extent of its meaning.<sup>21</sup> In the current matter, it is common cause that the repealed Public Enterprises Governance Act did not define either remuneration or other service benefits.

<sup>20</sup> *Firestone SA (Pty) Ltd & others v I Gentirucco AG* 1968 (1) SA 611 (A) at 628G.

<sup>21</sup> *Kruger v the Office of the Prime Minister & Another* (1996) 17 ILJ 1092 (LCN) at 1093 I.



The Directive<sup>22</sup> referred to by the respective counsel was issued under s 4(1)(d)(iii) of the State-owned Enterprises Governance Act, wherein the State-owned Enterprises Governance Council laid down directives in relation to the remuneration levels for the chief executive officers and senior managers of the State-owned enterprises. As pointed out by Mr Corbett, remuneration consisted of a band for the total guaranteed pay per annum, excluding performance and incentive-based pay. The band of remuneration depended on the classification and size (or tier) of the state-owned enterprise.

[228] Clearly, a CEO's annual remuneration is separate from performance and incentive pay. Only remuneration was set at an amount depending on the tier of the state-owned enterprise. Performance and incentive-based pay would be at the discretion of the Board.

[229] The defendant sought to find a definition of remuneration and other service benefits in the Labour Act 11 of 2007. Specific reference is made to s 1 of the Labour Act, where remuneration is defined as follows: ‘...(means) the total value of all payments in money or in kind made or owing to an employee arising from the employment of that employee...’

[230] In his authoritative work, Re-Interpretation of Statutes, Prof Louwrens du Plessis cautions against transposing definitions from one act to another. He opined that certain definitions may have a ‘technical’ meaning for the purposes of a specific act. Thus, context is critical in determining whether or not, and to what extent, a definition would guide the interpretation of a statute.

[231] The definition of remuneration in the Labour Act, in my view, is distinguishable from remuneration in the context of the Public Enterprises Governance Act, as remuneration in terms of the Labour Act refers to all payments in money or in kind arising from the employment of the employee. In terms of the Public Enterprises

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<sup>22</sup> Government Notice No 174 of 2010: Directives in relation to remuneration levels for chief executive officers and senior managers of State-owned enterprises and annual fees and sitting allowances for board members: State-owned Enterprises Governance Act, 2006.

Governance Act, performance and incentive payments stand separate from annual guaranteed pay. In the context of the Act, the latter appears to be the remuneration. In my view, the payment of the restraint clause does not fall within guaranteed pay/remuneration.

#### *Other benefits*

[232] That leaves the court to consider the meaning of 'other benefits' and if the restraint clause would resort thereunder.

[233] Mr Makando submitted that the term "service benefit" in terms of the Public Enterprises Governance Act is broad enough to include any compensation and that the plaintiff's claim relates to compensation for the period of the restraint. With the greatest deference to Mr Makando, I'm afraid I have to disagree with this statement as the Act does not define service benefit, nor does the Directives. It also does not define 'other benefits'. If one considers the Labour Act, it does not define benefits of service benefits either.

[234] The definition of benefit was discussed inter alia *SA Chemical Workers Union v Longmile/Unitred*<sup>23</sup> in the context of the South African Labour Act. Remuneration in the South African Labour Act is similar to ours, and the court discussed it as follows:

'Remuneration' in section 213 means: 'any payment in money or kind or both in money and in kind . . .' remuneration is an essentialia of a contract of employment. Other rights or advantages or benefits accruing to an employee by agreement are termed naturalia to distinguish them from the essentialia of the contract of employment. Some naturalia are the subject of individual or collective bargaining, others are conferred by law. In my view a benefit may be part of the naturalia. It is not part of the essentialia. 'Remuneration is different from 'benefits'. A benefit is something extra, apart from remuneration. Often it is a term and condition of an employment contract and often not. Remuneration is always a term and condition of the employment contract.'

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<sup>23</sup> *SA Chemical Workers Union v Longmile/Unitred* (1999) 20 ILJ 244 (CCMA) at 248–253.

[235] The plaintiff and Mr Kapere negotiated his overall package beyond the Directive, which was set in statute. The guaranteed annual pay comprised 65% of his package. The remainder comprised the benefits set out in clause 6 of the agreement. The performance payment referenced in the Directives was subject to a performance review, which was calculated on a sliding scale from 0 to 100%. All the aforementioned payments and benefits accrue to the employee during his period of employment.

[236] It was argued on behalf of the defendant that the restraint clause is indeed remuneration or a service benefit arising from the plaintiff's employment contract. The flaw in this argument lies in the fact that a restraint of trade clause is not for the benefit of the employee, but it is for the benefit of the employer. A restraint of trade clause would only become operational upon termination of the contract between the parties and not prior. The restraint agreement is, therefore, geared at protecting the employer's proprietary interest after the employee has left the employer's employment.<sup>24</sup>

[237] A restraint of trade clause is a common clause found in employment agreements for the employer's benefit. It aims to protect the employer's confidential information, trade secrets, and company interests. This is done by preventing employees from working for a competing company, either directly or indirectly, within a particular geographical area for a specific period. Generally, a restraint of trade clause is only enforceable if the information used is confidential and protectable. Once an employee agrees to the terms and conditions of an agreement containing a restraint of trade clause, it can be difficult to avoid its impact and enforcement. However, if the agreement in restraint of trade is contrary to public policy, it is not enforceable even if it is valid.

### *Public policy*

[238] This was then also the defendant's fallback position, ie. that the plaintiff is not entitled to rely on clause 12.5 as it is against public policy and that the enforcement of the said clause would not be in the public interest.

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<sup>24</sup> *Bonfiglioli SA (Pty) Ltd v Panaino* (2015) 36 ILJ 947 (LAC) at para 24.

[239] To rely on public interest or public policy, it is important to determine whether public policy requires that the restraint of trade be maintained or rejected. Mr Imbili testified that no protectable interests would justify a restraint of trade clause in the plaintiff's agreement. He further testified that the defendant is a public enterprise for the benefit of the public. Hence, paying the plaintiff the amount of N\$3 837 429.12 with interest of 20% per annum without rendering any service to the defendant would be against public policy and not in the interest of the public.

[240] In *Factcrown Ltd v Namibia Broadcasting Corporation (Pty) Ltd*,<sup>25</sup> the court extensively referenced *Sasfin (Pty) Ltd v Beukes*, wherein Smallberger J discussed public policy. I have extracted portions from the quotation as follows:

[56] Regarding the plea of the defendant that the contract is not enforceable on the ground that it is contrary to public policy the following was said in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) by Smallberger JA at p 7I – J p 8 and p 9A – G.

“Our common law does not recognize agreements that are contrary to public policy (*Magma Alloys and Research SA (Pty) Ltd v Ellis* 1984(4) SA 874(A) at 891(G). This immediately raises the question what is meant by public policy, and when can it be said that an agreement is contrary to public policy. Public policy is an expression of ‘vague import’ (per Innes CJ in *Law Union and Rock Insurance Co Ltd v Carmichael’s Executor* 1917 AD 593 at 598), and what the requirements of public policy are must needs often be a difficult and contentious matter. Wessels *Law of Contract in South Africa 2<sup>nd</sup> ed vol 1 para 480* states that ‘(a)n act which is contrary to the interests of the community is said to be an act contrary to public policy’. Wessels goes on to state that such acts may also be regarded as contrary to the common law, and in some cases contrary to the moral sense of the community. The learned author ‘*Aquilius*’ in one of a series of articles on ‘Immorality and Illegality in Contract’ in 1941, 1942 and 1943 SALF defines a contract against public policy as ‘one stipulating performance which is not per se illegal or immoral but which the Courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the interest of the community’ (1941 SALF 346).

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<sup>25</sup> *Factcrown Ltd v Namibia Broadcasting Corporation (Pty) Ltd* (394 of 2005) [2011] NAHC 360 (13 December 2011)

Wille in his *Principles of South African Law* 7<sup>th</sup> ed at 324 speaks of an agreement being contrary to public policy 'if it is opposed to the interests of the State, or of the public'. The interests of the community or the public are therefore of paramount importance in relation to the concept of public policy. Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced. (Cf Chesfire, Fifoot and Furmston's *Law of Contract* 11<sup>th</sup> ed at 343).'

And further

'This is in keeping with what was said by Innes CJ in *Eastwood v Shepstone* 1902 TS 294 at 302, viz: Now this Court has the power to treat as void and to refuse in any way to recognize contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the Court would be wanting in its duty if it hesitated to declare such an arrangement void...'

And still further

'One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12 ([1937] 3 All ER 402 at 407B-C), 'the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds'. (See also *Olsen v Standaloft* 1983 (2) SA 668 (ZS) at 673 G). Williston on *Contracts* 3<sup>rd</sup> ed para 1630 expresses the position thus:

'Although the power of courts to invalidate bargains of parties on grounds of public policy is unquestioned and is clearly necessary, the impropriety of the transaction should be convincingly established in order to justify the exercise of the power.'

[241] The averment that there were no protectable interests that would require a restraint clause was not developed further during the trial. I have considered the

conspectus of the evidence presented before this court and there is no basis on the facts or law to find that the restraint clause was against public policy.

*Concurrence of the Portfolio Minister*

[242] Having established that payment in terms of clause 12.5 would neither be remuneration nor other benefits, the payments agreed upon between the parties would fall outside the ambit of s 22(3) of the Public Enterprises Governance Act and within the negotiations between the parties and would therefore not require the concurrence of the Portfolio Minister.

[243] I was referred to *TransNamib Holdings Ltd v Tjivikua and Others*<sup>26</sup> Masuku J when faced with the issue of compliance with the terms of s 22 of the Public Enterprises Governance Act in the context of a labour matter. On the issue of approval by the relevant Minister, Masuku J concluded as follows:

'[80] Whatever compunctions the court may have, it would be precipitous and in particular, a violation of the doctrine of separation of powers for the court to recognise and give effect to an act that appears to have been done in contravention of a legislative enactment. The minister's imprimatur of some sort is required for the validity of the remuneration of the respondent. Since it appears that same was not obtained, it appears to me that a case has been made out for the rescission of the arbitrator's award, and by extension, the court's order, for non-compliance with what appears to be a clear legislative requirement in this matter. A case for rescission on the basis of the act being invalid from the instance has clearly been made out in my considered opinion.' (my emphasis)

[244] Even if I am wrong regarding the approval by the Portfolio Minister, there can be no doubt that the plaintiff's appointment was presented to Cabinet by the Minister of Health and Social Services and endorsed. The Portfolio Minister sits in Cabinet, and therefore, the inference to be drawn is that the plaintiff's appointment was made with the

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<sup>26</sup> *TransNamib Holdings Ltd v Tjivikua and Others* 2019 (3) NR 756 (LC) at [77] to [79].

concurrence of the Portfolio Minister, inclusive of his remuneration levels and benefits. This, in my view, satisfies the views expressed by Masuku J above.

[245] It is also important to note that the issue of authority was raised four years after the plaintiff's appointment. The defendant also had the opportunity to repeatedly to renegotiate the contract of the plaintiff whilst still in the employ of NIP and to revisit the issue of the restraint clause but elected not to do so. The issue of approval by the Minister was raised for the very first time in the defendant's plea (five years after the fact). The defendant had the opportunity to rebut the plaintiff's evidence regarding the approval of his appointment by the line Minister but failed to do so.

#### Quantification of the plaintiff's claim

[246] Before concluding, I must briefly refer to the quantum of the plaintiff's claim. In terms of clause 12.5, he would be entitled to a once-off payment equal to the CEO's total guaranteed pay for each year of restraint. The total guaranteed pay that the plaintiff was entitled to on the date of his appointment was set on the 90<sup>th</sup> percentile of the Directive. At the time, it was N\$987 197. In his witness statement in para 4.5.2 of the main claim, the plaintiff stated his total package consisted of his guaranteed pay and medical aid, pension, housing and motor vehicle allowance, which amounted to N\$1 500 000 at the time of his appointment. His basic salary was 65% of the total package, which amounted to N\$975 000, slightly less than the N\$987 197 per the Directive. Benefits like medical aid and pension could logically not qualify as income, but rather a deduction. However, the gist of this statement by the plaintiff is that the N\$1 500 000 consisted of his basic salary and benefits payable to him annually.

[247] For some reason, the contract referred to total guaranteed pay as N\$1 500 000, which is not in line with the Directive at the time, although clause 6.1 reads as follows:

'6.1 The Chief Executive Officer shall be entitled to a Total Guaranteed Pay of N\$1 500 000.00 per annum, but excluding performance and incentive-based benefits in line with the

State Owned Enterprise Governance Act Directives No. 174 of 2010, payable in arrears by cheque or into a bank account nominated by the Chief Executive Officer.' (my emphasis)

[248] At the time of his dismissal, the plaintiff earned N\$1 918 714.56 with the necessary increments as his total package. That would place him at a total guaranteed pay per annum of N\$1 247 164.46. According to the amendment to the Directive, as of 16 April 2018, the 90<sup>th</sup> percentile was N\$1 341 081.33.<sup>27</sup>

[249] The plaintiff's claim, however, is for his complete package, which included his total guaranteed pay and other benefits. This, in my view, cannot be correct as it is clear that the intention was that the total guaranteed pay would be in line with the Directive. Therefore, the two-year guaranteed pay of 65% of his total package would amount to N\$2 494 328.92 and not N\$3 837 429.12 as claimed.

### Conclusion

[250] In light of my discussion above, I find that the plaintiff has proven his case on a balance of probabilities and should succeed in his claim in the amount set out in para 251. The defendant, on the contrary, did not prove its counterclaim on a balance of probabilities and stands to be dismissed. The costs must follow the result.

[251] My order is as follows:

### Main Claim:

The plaintiff's claim is granted in the following terms:

1. Payment in the amount of N\$2 494 328.92;

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<sup>27</sup> Government Notice 69 of 2018: Amendment of Government Notice no. 174 of 2010: Directives in relation to remuneration levels for Chief Executive Officers and senior managers of State-owned enterprises and annual fees and sitting allowances for board members: Public Enterprises Governance Act, 2006.



2. Interest on the aforementioned amount at the prescribed rate of 20% per annum a tempora morae from 31 August 2018 to date of final payment thereof.

Counterclaim:

3. The defendant's counterclaim is dismissed.

Costs ad main and counterclaim:

4. The defendant is liable for the costs of the plaintiff. Such costs to include the costs of one instructing and one instructed counsel.

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JS Prinsloo  
Judge

Appearances:

For the Plaintiff:

A CORBETT (assisted by R SHIPINDO)  
Of Shipindo & Associates Inc.  
Windhoek

For the Defendant:

S MAKANDO (assisted by F  
BANGAMWABO)  
Of FB Law Chambers  
Windhoek