



CASE NO.: SA 54/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MICHELLE DIANA MCLEAN

First Appellant

CONSTANZE YVONNE MARITZ

Second Appellant

JOACHIM JOHANNES NICOLAAS KRUGER

Third Appellant

SELMA SHEJAVALI N.O.

Fourth Appellant

and

DANIEL BOTES

Respondent

Coram: DAMASEB DCJ, MAINGA JA and HOFF JA

Heard: 02 November 2021

Delivered: 17 May 2022

Summary: The deed of Trust of a charitable trust, Michelle McLean Children's Trust (MMCT), authorised payment of remuneration to a Trustee (employee) for services

rendered. The respondent was employed on short term contracts, renewed from time to time, by the co-trustees as an Executive Director in addition to being a Trustee. When he was dismissed by the co-trustees for suspected misappropriation of Trust funds, he sued the Trust and co-trustees for unlawful repudiation of his contract and causing him financial loss for the unexpired term of his contract and unpaid pension benefits.

The contract of appointment entitled the respondent to claim a commission of 20% at first, and later 30% on 'all income' of the Trust, which he alleged meant gross instead of nett income. The co-trustees who denied that the contract of the respondent was unlawfully terminated in addition maintained that the commission of 30% was payable on the nett income of the Trust. The co-trustees also counterclaimed against the respondent for overpayments and selling to the Trust his shares in what they said was a worthless company.

Both parties raised special pleas of prescription against the claims of the other.

The High Court dismissed the Trust's special plea, upheld the respondent's claim for unlawful repudiation and awarded him damages for the unexpired term of his contract, and unpaid pension, with costs. The High Court dismissed the Trust's counterclaims for unauthorised payments to the respondent.

On appeal, *held that* the High Court erred in concluding that the respondent's contract was unlawfully repudiated, and that the co-trustees established on a balance of probabilities that the respondent received unauthorised payments; that such conduct by respondent justified termination of his contract.

Held that, properly construed, the agreement entitled the respondent to charge commission on nett income and not on gross income; that although the co-trustees proved respondent overpaid himself, due to their lack of diligence, the claims had

prescribed; that the co-trustees also established that part of the respondent's pension claim had prescribed.

Held that, although the respondent had succeeded in respect of part of his pension claim, he should be denied his costs because of his unacceptable conduct of receiving benefits from the Trust to which he was not entitled.

The appeal upheld in part.

Because the judgment largely restates trite principles, its reportability is left to the discretion of the Namibian Law Reports' editors.

APPEAL JUDGMENT

DAMASEB DCJ (MAINGA JA and HOFF JA concurring):

Introduction

[1] This appeal arises from a dispute that served before the High Court in which the respondent (Mr Botes) successfully sued his co-trustees of the Michelle McLean Children's Trust (MMCT), for 'unlawfully repudiating' his contract of employment as Executive Director (ED) and Secretary of MMCT and for 'unlawful interference' by the co-trustees with his appointment. The co-trustees are the first to fourth appellants.

[2] According to Mr Botes, the unlawful conduct by the co-trustees took the form of an 'abrupt termination and repudiation and/or breach in reckless disregard of their duties as trustees and in breach of the legal duty owed to him to conduct themselves

with due care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.’

[3] The court dismissed counterclaims by MMCT against Mr Botes for (a) alleged overpayments made to him from the Trust’s funds and (b) unjustly enriching himself to the Trust’s detriment by selling his worthless shares in a legal insurance business (LawSure) to MMCT. The court also dismissed MMCT’s special plea of prescription against one of Mr Botes’ claims.

Common cause facts

[4] It is common ground that MMCT was registered in 1992 as a welfare organisation in terms of the National Welfare Act 79 of 1965 (the Welfare Act). MMCT is therefore a charitable Trust founded by the first appellant (Ms McLean). As ED, Mr Botes was responsible for the day-to-day administration of the Trust and was its principal fundraiser since his appointment in or about 1994. Mr Botes was introduced to Ms McLean by the third appellant (Mr Kruger), a co-trustee.

[5] Mr Botes’ appointment was extended yearly until he was suspended on 13 September 2013 and his services finally terminated on 27 November 2013. All told, Mr Botes worked for MMCT as principal fundraiser and administrator for almost 20 years before his contract was terminated.

[6] MMCT initially relied entirely on donor funding but over time begun to engage in commercial business activities which included, as the court *a quo* records, micro-lending, a wellness center, fishing, estate agency and legal insurance.

[7] The following minutes of the Board of Trustees exist in relation to Mr Botes' employment by the Trust:

Minutes of 17 November 1994

'4. APPOINTMENT OF A SECRETARY TO THE BOARD

Mr Botes was appointed Secretary to the Board.

...

10. AGREEMENT

The initial contract between Mr D Botes and the MMCT expired at the end of February 1994, and he has not been fully reimbursed for costs incurred during this period.

Mr D Botes requested that he receive payment as per attached invoice as well as 20% commission which is payable from 1 March 1994 until now.

It is further requested that the contract is only for a period of 6 months and that Mr D Botes is remunerated as follows:

- as from 1 November 1994 to 30 April 1995 at N\$2500 per month
- Commission will be determined at the end of the 6-month contract and will be calculated as follows:

Total amount raised over 6 months x 20% commission less (N\$2500 x 6) =
amount due.' (Emphasis added)

Minutes of 20 November 1997:

'14. CONTRACT MMCT/ D BOTES

14.1 1 December 1996 – 30 November 1997

The appointment of Mr Botes for the above-mentioned period was approved.

14.2 1998

The contract for the period 1 December 1997- 31 December 1998 was renewed. Mr D Botes will be paid as follows: N\$5 000.00/ month and/or 20% commission whichever is the largest amount.'

Minutes of 11 March 2005:

'3. Contract of D Botes

Mr D Botes requested the meeting that the current contract need to be revised, due the massive load of work at the MMCT Mr D Botes requested the following:

The monthly fee of N\$2500-00, will be N\$5000-00/month, back dated to January 1, 1995.

The calculation of the commission will remain as follows:

Total Funds Raised x 20% - Monthly fee received = Amount Due

The above mentioned was approved.' (Emphasis supplied)

Minutes of 27 April 2005:

'6. Danie Botes- Contract

The board approved the contract of Mr. D. Botes as Executive Director as from 1 January 2005 until 31 December 2006. Mr. Botes's remuneration will be based on 20% off all income that the MMCT will receive. Mr. Botes will be paid on a monthly basis.' (Emphasis added)

Minutes of 17 October 2005:

'6. Danie Botes – Contract

The Board approved the contract of Mr. D. Botes as Executive Director as from 1 January 2005 until 31 December 2006. Mr. D Botes remuneration will be based on 20% on all income received by the Michelle McLean Children Trust. Mr. Botes will be paid on a monthly basis. Income will be calculated on all donations, grants, interest on Nedloans (Pty) Ltd income, dividends, specified- and unspecified income, VAT

refunds, excluding profits from sale of assets, insurance claims on assets and bank interest on current account earned. (Emphasis added)

Minutes of 26 October 2010:

'28. Contract- Mr D Botes

The Board took note of all the efforts of Mr D. Botes to acquire a stake in private ventures to ensure a sustainable income for the MMCT with the aim to expand all projects, as well as new projects and educational training of the MMCT.

The Board approved the contract of Mr D. Botes from 1 January 2010 – 31 December 2011 and increased the commission to 30%.'

Minutes of 6 April 2011:

'11. Contract – Mr D. Botes

The Board approved the contract extension of Mr D. Botes to 31 December 2012 and he will be paid 30% commission as determined in the past.'

[8] At the heart of the dispute between the parties is the proper construction to be placed on these minutes. Against the backdrop of the various minutes which allegedly formed the basis for the employment of Mr Botes as ED, the issues arising are (a) whether it was agreed between Mr Botes and the Trust that the commission payable to him as remuneration was to increase from 20% to 30%, (b) whether the commission payable was on 'gross income' or 'nett income', and (c) what was included (or excluded) in the items listed in the minutes of 17 October 2005 as income on which Mr Botes' commission could be levied.

Mr Botes' Claims

Claim A

[9] Under Claim A, Mr Botes claimed the sum of N\$10 047 208.23 as contractual damages due to him in terms of his appointment, alternatively as a direct or reasonably foreseeable and contemplated result of the repudiation. He claimed a further amount of N\$2 million as remuneration he would have received for the remaining 16 months of his appointment from 1 October 2013 to 31 December 2014.

Claim C

[10] Claim C is a delictual claim in the amount of N\$2 million against first, second and third appellants jointly and severally in their personal capacities for future loss of income. It is based on an alleged conspiracy by the said appellants, at the instigation of Ms McLean, to repudiate his appointment. It is alleged that Ms McLean improperly sought Mr Botes' acquiescence to obtain personal benefits from the Trust for herself and when he refused to cooperate, instigated the co-trustees to terminate his services. That termination, according to Mr Botes, was contrary to the duty of care that his co-trustees owed him not to engage in unlawful interference with and repudiation of his appointment. In so acting, the first, second and third appellants acted negligently or intentionally in breach of a duty owed to Mr Botes.

Claim D

[11] Claim D is for the amount of N\$2 006 940 for alleged unpaid pension contribution by the Trust to Mr Botes' Namlex Pension Fund for the periods 2005 - 2008 and 2009 - 2013. That failure, Mr Botes alleged, was in breach of an agreement between him and the co-trustees as reflected in the deliberations of a meeting of the

Trust held on 25 October 2005 – approving the payment of 7% (of the commission due to him) towards his pension fund. The initial 7% pension contribution was allegedly augmented in Mr Botes' favour to 9% at a meeting held in December 2009. Mr Botes alleged that the co-trustees were in breach of the agreement by failing to make any payments towards his pension fund for 2009 - 2013 and failing to make the correct corresponding monthly pension contributions.

[12] Mr Botes also claimed costs against the defendants.

The Plea

Prescription

[13] It being common cause that Mr Botes' summons was served on the co-trustees on 24 March 2014, the Trust pleaded that the claim for alleged unpaid pension benefits relative to the period 2005 - 2010 had prescribed in terms of s 11 of the Prescription Act 68 of 1969.

On the merits

[14] The Trust had pleaded that Mr Botes' appointment was not permanent but was for specified periods which were extended from time to time; was regulated by MMCT's deed of Trust; that the minutes do not constitute the agreement between the parties relative to Mr Botes' appointment; that on a proper construction of the minutes of 17 October 2005 Mr Botes' remuneration was 20% of the nett income received

from donations, grants, interest on NedLoans (Pty) Ltd income, dividends specified and unspecified.

[15] Mr Botes was challenged to prove that it was agreed that he was entitled to 30% commission instead of 20%.

[16] According to the plea, to the extent that the minutes may constitute a meeting of the minds between the parties, the true intention of the parties was that Mr Botes would be paid 20% of all nett income earned by MMCT. It was further pleaded that VAT refunds to the Trust were excluded since they do not constitute income.

[17] The plea further alleged that to the extent that the minutes may constitute an agreement between the parties, due to a misrepresentation by Mr Botes, alternatively due to a mistake common to the parties, para 6 of the minutes of 17 October 2005 does not correctly reflect the true intention of the parties. The minutes therefore fall to be rectified by incorporating the word 'nett' before the word 'income' wherever the latter appears in the minutes and to expunge the words 'VAT refunds'.

[18] As regards the claim for pension contribution and in so far as it may be found not to have prescribed in part, the co-trustees pleaded that the reference in the minutes to such contribution does not constitute an agreement, and if it does, its terms are vague and ambiguous and accordingly unenforceable.

[19] Since the terms are allegedly vague, the following alternative defences were pleaded:

- (a) The parties agreed and limited pension contributions to specified benefits or income and not on all income or benefits received or earned by Mr Botes;
- (b) Mr Botes personally approved for payment to himself by the Trust's finance manager specific pension contributions by applying pension fund rates to limited and specified amounts which were accepted by the finance manager on behalf of the Trust. By so doing and by not demanding further (or other) payments for pension or medical aid contributions, Mr Botes waived any further claims for payment over and above the payments already received for such benefits;
- (c) The Trust paid all amounts claimed in respect of pension fund contributions;
- (d) Pension fund debts due, if any, before 13 October 2011, had prescribed.

The counterclaim

[20] On the strength of the allegation that Mr Botes allowed his personal interests to conflict with those of MMCT in breach of his fiduciary duties to MMCT - by authorising unauthorised payments to himself from the Trust's funds - the co-trustees counterclaimed an amount of N\$4 947 283 against Mr Botes.

[21] In addition, on the strength of the allegation that Mr Botes sold worthless shares in LawSure to MMCT, the co-trustees by way of counterclaim sought the repayment of the amount of N\$1 million paid to Mr Botes by the Trust for those shares.

Plea to counterclaims

[22] Mr Botes denied all the allegations destructive of his claims and intended to support the co-trustees' claims in reconvention. He also raised a special plea of prescription in relation to the claims in reconvention which were served on 18 July 2014.

[23] Mr Botes denied that there is ambiguity in the Trust's minutes of 17 October 2005 on what income was intended and maintains that 'gross' income was intended. In respect of LawSure, he admits that the LawSure business had been sold to Santam and that what was sold to MMCT was 'the company and its infrastructure together with the license'. Prior to that sale, what was already sold to Santam was 'the running book of LawSure Ltd'.

The issues the High Court had to decide

[24] The issues for determination *a quo* were:

- (a) Whether remuneration due to Mr Botes was 20% or 30% commission of the Trust's income?
- (b) Whether Mr Botes was entitled to commission on gross or nett income?
- (c) Whether Mr Botes' employment was unlawfully terminated?
- (d) Whether (and in what amount) MMCT was liable for Mr Botes' pension benefits?
- (e) Whether the appellants proved (i) prescription in respect of Mr Botes' pension claim and (ii) the claims in reconvention against Mr Botes.

The evidence

[25] Both parties filed witness statements in terms of High Court Rule 92 and called witnesses at the trial. The evidence fell into two broad categories: the terms of Mr Botes' engagement as fundraiser and administrator of MMCT, and where proven, the quantum of Mr Botes' claims. It will be recalled that Mr Botes had to prove three claims and MMCT its counterclaims.

[26] It is common ground that of Mr Botes' three claims, the one relating to pension fund contributions was only introduced by way of an amendment long after proceedings commenced and did not form part of the initial combined summons. I will later deal with the significance of this fact when dealing with how the High Court dealt with the probabilities of the matter overall.

[27] Whether or not Mr Botes as fundraiser and administrator was entitled to remuneration for the work he did for MMCT admits of no doubt. That the remuneration would be calculated on a percentage basis of MMCT's income equally admits of no doubt.

[28] Before dealing with the specific aspects of the evidence of the parties, it is important to refer to an important consideration having a bearing on this case; and it's this: where the disputes between the parties turned on written documents, in particular the interpretation to be placed on the minutes, the court *a quo* ought to have disregarded entirely the spin placed by the parties on the import of those documents because their true import was, as the court correctly held, a matter for the court and not for the parties. I say so because, as will soon become apparent, not only does the record show a poorly run Trust whereby there was complete lack of oversight by the Trustees of the affairs of the Trust and non-disclosure by Mr Botes of important information about the Trust's affairs to his co-trustees. That state of affairs encouraged each side to engage in *ex post facto* rationalisation of events which on the face of it contradict what is asserted in pleadings and contemporaneous documents and transactions.

[29] Whether or not Mr Botes was entitled to 20% or 30% commission on MMCT's income, the nature of the income and whether or not it would be on nett or gross income, on Mr Botes' own version, were recorded in the minutes. The minutes were therefore at the centre of the dispute between the parties.

Mr Botes

[30] Mr Botes testified in support of his claims and in defence against the Trust's counterclaims. He confirmed that he was recruited by the Trust on the basis that he had a good reputation in fundraising.

[31] He testified that the computation of his commission (remuneration) was based on 'certainty' and approved by the Board of Trustees since 1994. He was not paid for work done and or time spent on projects but on 'fundraising successes'. The commission paid to him was based on all income or total income earned by the MMCT multiplied by the percentage approved by the Board since 1994. He vehemently denied that his commission was based on 'nett' income.

[32] According to Mr Botes, in addition to running the day-to-day affairs of MMCT and raising funds, his functions included ensuring that the Trust is audited, convening regular Board meetings, that donor funds were used for their intended purpose and to report to donors with accounting statements. He also spearheaded a drive to make the Trust self-reliant and not to rely entirely on donor funding. To that end, he assisted the Trust to engage in commercial business activities and to own property.

[33] Mr Botes testified that all commission payments from MMTC to him were calculated on agreed terms, namely 20% and 30% since 2010 'on all income received by the Trust'. He testified that these payments were always fully reported in audited

reports presented to and approved by the Board. As the High Court recorded Mr Botes' evidence on that score:

'At the end of each financial year, the financial manager calculated the total income of the Trust and multiplied it with the agreed percentage of commission that was approved by the Board and payment of the commission was only made once the Trust was able to do so.'

[34] According to Mr Botes, although he ensured that proper financial records were kept on all the Trust's projects, he had no direct or independent access to the Trust's financial records or its banking accounts. He could thus not make any withdrawals on his own from the Trust's banking accounts.

[35] Mr Botes testified that from about 2010, Ms McLean made overtures to him seeking personal financial benefits for herself from MMCT's income. He made it clear to Ms McLean that the Board would have to approve if she were to obtain personal benefits. He added that Ms McLean did not heed that caution.

[36] Mr Botes recounted incidents of alleged improper conduct and interference by Ms McLean in the running of the Trust's affairs, including making him report to her husband on the activities of the Trust and, without Board approval, appointing a lawyer to act as the Trust's lawyer and to be paid from the Trust's funds.

[37] The witness denied misappropriating MMCT funds and asserted that he was never confronted with such allegations by the co-trustees. Such allegations as were

made by the auditors of MMCT against him were, he said, 'unfounded' and without him being given an opportunity either by the auditors or the Board to deal with them. He testified that the allegations were pursued by the co-trustees to 'discredit' him and to pave the way for Ms McLean to benefit from MMCT's micro-lending business.

[38] Mr Botes testified that Ms McLean negatively influenced the co-trustees and MMCT staff against him and that Board meetings were being conducted behind his back since a rift developed between him and Ms Mclean.

[39] Mr Botes testified that he was suspended without being confronted with the allegations of irregularities and dishonesty made against him, nor was he subjected to any disciplinary process.

[40] In cross-examination, Mr Botes accepted that if his version were accepted that he was entitled to commission on gross income, he could for example earn a commission of N\$9.7 million on Trust income of N\$4.5 million. He suggested that if that seemed 'ridiculous' it was because that is what his co-trustees had agreed to and that it was 'in front of the door of the Defendants and the attitude that they took... that is let sleeping dogs lie'.

[41] Mr Botes conceded that when he was remunerated it was on the basis that what was taken into account was 'all income' deposited into the Trust's account either

on the basis of 20% or 30% as the case may be. He confirmed that the formula applied both before and after the minutes of 17 October 2005.

[42] The record shows that Mr Botes confirmed the following proposition put to him by Mr Marais for the Trust:

'Mr Marais: I have observed that you maintain that you were paid commission quantified on the same principles from the very beginning right through before and after the October [minute].

Mr Botes: Yes My Lord, I just want to repeat myself, apart from deposits which I can recall at this moment from IJG but the rest yes My Lord.

Mr Marais: Yes I will accept that you excluded IJG. My point is simply that that approach that was adopted at the subsequent time period and leaving aside IJG was also implemented by you from the very beginning leaving aside ...IJG taking income that came into the bank account and taking your 20 or 30 percent as the case may be?

Mr Botes: That is correct My Lord.'

[43] In respect of his pension fund claim which was introduced well after the initial combined summons, Mr Botes testified in chief that he only became aware 'by the middle of 2014' that payments were not made and denied that he knowingly waived the claim. Under cross-examination he was asked to explain why the claim for pension was made so late in the day and the following exchange took place:

'Mr Marais: Now this claim that was not initially advanced when the action was instituted was it?

Mr Botes: No My Lord.

Mr Marais: Why not?

Mr Botes: My Lord I was not even aware of the pension fund If I did not think of the pension fund at that stage so it did not cross my mind.

Mr Marais: Can you just analyse that Mr Botes you did from time to time actually see the financial statements and look at management accounts and information of that kind?

Mr Botes: My Lord financial statements I cannot really recall management statements.

Mr Marais: But you did at least know on a regular basis what payments were made on your behalf toward the pension fund that you cannot dispute?

Mr Botes: That is correct My Lord'.

[44] Another relevant aspect is the claims Mr Botes made against VAT refund. Cross-examination revealed that this amounted to a very big amount. The following exchange in cross-examination elucidates the issue.

'Mr Marais: Mr Botes so to again see if we can come to the choice that VAT payment benefit that you have claimed commission on is in fact not a valid payment benefit?

Mr Botes: Correct My Lord and I must indicate that this, these two pages in the Makadi report we received in February 2016 before that time nobody has discussed detail but it might be incorrect and if it was incorrect My Lord that claim came from SGA auditors and not from me. I am not an accountant.'

[45] Mr Botes made a valiant effort to attribute the payment of the commission to him on VAT to the Trust's auditors and to Ms Hüsselmann (the Trusts' Financial Manager and Bookkeeper) but that seems at odds with the fact that he in his particulars of claim asserted that he was entitled and that it is reflected in Board minutes which he relies on as an income source on which he could levy commission.

[46] It is recorded in the minutes of 17 October 2005 that Mr Botes was not entitled to commission on the sale of Trust assets. However, when he was cross-examined it became clear that he in fact claimed commission on the sale of the Trust's shares in Nedloans (Pty) Ltd which he accepted was an asset in the books of the Trust. The sale earned the Trust N\$2million and Mr Botes charged commission on it. That payment to Mr Botes is part of what the Trust claims against him in reconvention. He sought to justify this by saying that he was instructed by the co-trustees to undertake the work but conceded that there was no agreement for him to be remunerated for the work he says he did on the transaction.

Mr Hans Hashagen

[47] Mr Botes called an accounting expert, Mr Hans Hashagen, in support of his claims. The essence of Mr Hashagen's evidence is that (a) the forensic report relied on by the Trust as proof of Mr Botes' malfeasance in relation to the Trust's funds is unreliable (b) that because the minutes say so, Mr Botes was entitled to commission on the Trusts' VAT refunds, and that (c) the minutes relied on by Mr Botes were prepared by Mr Botes *qua* secretary and were, therefore, proof of the existence of a valid agreement.

[48] With regard to the commission levied on VAT refunds, Mr Hashagen confirmed that based on written material he reviewed, Mr Botes was paid commission on the Trust's VAT refunds from 2005 – 2012. According to him, although VAT refunds

should not be considered as income, it was so intended by the parties in the present case.

Ms Michelle McLean

[49] The co-trustees called several witnesses: Ms McLean, Mr Kruger (third appellant), the Trust's financial manager, Ms Hüsselmann and Mr Feris. Mr Feris was at the time the Chief Executive Officer of the insurance company, Santam.

[50] Ms McLean testified that the success of MMCT was depended on her being the public face of the Trust as its founder. She met Mr Botes in 1994 having been favourably recommended to her by Mr Kruger, the third appellant. She knew Mr Botes was a fundraiser of some repute.

[51] According to Ms McLean, Mr Botes was initially appointed as a secretary 'with a basic salary and commission'. He later became the Trust's Executive Director. He was given full control and management of the day-to day financial and administrative affairs of the Trust with a 'fair measure of independence'.

[52] The witness testified that on 20 March 1997 Mr Botes asked that his 'monthly salary be increased to 20% of the funds he brought in'. That was agreed to. She testified that on 20 April 2005, the Board agreed that Mr Botes be paid 20% of the 'nett' income received as a result of his fundraising efforts.

[53] Ms McLean maintained that she has no recollection of, and would not have agreed to, Mr Botes being paid 20% of MMCT's 'gross income' as he claimed and was paid as reflected in the financial statements. She added that she never agreed to Mr Botes 'sharing in the VAT refunds'.

[54] According to Ms McLean, the minutes relied on by Mr Botes were drafted by him and are, as the court below records the witness' evidence in its judgment, 'incorrect minutes of meetings drafted by the plaintiff and subsequently produced for signature on his assurance that they correctly reflected the true state of affairs'.

[55] Ms McLean denied any agreement by MMCT with Mr Botes for the Trust to make contributions towards his medical scheme and pension fund. She however added that her understanding of the position, gained from the Trusts' financial manager, is that every claim Mr Botes made in respect of his pension fund and medical aid contributions had been paid by the Trust and 'received by him without complaint'. She added that Mr Botes at no stage demanded anything more nor complained of short payment.

[56] According to Ms McLean, Mr Botes 'was actually aware of the benefits received by him', he calculated his own benefits and to the extent that he claims benefits over and above that which he paid himself in respect of pension fund and medical aid contributions, those claims had either prescribed or were, if indeed he was entitled, waived with full knowledge.

[57] Ms McLean also testified that Mr Botes had at some stage requested that his commission rate be increased from 20% but that it was not approved by the Board 'despite the contrary being stated in the minutes'.

[58] According to Ms Mclean, she would ordinarily sign the financial records and statements prepared by Mr Botes without realising that he remunerated himself in breach of the agreement. In that way, she maintains, Mr Botes received commission 'at a rate contrary to the true agreement, thus acting in conflict with the skill and care expected of a person in his position. It was after Mr Botes' appointment was terminated that his conduct, in particular his withdrawals and payments to himself from the Trust's funds, were carefully analysed. That process led to the discovery that Mr Botes had withdrawn funds to which he was not entitled. The forensic accountants' report showed that Mr Botes received substantial overpayments resulting in losses being suffered by the Trust.

[59] According to Ms McLean, over time she became concerned about Mr Botes' lack of transparency in the way he ran the affairs of the Trust. That led to her engaging the services of an attorney and, ultimately, an independent accountant, Mr John Mandy. She testified that Mr Botes became hostile towards this accountant and did not cooperate with him. That resulted in the deterioration of relations between her and Mr Botes.

[60] According to Ms McLean, it was in August/September 2013 that the Trusts' auditors informed her of their discovery of financial irregularities committed by Mr Botes in that he received from the Trust substantial benefits in excess of what he was entitled to. That led to the Trustees' meeting with Mr Botes on 12 September 2013. According to her, at this meeting, Mr Botes was unable to provide a satisfactory explanation for the payments to him. Mr Botes said what had happened 'must be a big mistake' and that he would rectify matters. It was because he was unable to provide a satisfactory explanation for his conduct that the trustees suspended him and ultimately dismissed him.

[61] The witness denied any effort on her part to enrich herself from the Trust's resources. She admitted to receiving some benefits such as airline tickets for her and her family covered by the Trust for her wedding in March 2013 because of the public relations opportunity that the event presented. Ms McLean testified that these costs and others she received she however repaid.

[62] According to Ms McLean, Mr Botes is indebted to the Trust in the amount as calculated in the McHardy Report and should make that good to the appellants as Trustees of MMCT.

[63] As regards LawSure, Ms McLean testified that Mr Botes had sold an empty shell to MMCT, 'fraudulently' representing to the Trust that it was a viable and going

concern likely to earn substantial income for the Trust. A representation, she alleges, that proved to be false.

Mr Joachim Kruger

[64] Mr Kruger is the third appellant and a Trustee of MMCT. It was he whose introduction of Mr Botes to Ms Mclean resulted in the latter being employed by the Trust. According to Mr Kruger, upon his initial appointment as a Trustee it was agreed that Mr Botes would be paid 20% on all funds raised through his efforts. He understood the reference to 'all' income to mean 'nett' income.

[65] Mr Kruger expressed surprise at the content of the minutes of the meeting of 17 October 2005 - especially the detail in which it is framed. He recalled that all that was discussed at the meeting was the extension of Mr Botes' contract. He elaborated that the detail reflected on that minute was never discussed at the meeting. He denied agreeing that Mr Botes would receive 20% on the interest of the NedLoan income, dividend and VAT refunds. He pointed out that if that were agreed, Mr Botes would be entitled to income even where no income was raised on a project.

[66] Mr Kruger testified that he was not present at the meeting of 26 October 2010 and therefore could not say if the decisions recorded in the relevant minutes were ever agreed to.

[67] According to Mr Kruger, Mr Botes was allowed a great deal of independence in running the affairs of the Trust. He denied being improperly influenced by Ms McLean against Mr Botes. Mr Kruger testified that Mr Botes was dismissed because of irregularities related to his financial administration of the Trust.

[68] The witness confirmed that he was present at a meeting called in the wake of the Trust's auditor's forensic report into Mr Botes' handling of the Trust's funds. Although Mr Botes in some respect disputed the auditors' findings, he offered to meet with the auditors and to resolve the matter. That Mr Botes never did. Mr Botes was therefore suspended pending a satisfactory resolution of the auditors' adverse findings. The bone of contention, according to Mr Kruger, was Mr Botes' overpayments to himself.

[69] Mr Kruger testified that, as regards the medical scheme and pension fund, the Board had approved 60% contribution towards Mr Botes' medical scheme and 7% contribution towards his pension fund. That he considered to be a 'general practice' in the employment market.

[70] Mr Kruger then dealt with the LawSure transaction and stated that Mr Botes had represented to the co-trustees that the Trust would be buying a viable going concern likely to earn substantial income. The Trust therefore bought Mr Botes' shares in LawSure for N\$1 million.

Ms Elise Hüsselmann

[71] Another witness who testified for MMCT was Ms Hüsselmann. She was the Trusts' financial manager and bookkeeper from 2001 until 2015. According to Ms Hüsselmann, Mr Botes would instruct her to transfer huge sums of money into his private bank account 'without proper commission calculations or submission of any documentary proof or calculations'.

[72] Ms Hüsselmann testified that Mr Botes would verbally give her instructions to transfer funds to him on a number of occasions during a month. She would then complete a requisition note to reflect the payment and she had 'no idea how, why or for what purposes the payment was being made'. At the end of the year the financial statements were prepared and the payments made to Mr Botes would be quantified and compared with the income earned by MMCT on different projects.

[73] Ms Hüsselmann made clear that neither she nor the Trust's accountants computed Mr Botes' commission payments and that same was submitted to her by Mr Botes.

[74] Ms Hüsselmann testified that sometime in 2013 she advised Ms McLean and the second appellant that Mr Botes was claiming commission on the Trust's gross income and that he was also paid commission on VAT refunds.

[75] According to Ms Hüsselmann, the co-trustees 'never investigated the Trust's books.' She added that Ms McLean would ordinarily be presented the financial statements for approval and would sign them without checking them.

[76] As regards to Mr Botes' pension and medical aid contributions and claims, Ms Hüsselmann testified that he never paid his 'portion towards the medical aid and pension fund and that the Trust paid the entire 100%'. According to the witness, Mr Botes owed the Trust the balance of 40% and 5% on the monthly payment of N\$45 000. According to Ms Hüsselmann, the Trust also paid for Mr Botes' daughter's medical aid and that same had to be repaid to the Trust but never was.

Mr Franco Feris

[77] Mr Feris testified on behalf of MMCT in respect of the LawSure transaction. He was at the material time the Chief Executive Officer of Santam Namibia. Mr Feris testified that he had personal knowledge of LawSure, an insurance business in respect of which Santam acquired from Mr Botes the underwriting business and 'short-term policies'. That was with effect from 1 January 2009. Santam paid N\$2.6 million to Mr Botes for the transaction. Of that amount, Mr Botes received N\$1.5 million which was reflected as a loan to him by LawSure.

[78] Mr Feris subsequently learnt about the sale of the LawSure business by Mr Botes to MMCT despite it having become dormant after Santam acquired it. Mr

Feris testified that the LawSure business was 'non-existed' when it was sold to the Trust. He saw no value for MMCT in the transaction sold to it by Mr Botes.

High Court's approach

[79] Based on the evidence led by the parties, the task facing the court below was to decide if Mr Botes proved his claims and whether the Trust proved its counterclaims. Each party bore the onus in respect of its claims. Of course, where there are mutually destructive versions, the trial court had to make credibility findings and to come to a conclusion which version to accept.¹ But at the end of the day, it had to be satisfied that the probabilities favoured the party whose claim(s) it sustained.

[80] The fact that a party's evidence is unsatisfactory in some respects does not mean its evidence is to be rejected in every other respect. Moreover, the fact that a protagonist's version is unreliable does not mean the opponent who bears the onus is thereby relieved from satisfying the court to the requisite standard of proof.

[81] There is a danger in over-emphasising issues of credibility at the expense of the probabilities of the case. The applicable test appears from Eksteen AJP's oft-cited dictum in *National Employers General Insurance Co. Ltd v Jagers*²:

'In deciding whether that evidence [of a party] is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the

¹ *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie & other* 2003 (1) SA (SCA) at para 5; *U v Minister of Education, Sports & Culture & another* 2006 (1) NR 168 (HC) at 184A-J and 185A-B and *Josea v Ahrens* 2015 (4) NR 1200 (HC) para 10.

² *National Employers General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E), 440E-F.

credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case. . . .’

[82] In fact, where the court is faced with the interpretation of a document, issues of credibility do not assume as important a role as where a court is faced with issues of fact unconcerned with interpretation.

Credibility findings

[83] The trial judge made the following credibility findings in favour of Mr Botes:

[136] . . . I am of the view that both Ms. McLean and Mr. Kruger, were not impressive witnesses at all. It must, in this connection, be recalled that the essence of their counterclaim and the reason for terminating the plaintiff’s appointment when it was, were allegations that he had committed dishonest acts and misappropriated funds belonging to the Trust. Another salvo, was that he was guilty of non-disclosure related to the basis of his commission. He was also accused of having falsified the minutes for his own purposes.

[137] In cross-examination, both Ms. McLean and Mr. Kruger, admitted that there was no misappropriation or theft of funds. They admitted that the dispute was commercial in nature and was in respect of the proper interpretation of the minutes relating to the plaintiff’s remuneration. As it is, no case was made at all for the serious and inflammatory allegations of dishonesty against the plaintiff.

[138] These admissions, viewed in contradistinction to the pleadings, which are replete with allegations of dishonesty, show plainly that the case pleaded by the defendants was not borne out by them in evidence. The court, is in the circumstances, entitled to treat their evidence with great circumspection. Having said this, their honesty in stating, albeit extracted in the hot oven of cross examination, that the true nature of the dispute is commercial, goes a long way in putting the correct colour to

the proceedings, a safe distance away from the nefarious conduct of misappropriation, of funds and fraud, attributed by them to the plaintiff both in the pleadings and to some extent, in their witness' statements. The court is accordingly entitled to regard their evidence as lacking in credence in the circumstances.' (Emphasis supplied)

[84] The High Court further found that Ms. McLean 'did not come out very clean' from the cross-examination. The court held that Ms McLean's statement, to the effect 'that the plaintiff had 'cooked' the minutes, so to speak, and that the minutes, are, as a result, 'false and a forgery' and that he had 'altered them"', was liable to be rejected.

[85] Based on the principle that a party must put its pleaded case to the opponent in cross-examination³, the court *a quo* observed that the appellant's legal practitioners never suggested or put to Mr Botes that the disputed minutes were falsified by him.

[86] Having preferred Mr Botes' version to that of the appellants, the learned trial judge sustained all of Mr Botes' claims, dismissed the appellant's plea in respect of prescription; and dismissed all of the appellants' claims in reconvention.

[87] In respect of the fact that Ms McLean had signed the minutes, the court *a quo* found that:

'[140] [I]t is clear that she appended her signature to the minutes and short of any allegation negating the reality of consent, as it were, when she appended her signature, she must be bound by the words contained therein and her attempt to distance herself from the minutes must be refused in the light of her signature and the

³ *Small v Smith* 1954 (3) SA 434 (SWA), 438 E-H.

absence of countervailing considerations that would support her sudden *volte face*. In law, the principle *caveat subscriptor*, applies, meaning, let the signer beware. Ms. McLean cannot be allowed to so easily wiggle her way out of a signature that she appended in the absence of any coercion or compulsive action.’

[88] The learned judge *a quo* was fortified in that conclusion by Shivute CJ’s dictum in *Hugo v Council of the Municipality of Grootfontein*⁴.

[89] The court *a quo* drew an adverse inference against the appellants for failing to call witnesses whom they had listed and who were otherwise able to testify on their behalf and could have shed light on some crucial parts of their case; a failure which the court held leads to the inference that the party concerned feared such evidence will expose facts unfavourable to it⁵.

Findings on the merits of the claims

(i) Agreement between MMCT and Mr Botes

[90] In light of the denial by the Trust that the minutes relied on by Mr Botes to support his claims constituted an agreement between the parties on the disputed issues, the first issue the trial court had to resolve was the status of the minutes relied upon by Mr Botes in support of his claims.

⁴ *Hugo v Council of the Municipality of Grootfontein* 2015 (1) NR 73 (SC) para 16.

⁵ *Conrad v Dohrmann* 2018 (2) NR 535 (HC); see also *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A).

[91] As the court below saw it, on the totality of the evidence, the minutes relied upon by Mr Botes are those of the Trust and constitute the agreement between the parties, in so far as the terms of Mr Botes' engagement and remuneration are concerned. According to the learned trial judge, the parties referred to no other document that could have formed the basis for Mr Botes' employment and remuneration by the Trust.

[92] Although the appellants initially indicated that they intended to apply for rectification of the recorded terms relating to Mr Botes' remuneration, that was not pursued, and the court was left only with the recordal in the minutes.

(ii) 'Gross' or 'nett' income?

[93] Another issue that called for determination by the High Court was the interpretation to be accorded to the minutes in question⁶, and in particular whether Mr Botes was entitled to gross or net income. The court *a quo* correctly pointed out that matters of interpretation of written documents are within the exclusive province of the court and not witnesses.

[94] The court *a quo* found that Mr Botes had established his case on a balance of probabilities. The court therefore held that the parties intended and agreed in writing that Mr Botes was entitled to receive his commission on gross income (instead of nett

⁶ The first reference to the nature of the funds on which commission was chargeable is the minutes of 17 November 1994, referring to 'Total amount raised'. The first reference to 'all income' is in the minutes of 27 April 2005.

income) received by the Trust. The court's reasoning for why it was gross and not nett income is captured in the following passages:

[164] I am in agreement with the plaintiff. The words employed in the minutes, though maybe not in all of them, was 'all income'. In this regard, there are instances where the particular income streams were mentioned in the meetings. The 'all income', would, to my mind, refer to the gross income. This must also be seen in the context that there is no doubt that the plaintiff was, from all indications doing a fantastic job, and this is exemplified by the fact that this contract was renewed from time to time and in later years, his commission was increased from 20% to 30% of the income received.

[165] This, it must be mentioned and observed, is how Ms Matthee and her firm also understood the meaning and applied same in determining what was due to the plaintiff. Ms Matthee cannot, by the stretch of the imagination, be said to have been under the plaintiff's spell, so to speak, so as to understand the documents in the same manner the plaintiff understood them as exemplified in evidence.

[166] In this regard, the defendants intimated in their amended pleadings that they intended to apply for rectification of the minutes relating to the remuneration of the plaintiff. In this regard, they sought to rely on an oral agreement, alternatively a written agreement, which makes provision for the plaintiff's remuneration to be based "on 20% on all nett income received by MMCT". This clearly goes against the clear wording employed by the parties. In any event, the issue of rectification was not pursued and we are left only with the language used by the parties. The defendants had every opportunity to make a correction in the wording of the minutes but they did not and this speaks volumes of their state of mind at the time the relationship was navigating on serene waters.

[167] . . . [T]here is nothing to suggest that there was any mistake in the recordal of the minutes from what was the clear intention of the parties. I accordingly come to the

considered view that the parties intended and agreed in writing that the plaintiff was entitled to receive his commission on the gross income received by the Trust'.

(iii) Loss of Income

[95] The High Court held that the appellants failed to prove that Mr Botes unlawfully appropriated to himself money to which he was not entitled. The court *a quo* held that 'there is no evidence that was adduced by the defendants and on the basis of which it was shown that there was or were reasons that justified the removal of the plaintiff from his position before the end of the term that was current at the time.' And that 'The Trustees, who took the decision, testified in cross-examination that the dispute was a purely commercial one, without any purloining of the Trust's funds by the plaintiff being mentioned. The learned judge also stated that 'the plaintiff was first suspended and later removed on allegations of dishonesty that the defendants failed to sustain in cross-examination. I accept that the submission on the plaintiff's part that the defendants' evidence was untruthful or at the very best reckless or grossly negligent in the performance of their fiduciary duties.'

[96] The court therefore found that Mr Botes lost income as a result of the unlawful and/or negligent actions of the appellants and upheld his claim under that head.

(iv) Pension

[97] On Mr Botes' pension claims, the appellants alleged that there was no agreement on the payment of pension as alleged by Mr Botes. The High court

rejected the appellants' plea in respect of this claim and held that Mr Botes' claim in this regard had been proved.

(v) MMCT's special plea of prescription

[98] The High Court dismissed the appellants' special plea of prescription in relation to Mr Botes' claim in respect of unpaid pension. The court held that the appellants had not led evidence in support of the special plea and only advanced it in the heads of argument. The learned judge was therefore satisfied that the minutes reflected the payment of pension for Mr Botes; and that 'Ms Hüsselmann was aware of the pension issue as part of the plaintiff's package, so to speak.'

(vi) MMCT's Counterclaim: LawSure

[99] The court *a quo* also dealt with the appellants' allegations of false misrepresentations by Mr Botes; in particular, the claim that he had sold to MMCT an empty shell that was touted to make money for the Trust while he knew that it was in fact not so. The court took into consideration the fact that Ms. McLean was also a director of LawSure from November 2009 and was accordingly expected to have known of the goings on in the business in that capacity and it thus cannot be that she knew nothing over this entire period of time.

[100] The learned trial judge accordingly found that the allegation that Mr Botes was guilty of non-disclosure had not been proven on a balance of probabilities, particularly given the disclosure reflected in the minutes of the Trust. The court concluded that

the fact that the business did not become profitable, could not colour the sustainability of the claim. This counterclaim was therefore dismissed.

(vii) Quantum

[101] The record shows that there was a monumental dispute on what kinds of Trust income Mr Botes was entitled to charge commission on. That was very important because it had a bearing on the quantum of his claim in the event that he succeeded in respect of his claims which were directly linked to the Trust's total income in any given year. That was also important for the Trust's counterclaims in that if Mr Botes was overpaid it raised the question 'in respect of which income?'

[102] The court *a quo* did however not go into the detail of the disputed heads of income. The learned judge wrote at para 194 of the judgment:

'I indicated to the partes when delivering the order that I will defer to the parties' respective experts regarding the computation of the amounts in respect of the successful claims as found by the court above. In that regard, the matter is referred to the parties' experts to agree on calculations based on the findings by the court. An order stipulating the respective amounts will then be issued once the process has been finalised.'

[103] The court *a quo* granted judgment in favour of Mr Botes as follows:

'AD Claim in Convention

As against the First to Fourth Defendants, in their capacities as Trustees of the Michelle McLean Trust:

1. In respect of Claim A – payment in the amount of NAD 1,921, 866.50
2. In respect of Claim D – payment in the sum of NAD 943,739.79, alternatively payment of the said amount to Namflex Pension Fund, to the Plaintiff's credit.
3. Payment of interest on the amounts stipulated in paragraphs 1 and 2 above, calculated at the rate of 20% per annum from the date of summons to the date of payment thereof.

As against the First to Fourth Defendants in their capacities as Trustees of the Michelle McLean Trust and jointly severally in their personal capacities:

4. Claim C for the unexpired period of the plaintiff's contract from the date of termination.
5. Interest on the amount in Claim C.

AD Claim in reconvention

6. The claim in reconvention is dismissed.

Costs

7. The costs for 22 November 2016 are to be borne by the defendants, jointly and severally the one paying, and the being absolved. The costs are not subject to rule 32(11).
8. The costs of the action are to be borne by the defendants jointly and severally in their capacities as Trustees of the Michelle McLean Trust.
9. The matter is removed from the roll and regarded as finalised.'

Grounds of Appeal

[104] The appellants filed very comprehensive and detailed grounds of appeal running into ten pages attacking each and every finding of fact and law by the trial judge adverse to them. It will burden this judgment if I refer to each one of them. Having appealed as of right to this court, the appellants are entitled to a rehearing of the matter. This court, in any event, has to be satisfied that the court *a quo*'s

judgment is correct in light of the pleaded case, the evidence led and the applicable law. I will where necessary make reference to the specific grounds and submissions advanced by the appellants in the course of the judgment instead of detailing the grounds of appeal and the detailed submissions.

[105] At the hearing the Trust was represented by Mr Marais, the Trustees in their individual capacities by Mr Heathcote and Mr Botes by Mr Fitzgerald.

Discussion

[106] Given the centrality of the minutes to the parties' cases, it was necessary for the High Court to interpret just what the parties intended with the disputed recordal therein.

[107] It is apparent from the pleadings that the following parts of Mr Botes' case are directly related to the minutes: that initially he was entitled to 20% commission on the Trust's income; that after 17 October 2005 he was entitled to 30% commission on the Trusts' income; that the commission due to him was on the Trust's gross income; that he was entitled to a 7% (and later 9%) contribution towards a pension fund of his choice, being Namlex Pension Fund.

[108] The remaining claims are: the contractual claim relating to the unexpired term of Mr Botes' terminated contract, and the delictual claim based on the alleged conspiracy to dismiss him. The Trust's counterclaims have also to be considered.

Status of the minutes

[109] The co-trustees, either through the evidence led at the trial or by means of the documentary evidence led into evidence, have not displaced Mr Botes' case that the minutes purporting to be the official documents of the Trust are indeed so. The court *a quo's* conclusion affirming Mr Botes' allegations in that regard is therefore unassailable.

[110] As for the percentage commission which Mr Botes was entitled to on Trust income, it became abundantly clear from the evidence that from 17 November 1995 the agreed formula was that he would, in addition to a specified amount of money, receive as income 20% commission on the Trust's income. That position is consistently repeated in the minutes until the minutes of 17 October 2005.

Was Mr Botes entitled to 30% commission?

[111] It will be recalled that the Trustees deny in the plea that Mr Botes was entitled to 30% commission - a posture that was persisted with in evidence at the trial. As the court *a quo* correctly observes, that denial is based on the allegation that Mr Botes committed fraud in relation to the minutes so as to benefit himself to the detriment of the Trust. The court *a quo* correctly concluded that the allegation is not supported by the fact that Ms McLean signed off the minutes. The denial was therefore properly rejected by the court below. That posture is unsustainable in the light of the unambiguous recordal in the relevant minutes which I have already stated was

correctly found by the trial court in Mr Botes' favour. The minutes of 26 October 2010 records extension of Mr Botes' contract from 1 January 2010 to 31 December 2011 and 'increased the commission to 30%'. The minutes of 6 April 2011 extended the contract to 31 December 2012 and '30% commission as determined in the past'.

[112] The language used in the minutes is quite plain. It refers to 30% commission of the Trusts' income. Therefore, since 26 October 2010, Mr Botes was entitled to commission at the rate of 30% - whatever the court finds to be the income to which it relates.

Gross or nett income?

[113] The next disputed issue then is whether Mr Botes was entitled to levy commission on gross or nett income.

[114] As I understand Mr Botes' case, the parties had agreed that the commission he was to earn was on the gross income of the Trust. It is not in dispute that the first recorded reference to the nature of income is in the minutes of 17 November 1994 where a reference is made to 'total amount raised'. The minutes of 27 April 2005 for the first time introduced the formulation: 'Mr Botes' remuneration will be based on 20% of all income that the MMCT will receive'. That formulation was repeated in the minutes of 17 October 2005 and added that the 'Income will be calculated on all donations, grants, interest on Nedloans (Pty) Ltd income, dividends, specified – and

unspecified income, VAT refunds, excluding profits from sale of assets, insurance claims on any assets and bank interest on current account earned’.

[115] In the particulars of claim Mr Botes asserted that ‘the extensions of the appointments which are relevant to the present action (which were ‘expressly, alternatively tacitly agreed between the parties as comprising part of the terms and conditions governing the Plaintiff’s appointment’) relate to ‘par 6 of the minutes of the MMCT trustees’ meeting held on 27 April 2005’ where it was decided the ‘remuneration will be based on 20% of all income’. And also: ‘par 6 of the minutes . . .held on 17 October 2005’ basing remuneration on ‘20% of all income’. In addition, ‘par 28 of the minutes . . .of 26 October 2010’ in terms whereof ‘The Board approved the contract of Mr Botes from 1 January 2010 - 31 December 2011 and increased the income to 30%’. Further, ‘par 11 of the minutes on 6 April 2011’ extending the contract to ‘31 December 2012 and he will be paid a 30% commission as determined in the past’. Finally, that the Board at the meeting of 23 October 2012 ‘approved ...the extension of the contract of Mr D Botes until 31 December 2014’.

[116] It is apparent from the particulars of claim that Mr Botes claimed an entitlement to either 20% or 30% commission on gross income from 1 January 2010 to 31 December 2014.

[117] The High Court was satisfied that the language used in the minutes is clear: That the parties referred to ‘gross’ and not ‘nett’ income. I disagree. In my view, ‘all

income' is capable of either meaning, especially because the minutes make no attempt to define it. As the Appellate Division recognised in *Brownstein v Commissioner for Inland Revenue* referring to the word 'income':⁷

'That word may have three possible meanings. It may mean, firstly, that which comes in, i.e., all receipts in contra-distinction to outgoings, secondly "income" as defined by Act 40 of 1925 or, thirdly, the gain resulting from the balance of profits and losses. The third meaning is the natural and commonly-accepted meaning.

. . . There can be no doubt that, in the natural and ordinary meaning of language, the income of a bank or trade from any given year would be understood to be the gain, if any, resulting from the balance of the profits and losses of the business in that year.'

[118] My understanding of the above dictum is that even without being qualified by the word 'all' the word 'income' by itself when used in a commercial context raises the question whether those who referred to it intended it to mean gross or nett receipts. Thus considered, adding 'all' before 'income' is strictly tautologous. The onus that Mr Botes bore was to prove that the parties intended by 'income' (to borrow from *Brownstein*) 'a more onerous sense' of the word, being all moneys due from whatever source standing to the credit of the Trust even before the funds are applied towards the purposes for which the Trust was created or to meet the Trust's financial obligations which, if not satisfied, would place the Trust in legal jeopardy and spell its dissolution.

⁷ *Brownstein v Commissioner for Inland Revenue* 1939 AD 156 at 166-1667.

[119] Therefore, it cannot be correct that the words used in the minutes are clear and unambiguous. The question is, when the context is considered against the backdrop of the probabilities of the case, which meaning did the parties intend? In that process, the court must not be swayed by what the actors say which it is. The court *a quo* fell into that error when one considers its ratio that I set out in full in para [94] above.

The modern approach to interpretation

[120] In *Total Namibia v OBM Engineering*⁸ O'Regan JA set out the proper approach to the interpretation of documents generally. The construction of a contract or a document is a matter of law, and not of fact. Interpretation is therefore a matter for the court and not for witnesses. Interpretation is 'essentially one unitary exercise' in which both text and context are relevant to construing the contract. The court engaged upon its construction must assess the meaning, grammar and syntax of the words used; and the words used must be construed within their immediate textual context, as well as against the broader purpose and character of the document itself. Consideration of the background and context is an important part of interpretation of a contract. Since context is an important determinant of meaning, when constructing a contract, the knowledge that the contracting parties had at the time the contract was concluded is a relevant consideration. Context is considered 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. Consideration must be given to the language used in

⁸ *Total Namibia v OBM Engineering* 2015 (3) NR 733 (SC).

the document 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 insensible or unbusinesslike results or one that undermines the apparent purpose of the document. The court must avoid the temptation to substitute what it regards as reasonable, sensible, or unbusinesslike for the words actually used.

[121] In construing what was intended by the parties with 'all income', the court below was swayed by the conduct of the parties and other actors such as auditors as to their understanding and manner of implementation of the disputed minutes. That is a misdirection. Emphasis should have been on the context in which the document was created and whether, on the probabilities, it made business sense that the Trust would have agreed to remunerate Mr Botes on the terms that he alleged.

Context

[122] The appellants maintain that the High Court should have found that 'all' did not connote gross and that a common-sense approach would mean nett income. The appellants contend that the court below should therefore have found that it was clear that grammar, context, and purpose dictate a contrary intention to that contended by Mr Botes.

[123] An important context is that MMCT is a welfare organisation as contemplated by the Welfare Act. Mr Botes was not just an ordinary employee. He was also a trustee who owed a fiduciary duty to the Trust over and above his personal interest as an employee. It is equally important that the minutes are silent on whether commission is on 'gross' or 'nett' income. A further important context against which the interpretation should happen is the common cause fact that Mr Botes was employed by a welfare organisation whose funds were primarily geared to assist the needy. Counsel for the appellants submitted that the absurdity that is produced by an interpretation that income referred to 'gross' returns is exemplified by Mr Botes' (since abandoned) claim that refunds on VAT formed part of Trust income.

[124] The dictum in *Brownstein* which suggests that the default meaning of the word income in common parlance suggests nett is an important factor which would be taken to have been known to the parties when they created the minutes.

[125] The suggestion that all income means 'gross' receipts in my view effectively turned Mr Botes' claim into a first charge⁹ against Trust assets. In other words, it ranked above any other Trust liability. In other words, if all that the Trust had earned was not enough to meet any of its obligations such as utilities or the needs of those for whom it was created, Mr Botes had to be paid (and paid first) whatever the consequence. To give an example, if the Trust owed: the City of Windhoek N\$50 000 for water and electricity, a plumber who fixed the toilet facilities in the building housing

⁹ A creditor with a first charge has priority over all other creditors against the same asset: Compare, *C of T v Master and Trustee in Insolvent Estate Collias* 1930 SR 12 and *Irwin v Davis* 1937 CPD 447.

the Trust N\$15 000, the architect who prepared drawings for extensions to a building owned by the Trust a fee of N\$200 000, bills for student fees of N\$50 000 at a tertiary institution for a target beneficiary- while the Trust earned for the relevant period an income of N\$100 000 only, Mr Botes' remuneration would come first and he would be entitled to sue the Trust to recover remuneration of 30% commission and a pension contribution of 7% or 9% on the N\$100 000. That is absurd!

[126] Mr Heathcote for the trustees correctly submitted that Mr Botes as Trustee and paid employee could only earn such remuneration as is allowed under the 'charging clause' of the Trust. The first principle being that a Trustee is not to profit from the Trust unless specifically permitted by the charging clause. MMCT's charging clause states:

'The Trustees are appointed to office subject to the condition that no remuneration whatsoever, other than necessary out of pocket expenses, shall be payable to the trustees for their services in terms hereof, which services shall be regarded as charitable services on the part of the trustees, save in the instance of the remuneration or benefits granted by the trustees to, and received by, the Chairperson or executive director for services rendered to the trust.'

[127] The notion of a Trustee's remuneration being a first charge against Trust property sits uncomfortably with 'for services rendered to the trust'.

[128] In my view, the implication that a welfare Trust's main purpose is to financially provide for a Trustee (albeit also a paid employee) and that the needs of the Trust

beneficiaries and the very existence of the Trust come second, does not make business sense.

[129] Mr Fitzgerald for Mr Botes submitted that it is not for the court to unmake a bargain reached by the parties and that if it is a bad bargain the Trust made it and has to live with it. In my view the issue is not that of the court unmaking a bad bargain but whether such a bargain was permissible at all.

[130] The High Court should have rejected an approach that produces such an absurd interpretation in favour of one which makes business sense. The reference in the minutes to 'all income' therefore is to the Trust's nett income.

Was Mr Botes' dismissal unlawful?

[131] It will be recalled that Mr Botes had claimed loss of income because of what he alleged to be the unlawful manner his employment with the Trust was terminated. This claim is dependent for its viability on a finding that Mr Botes was unlawfully dismissed and that the co-trustees were in breach of their fiduciary duties in the manner that they effected the termination. Mr Botes succeeded with this claim and was awarded N\$1 921 866.50.

[132] Counsel for the appellants argued that the inquiry whether or not Mr Botes' dismissal was justified should be (and ought a *quo* to have been) considered against the following incontrovertible facts and circumstances:

- (i) At a meeting called to discuss the forensic report, Mr Botes admitted overcharging the Trust; admitting that he made a mistake;
- (ii) Mr Botes admitted that Ms McLean did not know the basis on which he charged the commission;
- (iii) The Trustees were seized with a report imputing improper conduct on Mr Botes' part;
- (iv) There is nowhere or at any time that Mr Botes told any of the co-trustees that his commission was on gross Trust income.
- (v) It is not in dispute that Mr Botes charged commission on gross income even before the meeting of 26 October 2005.

[133] Counsel further submitted that the High Court paid no regard at all to Mr Botes' admission that he made a mistake. Counsel added that if it is found that Mr Botes had overpaid himself that would be breach of trust justifying termination.

[134] The High Court appears to have approached the issue of overpayment on the premise that once dishonesty was not proved against Mr Botes in the manner that he remunerated himself, it followed that the unauthorised withdrawals were above board. That approach blindsided the trial court to evidence which, if properly weighted in the scale, could have tilted the balance of probabilities in favour of the appellants as regards the justification for his suspension and dismissal.

[135] It is so important that in the adjudication process, the trier of fact accounts for all the material and relevant evidence in (a) assessing whether the party bearing the onus has proved its case and (b) where the probabilities lie overall. It is not permissible for a court to select only that evidence which favours the version of one party and disregard evidence potentially favourable to the opponent. All material and relevant evidence must be taken into account and the court should not disregard some evidence in preference for the other without explaining why it is doing so. It is primarily for that reason that I set out in some detail exchanges that occurred between counsel for the appellants and Mr Botes under cross-examination. That evidence was not given sufficient weight by the court *a quo* when it considered whether or not Mr Botes was dismissed unfairly.

[136] Although said in a criminal context, the dictum by Nugent J in *S v van der Meyden*¹⁰ applies with equal force to civil cases:

‘A court does not base its conclusion, . . . on only part of the evidence. . . .

What must be borne in mind, however, is that the conclusion which is reached. . . must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.’

[137] It is common cause that Mr Botes was responsible for the day-to-day management and administration of the affairs and operations of MMCT. That included making or authorising payments from the Trust’s account either to himself or to third

¹⁰ *S v van der Meyden* 1999 (2) SA 79 (W), 82A-E.

party creditors. Ms Hüsselmann was MMCT's fulltime employee answerable to Mr Botes who, under his direction and supervision, made payments from the Trust's account. Mr Botes directed Ms Hüsselmann to make payments to him from time to time as a creditor of the Trust according to his interpretation of what was due to him. As co-trustee, Mr Botes owed a duty of full disclosure to his co-trustees especially as regards personal benefits which he derived from the Trust.

[138] It is common ground that Mr Botes' part-time co-trustees were not aware or made aware of the actual formula used by him and Ms Hüsselmann for the payments made to him – including the percentage of commission and in respect of the nature of the heads of income against which the commission was levied.

[139] The evidence on behalf of the Trust established that Mr Botes was confronted with the disclosures made by the forensic auditors about what they perceived as irregularities attributable to Mr Botes in relation to Trust assets. He is reported to have stated that what he did was a mistake and that he would rectify the situation. The evidence further demonstrates that although he promised to give an explanation for what were suspected to be irregularities of his part, he never offered any satisfactory explanation. What were the Trustees to do in those circumstances?

[140] It bears mention that the Trustees had not only a duty of care towards Mr Botes but also a fiduciary duty to act in the best interest of the Trust. The gravity of the situation leading up to 13 September 2013 and how it influenced the decisions of

the Trustees *vis a vis* Mr Botes received no consideration at all in the High Court's assessment of where the probabilities lay on the question whether Mr Botes' contract was unlawfully terminated. That led to the court *a quo* minimising Mr Botes' conduct.

[141] It is common cause that SGA as auditors of the Trust made a report to the Trustees in very stark terms, including reporting what they perceived as 'material irregularities' to the regulatory authorities.¹¹ The report had serious legal implications for the Trustees if they did not act.

[142] On 13 September 2013, the auditors wrote a letter to the Trustees stating that Mr Botes committed material irregularities in the manner he remunerated himself and resulting in a loss to the Trust. The auditors set out the amounts which they considered to have constituted overpayments and recorded:

'8. [W]e have reason to believe that a material irregularity contemplated in Section 26(3) of the Public Accountant's and Auditors' Act 51 of 1951 has taken or is taking place. Hence it is our duty to bring this to your attention by means of this written report.

9. It is our further duty to draw your attention to the provisions of paragraphs (c) of the said sections 26(3) which are as follows:

(b) "Unless within thirty days after an auditor has dispatched such a report, he has been satisfied that no such irregularity has taken place or is taking place or that adequate steps have been taken for the recovery of any such loss causes as aforesaid, . . . he shall forthwith furnish the board with copies of the report

¹¹ The Public Accountants and Auditors Board and the Attorney-General.

and of any acknowledgment of receipt thereof and reply thereto and such other particulars as he may deem fit .

(c) The board may disclose to any attorney-general or other officer in the public services or any member or creditor of the undertaking concerned any information supplied to it in terms of paragraph (b)".

10. Unless the trustees can satisfy us **within 30 days** of this letter that no material irregularity has taken place or is taking place, by addressing the issues mentioned in paragraphs 1 to 7 we will report this matter to the Public Accountants' and Auditors' Board as required by law. (Emphasis supplied)

[143] It was then that some members of the Trust held a meeting with Mr Botes. A minute exists of that meeting and forms part of the record. It is necessary to highlight some aspects of it. The minutes show that Mr Botes was asked to explain what the auditors considered and reported on as overpayments to him. He was specifically informed that the issue is delaying the completion of the Trust's 2011 audit. The minute records that 'although the trustees have approved the 2011 accounts SGA is not able to release them pending receipt of the confirmation from Danie Botes of the balance at that date.'

[144] In fairness to Mr Botes, the minute records that:

'Danie Botes stated that he disagreed with the auditors calculation as in his opinion the situation was square and he was then asked to meet with SGA to resolve the issue and report back to the other Trustees.'

[145] But the fact remains that the issue was unresolved and was compounded by the fact that, as the minutes show, he accepted that he made some mistakes, that his calculations were wrong, that he would put matters right and apologised because he did not notice the errors he made.

[146] The minutes also record that the payments to Mr Botes were not approved by the Board of Trustees and that 'The Chairperson then told Danie Botes that he has to respond to the Board of Trustees within 21 days as from 13/9/2013 to enable the Trustees to reply to SGA.'

[147] It is common cause that after these deliberations, Mr Botes was suspended and letters of demand and litigation followed. Against that backdrop, the conclusion that because the matter was 'commercial', the Trustees ought not to have done what they did, minimises Mr Botes' conduct and places a heavier evidential burden on the appellants and relieves Mr Botes of the onus he bore on his claim.

[148] Not only that, but the court also makes no reference at all to Mr Botes accepting that he made a mistake, that he had been paying himself commission on gross income even before the minutes of 17 October 2005; that until the forensic report (or in the case of Ms McLean until Ms Hüsselmann reported to her in August 2013) the trustees were unaware that Mr Botes was remunerating himself on gross income and on VAT refunds. I have also already demonstrated that Mr Botes accepted that he was paid commission on the sale of NedLoans shares when he was

not entitled to. His protestation that he was entitled flies in the face of the very minutes he relies on for his claims and the admission that the Trustees were not aware of the payment and that there was no agreement for him to receive remuneration on the transaction. It is also common cause that the Trustees were not aware that Mr Botes was charging commission on gross income from the very start. As I have found, he was not entitled to charge commission on gross income any way. He therefore derived a benefit from the Trust to which he had no legal right.

[149] As counsel for the appellants rhetorically asked, faced with those facts, what were the Trustees expected to do? The criticism levelled against the High Court therefore has merit.

[150] The fact that at the trial the witnesses for the Trust withdrew the allegation that Mr Botes acted dishonestly or fraudulently and stated that what he did raised a commercial dispute between him and the Trust did not detract from the fact that his conduct occasioned a loss to the Trust. Misappropriation of funds does not necessarily impute dishonesty or criminal intent. According to the Oxford South African Concise Dictionary the verb 'misappropriate' means 'dishonestly or unfairly take for one's own use'. The Oxford Learner's Dictionary on the other hand defines the noun 'misappropriation' as 'the act of taking somebody's money or property for yourself, especially when they have trusted you to take care of it'. How on anybody's showing Mr Botes can suggest that he did not misappropriate Trust property by taking commission on VAT refunds or on the sale of an asset defies reason.

[151] In fact, Mr Hashagen who was called by Mr Botes as an expert confirmed at the trial that Mr Botes was paid commission on MMCT's VAT refunds. Mr Botes' acceptance that he was not entitled to commission on VAT refunds makes hollow his expert's suggestion at the trial that the payment of commission against VAT was permissible. What it also makes clear is that the moneys received by Mr Botes from such refunds was not due to him and constitutes enrichment to him at the expense of the Trust.

[152] The co-trustees had therefore on a balance of probabilities established a good defence against Mr Botes' delictual claim. The High Court therefore misdirected itself in finding in his favour in respect of that claim.

Pension claim

[153] It will be recalled that the co-trustees denied the existence of an agreement to pay pension benefits to Mr Botes. In the alternative, it was pleaded that if such an agreement existed, the Trust had sufficiently met its commitment to Mr Botes in respect thereof because it was he who, knowing what it was, requisitioned regular payments in his favour which were made good by the finance manager on behalf of the Trust.

[154] The Trust's attitude to this claim is, at best, ambivalent and, at worse, confusing. Either there was an agreement or there was not. The denial of the

existence of such an agreement is undermined by both the minutes and the testimony of Mr Kruger who confirmed the agreement. Besides, the probabilities do not favour the Trust's denial. It is inconceivable that a professional such as Mr Botes would accept employment without some provision being made for retirement. In fact, Mr Botes' evidence that the benefit was extended to other Trust employees was not gainsaid.

The Trust's LawSure claim

[155] The High Court saw no merit to this counterclaim. It found that Ms McLean was a director on the LawSure Board and was or ought to have been *au fait* with the goings on there. It bears mention that Mr Botes was accused of fraud in concluding the transaction with the Trust. An allegation of fraud is a serious matter which requires strong evidence. It is no satisfactory answer for Ms McLean's lack of diligence in ascertaining the true state of affairs of the company whose shares the Trust bought to say that she relied on assurances given by Mr Botes. The Trustees also proffer no rational explanation for why they themselves did not do the necessary due diligence, either themselves or through experts such as an auditor, to establish the true facts.

[156] In those circumstances, it is difficult to find fault with the court *a quo's* conclusion that the evidence led on behalf of the Trust in support of the claim did not rise to the requisite standard of proof. The appeal against that part of the High Court's order therefore stands to be dismissed.

[157] The only issue left is that of prescription raised by both parties.

Prescription

[158] Both Mr Botes and the Trust raised special pleas of prescription against their respective claims. First I set out the relevant law and then proceed to consider the plea of each party against the backdrop of how the High Court dealt with it.

The law

[159] In terms of s 11 (d) the Prescription Act 68 of 1969 (the Prescription Act), a debt prescribes after three years from the date on which it becomes due. Further, in terms of s 12 of the Prescription Act:

'(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.

...

(3) A debt which does not arise from contract shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

[160] In *Gericke v Sack*¹² said Diedmond JA said:

¹² *Gericke v Sack* 1978 (1) SA 821 (A), at 832B – D.

‘The Act merely requires the creditor to seek such knowledge by the exercise of reasonable care; she is not required to issue summons - she is given a generous three years in which to institute proceedings. All that she is called on to do is to ask one question to establish identity and not to be content to play a purely passive role. If she could have acquired this knowledge by acting diligently, her inertia, ineptitude or indifference will not excuse her delay. A creditor who fails to exercise the reasonable care prescribed by the Act must pay the penalty for he is then deemed to have acquired the knowledge necessary for the debt to become due and for prescription to begin to run.’

[161] Section 12 (3) of the Act aims to achieve a balance between these two competing interests and ensures that negligent, rather than innocent, inaction is penalised.¹³ Accordingly, the yardstick to be used in determining the standard of care required of the creditor, is:¹⁴

‘to do no more than what could reasonably be expected in the circumstances of a reasonable man.’

[162] The knowledge that is required is the minimum to enable a creditor to institute action. In *Drennan Maud and Partners v Pennington Town Board*¹⁵ the Court decided as follows:

‘Section 12(3) of the Act provides that a creditor shall be deemed to have the required knowledge ‘if he could have acquired it by exercising reasonable care’. In my view the requirement ‘exercising reasonable care’ requires diligence not only in the ascertainment of the facts underlying a debt, but also in relation to *the evaluation and significance of those facts*. This means that the creditor is deemed to have the

¹³ *Minister of Trade and Industry v Farocean Marine (Pty) Ltd* 2006 (6) SA 115 (C), at 125.

¹⁴ *Jacobs v Adonis* 1996 (4) SA 246 (C), 253 B.

¹⁵ *Drennan Maud and Partners v Pennington Town Board* 1998 (3) SA 200 (SCA), at 209 F.

requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and facts from which the debt arises.’

The Trust’s plea of prescription

[163] The appellants raised a special plea of prescription against Mr Botes’ claims in respect of payments related to pension claimed for the years 2005 - 2010. The appellants averred that the claims by Mr Botes constitute a debt, as defined in the Prescription Act and that Mr Botes had served the summons on them more than three years after the claims arose. The summons was issued on the 11 March 2014.

[164] For completeness, it needs to be added that those claims did not form part of the initial particulars of claim which were issued in 2014 but were added by way of amendment to the particulars of claim filed on 29 March 2016. That was well outside the three years for bringing such a claim. Mr Botes places reliance for the claim on the minutes of 17 October 2005.

[165] The High Court held that the prescription defence of the appellants was not supported by evidence. The court stated:¹⁶

‘[185] . . . The defendants also raised the issue of prescription in relation to this claim. In this regard, it is trite that the party raising prescription bears the onus to show that the party acting reasonably could have established the identity of the debtor and the circumstances giving rise to the claim¹⁷.

¹⁶ *Botes v McLean* (I 853/2014) [2019] NAHCMD 330 (2 September 2019).

¹⁷ *McLeod v Kweyiyi* 2013 (6) SA 1 (SCA).

[186] The defendant did not lead such evidence during the trial and in the circumstances, the defendants failed to discharge the onus thrust upon them in support of the prescription defence. This is not a matter that can be canvassed in heads of argument when it is not established in evidence.'

[166] This finding is irreconcilable with the record. In the first place, the plea of prescription raised by the appellants is based on facts that are common cause. Secondly, Ms McLean in her evidence stated that the claims had prescribed. What further evidence she needed to give is not apparent to me.

[167] The only issue to be determined is whether, acting reasonably, Mr Botes could have known of the identity of the debtor and the facts giving rise to the claim for pension earlier than he brought a claim in respect of it. Mr Botes' explanation why he delayed filing the pension claim on time is implausible. I have already cited the explanation he gave under cross-examination which suggests, for example, that the matter did not 'cross my mind'. How could it not? He testified that he kept proper record of the Trust's financial affairs and made reports to donors that Trust funds were used for intended purposes.

[168] It is established on the record that Mr Botes gave regular instructions to Ms Hüsselmann to make payments to him in respect of what he considered was due to him. In fact, the evidence establishes that his co-trustees were blissfully unaware of what payments he was making to himself. It is therefore not that they withheld any payment or information from him as regards to benefits due to him. Claim D is for the

amount of N\$2 006 940 for alleged unpaid pension contribution by the Trust to Mr Botes' Namlex Pension Fund for the periods 2005 - 2008 and 2009 - 2013. The High Court made an award of N\$943 739.79 in respect of that claim.

[169] The evidence establishes on a balance of probabilities that Mr Botes knew when he gave instructions to Ms Hüsselmann for the payment of his benefits (which included, even if it were part only, pension benefits) that those benefits were due and payable by the Trust to him. There is therefore no reasonable explanation for why he did not claim those benefits before the expiry of three years from the date(s) they arose.

[170] The appellants had therefore succeeded in proving on a balance of probabilities that Mr Botes' claim for pension for the periods 2005 - 2010 had prescribed. The High Court should therefore have found that the claim for pension for 2005 - 2010 had prescribed. Mr Botes is entitled to payment of the pension contribution to his chosen pension fund for the period not extinguished by prescription, according to the formula which was adopted by the trial court with the agreement of the parties.

Mr Botes' plea of prescription against Trust's counterclaims

[171] Mr Botes raised a special plea of prescription against the appellants' claims that he overpaid himself and that he sold the Trust worthless shares in LawSure. It pains one to state at the outset that the evidence and submissions made in support of

the appellants' counterclaims are based on the co-trustees' lack of diligence in the performance of their fiduciary duties as Trustees.

[172] Mr Botes' co-trustees appeared to have had a lot of faith in him. The record amply and disturbingly demonstrates that they effectively left the running of the affairs of the Trust to Mr Botes. As Ms Hüsselmann pointed out, they hardly scrutinised the Trust's books. Ms McLean who ought to have known better, also accepted all that Mr Botes presented to her. Minutes were even approved without scrutiny. Ms Hüsselmann testified that it was between July and August 2013 that she informed Ms McLean that Mr Botes was charging commission of 30% on gross income of the Trust. It was on 13 September 2013 that the auditors SGA in stark tones informed the Trustees about Mr Botes' modus operandi.

[173] Had the co-trustees been diligent in the performance of their fiduciary duties, they would have established earlier than September 2013 that Mr Botes was authorising payments to himself to which he was not entitled. Upholding the Trust's special plea would in the circumstances be to reward them for the Trustees lack of diligence. Mr Botes' special plea of prescription against the appellants' counterclaims is good in law and those counterclaims stood to be dismissed.

[174] As for the claim relative to LawSure, the issue of prescription is moot because I found that the Trust had not proved that claim.

Costs

[175] Ordinarily, costs should follow the result. On appeal, only a part of Mr Botes' claim for unpaid pension has survived. The rest of the claims and the counterclaims have failed. The parties have therefore achieved success and suffered failure in roughly equal measure, save for a part of Mr Botes' claim for pension.

[176] It is clear from all that I have said that Mr Botes received substantial personal benefits from the Trust to which he was not entitled. Were it not for the co-trustees' lack of oversight of his running of the Trust's affairs, that would have been discovered and appropriate action taken. The reason that the Trust has failed to recover the overpayments to Mr Botes is because the claims had prescribed due to the co-trustees' lack of diligence and they failed to meet the test for the exception under s 12(3) of the Prescription Act. That, however, does not detract from the impropriety of Mr Botes' conduct as a Trustee which the court is entitled to take into account when considering costs. A party's conduct before or during litigation is a legitimate basis on which it can be denied costs even if successful.¹⁸ The conduct of Mr Botes *vis a vis* the Trust¹⁹ is an example of such conduct and is a good basis for denying him costs in respect of his successful pension claim, both *a quo* and on appeal.

Order

[177] I propose the following order:

¹⁸ *Du Toit v Dreyer & others* 2017 (1) NR 190 (SC).

¹⁹ See for example paras [28], [131] and [147] of this judgment.

(a) The judgment and order of the High Court are set aside and replaced by the following:

- '(i) The plaintiff's claims A and C are dismissed.
- (ii) The defendants' special plea of prescription against plaintiff's claim D for the period 2005-2010 succeeds and the claim for pension for that period is dismissed.
- (iii) The plaintiff's claim for pension for the period between 2010 and the date the summons was issued is granted.
- (iv) The defendants' counterclaim in respect of LawSure is dismissed.
- (v) The plaintiff's special plea of prescription against the defendants' claims in reconviction for overpayment to Mr Botes is upheld and the remainder of the claims in reconviction are dismissed.
- (vi) There is no order of costs.

(b) There is no order of costs in the appeal.

DAMASEB DCJ

MAINGA JA

HOFF JA

APPEARANCES:

Appellants:	J Marais SC (with him Y Campbell) Instructed by: Engling, Stritter & Partners
Appellants in their personal capacities:	R Heathcote (with him R Lewies) Instructed by: Ellis and Partners
Respondent:	M.J Fitzgerald SC (with him D Obbes) Instructed by Koep and Partners