

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO. I 853/2014

In the matter between:

DANIEL BOTES

PLAINTIFF

and

MICHELLE DIANE McLEAN

FIRST DEFENDANT

CONSTANCE YVONNE MARITZ

SECOND DEFENDANT

JOACHIM JOHANNES NICOLAAS KRUGER

THIRD DEFENDANT

S. SHEJAVALI N.O.

FOURTH DEFENDANT

Neutral Citation: *Botes v McLean* (I 853/2014) [2019] NAHCMD 330 (2 September 2019)

CORAM : **MASUKU J**

Heard: 22 March – 1 April 2016; 21 November 2016; 24 February 2017; 2 – 10 October 2017; 22 November 2017; 23 April 2018

Delivered: 2 September 2019

Flynote: Rules of Court – Rule 93 – contents of witness' statements – whether the court may circumvent the provisions of Rule 93 by allowing a witness to only confirm the

truthfulness of the witness statement and thereby avoid reading the entire statement as his or her evidence-in-chief – Law of Evidence – approach where there are disparate version presented court in order to make finding on the probabilities of the case – Interpretation of documents – whether witnesses are entitled to testify about the interpretation they attach to the document in question – effect of failure to call witnesses available and able to testify.

Summary: The plaintiff was engaged by the Michelle McLean Trust to be the fundraiser. He ultimately became Trustee as well and was the Executive Director of the Trust. His terms of service with the Trust, including the length of the term and his remuneration was recorded in the minutes of the Trust. After service for about a period of 20 years, decadence set in. Some mistrust among the other Trustees and the plaintiff set in as allegations of him appropriating money to himself that he was not entitled to, began to surface and the atmosphere in the organization went South. This eventually culminated in the members of the Board suspending the plaintiff and later terminated his contract with the Trust, it being alleged that h had acted dishonestly towards the Trust and was guilty of non-disclosure of certain crucial information to the Trust.

Seriously aggrieved by the actions of the Trust, the plaintiff sued the Trustees for a number of claims including money that he claims was owing to him; a claim for pension that the Trust had not paid during the tenure of his service; remuneration he was deprived of for the unexpired period of his contract and damages he suffered as a result of a campaign waged by the Trustees to get rid of him, without having afforded him a proper hearing.

The main issue in dispute, was whether the plaintiff was entitled to be remunerated on gross or net income. The plaintiff's case, based on the minutes, was that he was entitled to be paid on gross while the defendants averred that he was entitled to be paid on net.

The defendants filed a counterclaim for payment of an amount they claimed the plaintiff had been overpaid during his tenure. The further claimed an amount for non-disclosure in respect of a company in which the plaintiff held shares and which was sold to the

Trust. They claimed that he had not deliberately fully disclosed the true financial perilous status of the company.

Held: that the court, in exercise of its inherent powers to regulate its procedure, is entitled to allow a witness not to read the entire statement as in this case where it was very long and would have consumed most of the time allocated to the trial. In this regard, the court had to ensure that the overriding objectives of judicial case management held sway, as long as the spirit of Rule 93 was not violated.

Held that: witnesses should ensure that the witness' statements are written in the words of the witnesses and that legalese and other obscure language not generally known to witnesses should be avoided.

Held further that: where there are disparate version before court, the guidelines offered in *SFW Group Limited v Martell et Cie* should be adopted to enable the court to come to a finding on issues of fact in dispute and ultimately, on whether the party on whom the onus rests has discharged that onus.

Held: that a party that fails to call a witness, who is available and able to testify, runs the risk of the court drawing an adverse inference against that party for its failure to call the said witness. In this regard, the court may hold that the party developed cold feet because of the detrimental evidence against the party that the said witness would have adduced.

Held that: the interpretation of documents falls within the sole province of the court's powers and that evidence by witnesses as to what they may have understood, is irrelevant and that witnesses should not be allowed to usurp the functions of the court in this regard.

Held that further: that having regard to the minutes of the Trust, the intention conveyed by the language employed, pointed in the direction that the intention was for the plaintiff to be remunerated on gross and not net income.

The court, after considering the claim in convention and the claim in reconvention, found that the plaintiff had proven his case on a balance of probabilities and that the defendants had failed to show that they were entitled to the relief they sought. Their claims were accordingly dismissed the defendants' claims, while granting the plaintiff's claims.

ORDER

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.

JUDGMENT

MASUKU J:

Introduction

[1] Angula DJP, in our private conversations, normally states that the courtroom is a theatre in which human character, in all its forms and manifestations; the good, the bad and the ugly, is laid bare for the glare of the wider human audience with interest therein. I concur. His statement has and continues to prove true as one case after another plays out in open court.

[2] This case is, but one of the chapters to play out in the public domain. It particularly attracted wide interest for the reason that the 'darling of Namibia', Ms. Michelle McLean, who once adorned the crown of Miss Namibia and Miss Universe, played a central theme in the cast. It does not lie in my mouth to characterise where in the triumvirate of classifications mentioned in the immediately preceding paragraph the instant case falls – whether fair or the foul. This must necessarily be left to the reader to make his or her own determination in this regard.

[3] The main characters in this case are the plaintiff, Mr. Daniel Botes, of the one part and Ms. Michelle McLean; Mrs. Constanze Yvonne Maritz, Mr. Joachim Johannes

Niclaas Kruger, (the thorn among roses as it were) in this case, and Ms. Shejavali. At the centre of the dispute are the activities of a legal entity known as the Michelle McLean Trust, in which the aforementioned parties were duly appointed Trustees. The Michelle McLean Trust will hereafter be referred to as the Trust.

[4] The plaintiff was appointed in or about 1994 as the Executive Director and Trustee of the Michelle McLean Children's Trust, ('the Trust'). This appointment continued for a considerable period of time until some events chronicled below intervened. It would seem that the plaintiff's appointment was renewed from time to time and on conditions that were spelt out in minutes of the Board of Trustees. These minutes, it would also appear, stipulated the remuneration due to the plaintiff during the endurance of the appointment.

[5] In the course of time, as it is wont to in many human relationships, the relations between the plaintiff, on the one hand, and the defendants, on the other, began to deteriorate and went South at a rather alarming speed. Where there previously lay collegiality, trust and confidence, set in putrid elements of distrust and accusations of impropriety that rendered the previously enduring trust relationship moribund. The appointment of the plaintiff as the principal fundraiser for the Trust was, after a period close to two decades, brought to a screeching halt when his appointment was suspended with immediate effect from 13 September 2013.

[6] In November 2013, an email written by the defendants' legal practitioners of record brought the relationship to a final end when the plaintiff's appointment was terminated 'with immediate effect'. The plaintiff considered this act of termination, a repudiation of the agreement, which he refused to accept. The daggers were thus drawn and a long, bitter and expensive legal war, in recent times referred to as lawfare, began in earnest, culminating in the present judgment.

[7] The plaintiff, concluded that the termination of his aforesaid appointment was unlawful and approached this court seeking payment of an amount of N\$ 14 110, 931 from the defendants in their capacities as Trustees; a full account to be rendered by the

defendants in their capacities as Trustees for respective periods that need not be particularized at this point; payment of N\$ 5 319, 572, interest thereon at the rate of 20% per annum and costs of suit.

[8] The defendants returned the fire with a fire of their own. Whilst disputing the averrals in the plaintiff's plea, they put up a case of their own in which they essentially sought payment of an amount of N\$ 4 497, 283; N\$ 1 000, 000, interest on the aforesaid amounts and costs of suit. The basis of the counterclaim were averrals to the effect that the plaintiff withdrew, transferred and/or appropriated funds of the Trust to which he was not entitled. Furthermore, it was alleged that the plaintiff was guilty of non-disclosure regarding Law Sure, as appears in para 21, below. I will not examine the pleadings in any further detail for present purposes.

The pleadings

[9] The plaintiff essentially lodged three separate claims against the defendants. In claim A, intimated earlier, the plaintiff averred that he was appointed in 1994 as an Executive Director and Secretary of the Trust, with the appointments being extended from time to time in minutes of the Trustees. He averred further that in terms of the minutes, his remuneration consisted, at the latter part, of 30% of all income received by the Trust, which was tabulated and need not be individually included in the judgment at this stage. Earlier, he averred, his remuneration was levied at 20%.

[10] The plaintiff further averred that he performed his duties in terms of the appointment and the objectives of the Trust and in this regard, dedicated almost 20 years of his professional career to the development and advancement of the Trust. The plaintiff alleges further that his performance of his duties was rendered impossible by:

- (i) unlawful repudiation of his contract by the Trust, represented by the defendants in their official capacities;
- (ii) unlawful interference by the defendants in his appointment by causing an abrupt termination and repudiation thereof in reckless disregard of their duties as Trustees and in breach of the duties they owed to the plaintiff.

[11] The plaintiff accordingly claimed contractual damages in the amount of N\$ 11 015 681, as being the amount directly or reasonably foreseeable and a contemplated result of the repudiation of his contract. A schedule of how the amount claimed is calculated was attached and need not be included herein. In his next claim, the plaintiff alleged that the Trust failed and/or refused, since September 2013, to render any account to him in accordance with the terms of his appointment. This latter claim, was later abandoned and will not, for that reason, be considered in the judgment.

[12] The plaintiff, in his last claim, which is delictual, claims an amount of N\$ 5 319 572. The genesis of this claim, the plaintiff avers, is that the 1st defendant made various attempts, which are outlined to enrich herself at the cost of the Trust, which the plaintiff resisted. These attempts included the 1st defendant desiring to personally obtain a financial share in a proposed fishing company of the Trust; desire to personally benefit financially from a proposed property development of the Trust, *C'es la Vie*; attempts to personally benefit from a proposed micro-lending business of the Trust, *Entrepo Finance*; insistence on the Trust paying for her personal wedding blessing ceremony; a number of unauthorised spending by the 1st defendant and failure to repay loans extended by the Trust to the 1st defendant, to name but a few.

[13] The plaintiff avers that his unwillingness to co-operate with the 1st defendant in the procuring the attempts to enrich herself personally as stated above, resulted in the 1st defendant orchestrating a campaign among the rest of the Trustees, particularly the 2nd and 3rd defendants, to get rid of the plaintiff by unlawfully procuring the repudiation of his appointment. It is the plaintiff's averral that the campaign, which culminated in the repudiation of his contract in circumstances where the defendants owed a duty of care to the plaintiff to refrain from the unlawful interference with his appointment and from engaging in conduct designed to unlawfully repudiate the contract. The amount claimed by the defendant, mentioned immediately above was alleged to have been the result of the legal duty owed by the defendants to the plaintiff.

[14] The last claim is for the payment of N\$ 3 095, 250. In this claim, the plaintiff avers that the Trustees held a meeting on 25 October 2005 in terms of which they approved payment of 60% Medical Scheme and 7% pension fund for the plaintiff. He averred that in terms of the minutes, he was to make monthly contributions to his pension fund in accordance with the monthly commission he received from the Trust and the Trust was further obliged to make monthly contributions to his pension fund on his behalf.

[15] The plaintiff further avers that at a meeting of the Trustees held in December 2009, the Board of Trustees approved an increase of his pension fund from 7% to 9%. The plaintiff pleads that the defendants breached the said agreement by failing to make any payments to the pension fund for the period 2009 to 2013 and that they also failed to make the correct monthly contributions to the pension fund during the same period. The claims mentioned above, added together, amount to N\$ 14 110, 931, which is the total amount claimed by the plaintiff from the defendants.

[16] In their defence, the defendants first raised an issue of prescription in respect of payments related to pension claimed for the years 2005-2008 and 2009 to 2013. The defendants averred that the claims by the plaintiff constitute a debt, as defined in the Prescription Act¹ and that the plaintiff had served the summons on the defendants more than three years after the claims arose.

[17] On the merits, the defendants averred that the plaintiff's appointment was not permanent but ran for different periods of time, namely, six months, a year or two years and was renewed from time to time. It was further alleged that the appointment of the plaintiff was regulated by the Deed of Trust. It was the defendants' further averral that the minutes relied upon by the plaintiff for its claim, do not constitute agreements *inter partes*.

[18] The defendants further averred that on a proper construction of the minutes relating to the plaintiff's remuneration, especially those dated 17 October 2005, to the

¹ Act No. 68 of 1969.

effect that the plaintiff's remuneration would be based on 20% of the income received from all donations, grants, interest on Nedloans (Pty) Ltd income, dividends specified and unspecified income, the true intention of the parties was that the plaintiff would receive remuneration by payment of 20% of all net income earned by the Trust from time to time from the identified sources, but excluding those not identified. In the alternative, the defendants averred that the inclusion of net income was as a result of a misrepresentation by the plaintiff, alternatively, a common or joint *bona fide* mistake of the parties. In this regard, it was alleged that the minutes do not accurately reflect the intention of the parties

[19] It was also defendants' averral that the plaintiff, as a Trustee, was to act with such care and skill as may reasonably be expected of a person who manages the affairs of another, and so comply with the duties of a trustee in common law and as contemplated in the Deed of Trust. It is, in this regard, alleged that the plaintiff failed to so act and had in fact acted in conflict or in breach of his duties to the 1st defendant by making unauthorised payments to himself, thus misappropriating funds of the Trust.

[20] In the amended claim in reconvention, the defendants repeat the averrals contained in the immediately preceding paragraph and allege that the plaintiff, in breach of his appointment and mandate, withdrew, transferred and/or appropriated funds to himself that he was not entitled to. These funds were alleged to be in the amount of N\$ 4,947, 283, which was the amount of the defendants' counterclaim.

[21] The defendants further claimed an amount of N\$ 1 Million in respect of an amount paid by the defendants to purchase what is referred to as Lawsure. This was a viable short term insurance business that it is averred the plaintiff had represented to the Trust would be in the latter's interest to conclude. An agreement to acquire shares in the said business was thus concluded. In doing so, the defendants further averred, the plaintiff intentionally and wrongfully made representations that he knew were false as the said business was an empty shell and its value, shares or assets were insignificant.

The evidence

[22] I will, at this juncture, chronicle the evidence of the witnesses led by the protagonists. It must be mentioned that there are in this regard, witnesses of fact and some expert witnesses, considering that the claim touches upon accounting issues that would need experts to assist the court in deciding parts of the case. In this regard, reference will be made to the key witnesses who testified and whose evidence is likely to have had a material bearing on the direction of the case or any computation arrived at.

Mr. Daniel Botes

[23] Mr. Botes testified that he was first employed in 1988 as a development officer at the Academy Foundation whose main purpose was fundraising and public relations. It was during this time that he learnt about fundraising and public relations activities which eventually became the core of his professional life and skills.

[24] According to Mr. Botes, he was approached by Democratic Media Holdings (DMH), which had established and funded the Trust. The Trust owed DMH an amount of N\$ 400,000 and they asked if he could assist them to recover this money by means of fundraising projects. He testified further that they approached him on the basis that he had built a good reputation for successful fundraising and had numerous contacts.

[25] It was his testimony that he later became involved with the Trust on a contract basis. In this regard, he preferred to work on fixed contracts because that motivated him to continue to seek out financially viable opportunities for the Trust to ensure it became a viable entity. He testified that he managed to recover the moneys and to extinguish the remainder of the debt and this success, was the beginning of the enduring relationship between him and the Trust until it was abruptly and unlawfully terminated by the 1st defendant.

[26] Mr. Botes testified further that his appointment, contract, remuneration, functions and calculation of commission was based on certainty and approved by the Board of

Trustees since 1994. He was also appointed as Executive Director, Trustee Member and Secretary to the Trust and requested that his appointment and contract with the Trust be for fixed periods. It was his testimony that the biannual appointments were extended from time to time. The most recent of his appointments was an extension to 31 December 2014.

[28] It was his further testimony that his commission was based on all income or total income received by the Trust multiplied by the percentage approved by the Board since 1993/1994. According to Mr. Botes, he was only remunerated on fundraising successes and was not paid for work done and or time spent on projects. Further, it was his evidence that the commission he received would have covered all the pre-work done and time spent to materialise the project, grant or donation as well as to implement, conclude the project and report to the donor.

[29] Mr. Botes also highlighted the numerous activities and functions which he performed on behalf of the Trust which included but were not limited to; fundraising, public relations to create awareness to potential donors as well as the general public about the work of the Trust, submission of proposals; implementation and overseeing of projects; exploring fundraising opportunities; obtaining Board approval before execution of projects; protecting and promoting the interest of the Trust and the day to day management of the activities of the Trust. He also ensured that donor funds were received and used for the intended purpose and also reported to donors with accounting statements on how their money was allocated. Furthermore, he ensured that the Trust is audited. He was also responsible for convening regular Board meetings.

[30] Mr. Botes further testified how, as the Trust's Executive Director for over 20 years, he made it possible for the Trust to become sustainable in the long run, bearing in mind the realities of a changing landscape, which meant that the Trust could not rely on donor funding alone. One of his ideas was to link the Trust with corporate or other business entities, thus adding value to their businesses and, in return the Trust would share in the profits. According to him, the Trust could in this way, own property, acquire

its own transport and would be fully mobilised and its impact and outreach would be far greater.

[31] According to Mr. Botes, sources of passive income and fundraising projects which he initiated and developed include; FinEd (Pty) Ltd (micro-lending scheme), wellness Centre, Fishing Rights in partnership with a fishing company, URBN CC-Property Estate Agency, Cest La Vie – Property Development, selling of shares held in Nedloans (Pty) Ltd, new micro lending scheme and law insurance. He went on to testify that these projects were all approved by the Board and he in turn was authorised to turn them into viable sources of income.

[32] It was his further testimony that all projects of the Trust, since 1994 were initiated by him and that at no stage did any member of the Board of Trustees or the first defendant initiate, propose a single project or arrange for funding.

[33] Mr. Botes testified that the commission payments to him, were calculated on the agreed terms, namely 20 % and 30 %, respectively, since 2010 on all income received by the Trust. These payments were always fully reported in the auditor's reports as presented to the Board and approved by the said Board. 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. According to Mr. Botes, payment of the commission was only paid once the Trust was able to do so.

[34] As the Executive Director of the Trust, Mr. Botes testified that he had no direct and independent access to the financial records or the banking accounts of the Trust and could thus not make any withdrawals on his own from the Trust's accounts. According to him, he never interfered with the daily financial record-keeping of the Trust but that he regularly made enquiries to establish if funds had been received, reasoning that constant follow ups and reports with the donors or entities are accordingly essential to build a good relationship of mutual trust to facilitate donations in future. He ensured that proper financial records were kept of all projects.

[35] It was Mr. Botes' further testimony that since 1994, all the Board meetings were called by him. He was the secretary for the Board and kept the minutes of the meetings which were submitted to the next meeting to be read, approved and signed as being correct.

[36] Mr. Botes also testified that from 2010, the 1st defendant started making overtures aimed at securing personal financial benefits from the Trust's passive income projects. At a meeting held in 2010 in Johannesburg where they were to meet with a potential donor, discussions were held about all the new income-generating ventures and the 1st defendant wanted to know how she could personally benefit from the passive income- generating projects. It was his further testimony that he told the 1st defendant he would not stand in her way to benefit from the passive income-generating projects as long as the Board of Trustees is notified accordingly and they approve her wishes.

[37] According to Mr. Botes, since 2011, the 1st defendant constantly wanted her lawyers, advisors and representatives to be involved in the activities of the Trust but she never submitted or gained any approval from the Board in this regard. He testified further that when she introduced him to her husband, Mr. Gary Bailey, the 1st defendant asked that he brief the latter on all the new income-generating projects and that when this was done, Mr. Bailey's response was that it was now 'Michelle's turn' to benefit from the ventures. Mr. Botes testified that this utterance made him feel that the two were applying undue and unfair pressure on him and the impression he got was that the 1st defendant was urged on by her husband. It was Mr. Botes' evidence that to the best of his knowledge, the 1st defendant failed to engage with the Board regarding the proposed financial benefit for herself.

[38] Mr. Botes testified further that the 1st defendant, along with her husband, consulted with Mr. Kutzner, a lawyer and subsequent to which she informed the plaintiff that the latter would call him for a meeting in order for him to provide Mr. Kutzner with certain documents. It was his testimony that no records exist appointing the said Mr. Kutzner, as the Trust's lawyer, nor to pay his account.

[39] It was his further testimony that the financial manager of the Trust raised concerns to him about the 1st defendant using the Trust's money for payment of her personal expenses without the Board's approval. According to Mr. Botes, the chairperson of the Board and the Trustees acted in a clandestine manner and did not confront him with any allegations of wrongdoing or misappropriation and that he, in any event, never engaged in any wrong doing or misappropriation.

[40] He further testified that serious and unfounded allegations were made by the Auditors about him but without consulting him and without a Board meeting having been called to put these allegations to him and to afford him an opportunity to present his side of the story.

[41] It was his further testimony that the Trustees failed in their fiduciary duties and did not act in the best interest of the Trust. The aim, was to discredit him, in order for the 1st defendant to get a share in the new micro-lending scheme with IJG. The trustees, as well as key staff members of the Trust, were in his view influenced against him by the 1st defendant. The 1st defendant further asked him to sign a resolution aimed at reducing his powers, which resolution had supposedly been signed by the other Board members despite there being no minutes to this effect.

[42] According to Mr. Botes, the 1st defendant, along with some of the other Trustees, started engaging with various stakeholders without his knowledge, let alone a Trustees' meeting. The 1st defendant ensured that he was excluded in that no meetings were held with him, nor was information shared with him. He was no longer invited to meetings that took place at locations other than the regular venue, which was the Trust's boardroom.

[43] According to Mr. Botes the 1st, 2nd, and 3rd defendants, along with Mr. Mandy and the auditors of SGA were instrumental in collapsing major income generating projects of the Trust. The aforementioned parties painted Mr. Botes on the canvass as the villain because they knew how passionate he was about the projects and the Trust and that he would not allow them the personal and unauthorised gains they sought to obtain.

[44] His further testimony was that after his sidelining by the other members of the Board, he then took it upon himself to call a meeting of Trustees in order to get the bottom of the hostile situation. All the Trustees, except Ms. Shejavali attended along with Mr. Mandy. It was at this meeting that the 1st defendant informed him that he was not empowered to call a meeting of Trustees. Mr. Botes invited the Trustees to say what problems they had with him and also whether he had done anything wrong. He further invited them to have regard to all the files in his office if they had any suspicion or doubt on any project or work that he had done. He also invited them to take his laptop and conduct an investigation as he had nothing to hide.

[45] Mr. Botes, in his lengthy evidence also testified that the transaction on which he did not have an entitlement to commission according to the 2005 minutes was the sale of the house occupied by the Trust as its offices and that he would never have undertaken the income generating projects if he was not entitled to earn an income or be remunerated accordingly.

[46] According to Mr. Botes, he explained to the Trustees that the auditors were relying on the 2005 minutes and that all new income generating projects were approved by the Board and thus, he was authorised to do the work. His testimony was that he requested the Board to rectify it and informed them he wanted to be paid accordingly but there was no discussion about it. He testified further that the 1st defendant then produced a letter from the SGA (auditors), dated 13 September 2013, stating that he was suspended with immediate effect. It was Mr. Botes' evidence that he was falsely accused of irregularity and that he owed the Trust about N\$ 2, 365,569 as at 31 August 2013, which he disputed as being simply incorrect.

[47] It was his further testimony that despite the serious allegations made by SGA and his response thereto, he was not invited by the Trustees to a Board meeting since 13 September 2013, to explain to the Board what his response to the allegations was and that the 1st defendant never brought to the Board's attention that she seemingly had a problem with him in a proper manner and/or forum. Mr. Botes reiterated that

regrettably, the 1st defendant's aim was to benefit personally from the income-generating projects of the Trust. The problem was that the plaintiff, apparently, stood in her way.

[48] He testified that no disciplinary procedures were taken against him. He was unceremoniously kicked out, his contract unlawfully repudiated and/terminated in violation of his rights and without a valid reason. As a result, he testified, he has suffered a considerable sum in damages and went further to testify that no basis exists for the minutes of 17 October 2005 to be rectified in that they are a correct reflection of what was decided and agreed upon by the Trustees. No oral or other agreement was concluded to the effect that net income would be used as a basis for calculation of his commission and that VAT refunds would be excluded. According to Mr. Botes, there was no misrepresentation, common or joint. No bona fide mistake had occurred, he further testified. In the result, he testified that he did not breach his mandate as alleged by the defendants.

[49] Lastly, it was his testimony that everything he did was above board and always in the interest of the Trust. In this regard, he testified that the Board was always aware of all the projects that he was working on and these had been approved by the said Board as per the various Board meetings minutes until his appointment was unlawfully terminated in September 2013.

Ms. Michelle Dianne McLean

[50] Ms. McLean testified that she was crowned Miss Namibia and then Miss Universe in 1992. It was her testimony that she received overwhelming and worldwide praise, recognition and publicity as a result. This celebrity status paved a way for the formation of the Trust.

[51] She testified that the success of the Trust depended heavily on her being the face of the Trust; her ability to retain national and international publicity, as well as the sound management of the affairs of the Trust.

[52] It was her testimony that she actively promoted herself and the affairs of the Trust. She became an active media personality as a result of which she had the opportunity to meet and interact with various famous and influential public figures. Ms. McLean testified that these relationships enabled her to explore and implement opportunities for the benefit of the Trust.

[53] It was her version that she met the plaintiff in 1994 after he was introduced to her by the 3rd defendant. At that time, she had been informed that the plaintiff had been involved in fundraising and that he would have sufficient interest and experience to render service as a fund raiser. She testified further that the plaintiff was initially appointed as secretary with a basic salary and commission. Subsequently, he was appointed as the Executive Director.

[54] According to Ms. McLean, the plaintiff assumed full control of the financial, administrative and daily affairs of the Trust and as a result, she had no reason to doubt his integrity. Owing to the trust reposed in him, the plaintiff was allowed to execute his duties with a fair measure of independence. The plaintiff enjoyed a reasonably free hand in the management of the affairs of the Trust and largely turned to the Trustees only for purposes of important Trust decisions at Trustee meetings.

[55] It was her testimony that at these meetings, which were arranged by the plaintiff, he would raise the issues requiring decision without too much elaboration or explanation and he became frustrated if he was subjected to detailed questioning. Her evidence was that she had no recollection of the plaintiff maintaining any notes during the meetings. She testified that long after the meetings and immediately prior to the next meeting, the plaintiff would provide her with the minutes for signature.

[56] According to Ms. McLean, she would briefly page through the minutes with short explanations offered by the plaintiff and she would then be required to sign the minutes. Her evidence was that she signed these minutes on the plaintiff's assurance that they

were correct but that in these circumstances, she does not accept that the minutes were all correctly kept.

[57] On 20 November 1997, Ms. McLean testified, the plaintiff required that the agreement regarding his monthly salary be increased to 20% of the funds he brought in and this was agreed to. She testified that on 20 April 2005, the Board again agreed that the plaintiff be paid 20% of the funds raised or net income received as a result of his efforts.

[58] Ms. McLean testified further that the only recollection she had about the meeting on 27 October 2005 is that the plaintiff again raised his 20% fee and sought the Board's consent. The minutes reflect that the plaintiff would receive 20% on all income including donations, grants, interest, dividends, specified and unspecified income and VAT refunds, excluding profits on the sale of assets, insurance claims on assets and interest earned. According to her, she would not have agreed to the plaintiff receiving 20% of the gross income as he seems to have claimed and received in terms of the financial statements. It was her evidence that she certainly did not agree to the plaintiff sharing in the VAT refunds.

[59] Her further testimony was that she disputes that the minutes of the meetings constitute agreements. According to her, they represent nothing more than belated and 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.

[60] According to her, she had no clear recollection of any discussions or agreement on the Trust's contribution to the plaintiff's medical scheme or pension fund. She further stated that she had no recollection of any agreement on the percentage contribution and therefore disputes the plaintiff's claim that an agreement was reached on the payment of contributions, amounting to 6 % and 7 % of the two funds. She testified further that on her understanding of the Trust's financial manager, every claim made by the plaintiff in respect of the pension fund and medical aid contributions had been paid

by the Trust and received by him without complaint. He at no stage demanded anything more nor laid a claim of short payment.

[61] Ms. McLean further testified that the plaintiff, being acutely aware of the benefits received by him, calculated his own benefits and payments and that the claims now advanced in respect of these two components of benefits have either prescribed or been waived with plaintiff's knowledge. It was her testimony that although the plaintiff had mentioned that he had wanted to increase the commission rate beyond 20%, this was not agreed to despite the contrary being stated in the minutes.

[62] The plaintiff, in terms of the 1st defendant's testimony, was responsible for the maintenance of all financial records, as well as the preparation of the financial statements which she signed without realising that the plaintiff had remunerated himself in breach of the agreement by recovering income at a rate in contrary to the true agreement, thus acting in conflict with the skill and care expected of someone in his capacity.

[63] It was Ms. McLean's testimony that after the plaintiff's appointment was terminated, his conduct, in particular, his withdrawals and payments were carefully analysed and compared with his duties. She testified that this exercise resulted in the discovery that the plaintiff had withdrawn funds to which he was not entitled as more specifically dealt with in the forensic accountant's report. According to her, the report revealed substantial overpayments and losses suffered by the Trust at the plaintiff's instance.

[64] By 2011, she further testified, she was no longer entirely satisfied with the lack of response and the management style of the Trust by the plaintiff. This developed because she had become even more concerned about the failure of the plaintiff to fully disclose and explain matters relating to the financial management of the Trust and the involvement of various members of his family in its affairs. She testified that she was concerned that by reason of her position as director of one of the companies created for the benefit of the Trust, she could face personal liability if it transpired that financial

irregularity had occurred under her watch. She testified that this resulted in the exchange of correspondence as well as the engagement of an attorney.

[65] She testified further that in August 2013, she discussed an American non-governmental sponsor's interest in South Africa with its South African agents. Against this background, she wrote to the plaintiff to mention this possibility and to require full access to relevant financial documents. The plaintiff became excited but she felt a need for the Trust's interests to be protected by proper investigation by an independent accountant. It was her testimony that the plaintiff did not want anything to do with the independent accountant, Mr. Mandy, which then resulted in a deterioration of the trust relationship between the plaintiff and herself.

[66] Ms. McLean also testified that she had become sufficiently concerned about the risk of the affairs of the Trust not being properly taken care of by the plaintiff and engaged a legal practitioner to prepare a Power of Attorney to ensure that the interim authority of any person and in particular the plaintiff, to sign documents on behalf of the Trust be suspended.

[67] Around August/September 2013, she testified, the Trust's auditors informed her that they had found evidence of financial irregularity in that the plaintiff had received substantial benefits in excess of what he appeared to have been entitled to. It was against this background the trustees met with Ms. Matthee on 12 September 2013 and later on the same day, with the plaintiff.

[68] On 13 September 2013, the Trust's auditors issued a report reflecting a prima facie opinion of financial irregularity arising from the plaintiff's management of the Trust. It was because of these concerns that the plaintiff was suspended on the same date.

[69] She went on to testify that her recollection of the meeting is that the plaintiff was unable to provide any satisfactory explanation and remembers him responding by saying 'oh, it must be a big mistake'; that he was wrong and that he would rectify matters. In spite of the exchange of correspondence and the investigations undertaken,

the plaintiff did not provide the Trustees with any satisfactory explanations as a result of which his appointment was terminated, she further testified.

[70] It was Ms. McLean's testimony that the plaintiff's claims about her orchestrating a campaign to get rid of him and enrich herself were untrue; that she neither sought nor received any interest in the fishing company; that she never received a unit from the C'est La Vie property development; that regarding the Entrepo Finance business, nothing came of this except that her acquisition of a share or interest was approved *qua* trustee on behalf of the Trust; Urbn Properties, on the contrary, nothing further occurred in relation to the plaintiff's claim; she received the benefits of flight costs for her family for her wedding in March 2013 because of the public relations opportunity presented by the event. She stated that the said costs had been repaid; she received some benefit for her wedding blessing ceremony with the approval of the Trustees and; received a loan from the Trust also with the Board's approval and that same had been paid up.

[71] Ms. McLean, in her testimony, denied having acted unlawfully, inappropriately or seeking to enrich herself at the expense of the Trust. She testified that the plaintiff merely revived all these claims to support his claim of malicious dismissal. She denied having formed any common purpose with the remaining Trustees to get rid of the plaintiff. She further disputed wrongly ending the plaintiff's appointment; breaching the plaintiff's appointment and poured scorn on any right by the plaintiff to claim damages. She went further to also dispute the quantum of claimed and testified that the plaintiff was in fact indebted to the trust in the sum as calculated in the McHardy Report.

[72] According to Ms. McLean, the plaintiff intentionally kept her and the other Trustees in the dark about his own income. She also testified that regarding Law Sure, the plaintiff had informed the Trustees that the Trust would be purchasing a viable and ongoing business and was likely to earn substantial income therefrom. Since the plaintiff was directly involved in Law Sure and had personal knowledge of its assets, operations and its viability, it was her view that the transaction amounted to a fraud as the Trust paid an amount of N\$1 million for an empty shell, consisting of a few pieces of furniture and a computer.

[73] She concluded her testimony by stating that the plaintiff opportunistically and dishonestly sought to escape the consequences of his termination by fabricating his claim to a campaign orchestrated at his expense.

Mr. Joachim Johannes Nicholas Kruger

[74] Mr. Kruger testified that he is a farmer and was appointed as one of the first Trustees of the Trust. He was a Trustee from 1992 to 1994 and again from 1998 to date. It was his testimony that it was possible that he continued to participate in the affairs of the Trust albeit to a lesser extent.

[75] According to Mr. Kruger, he was instrumental in the appointment of the plaintiff, who was initially appointed as a fundraising consultant. He recalled that the plaintiff was initially appointed for fundraising purposes and that he would be paid 20% on all funds raised through his efforts.

[76] Mr. Kruger testified further that they did not specifically agree that he should avoid a conflict of interest, act in accordance with sound financial accounting policies or act with the care expected of someone managing the affairs of another. Another thing they discussed was the creation of projects to generate income for the Trust and it was accepted that the plaintiff would be primarily responsible for these.

[77] According to Mr. Kruger, he recalled agreeing that the plaintiff would earn 20% commission on the funds raised for the Trust and that he understood this to mean that the plaintiff could claim payment of 20% on the net proceeds generated by a project. He further testified that he believed the foregoing to be consistent with the note reflected in the minutes dated 17 November 1994, to the effect that the plaintiff's commission, calculated over a 6 month period, was to be quantified with reference to the amount raised.

[78] Mr. Kruger also testified that he recalls an agreement around November 1997 that the Trust would pay the plaintiff N\$5000 per month and/or 20% commission whichever is the largest.

[79] He was provided with the minutes of a trustees meeting held on either 26 or 27 April 2005, as he was not present and same reflect that the plaintiff's remuneration would be based on 20% of all income that the Trust would receive and that he was certainly never informed of any change of the basis of the remuneration as previously explained.

[80] It was his evidence that he was present at the meeting held on 17 October 2005 and was surprised by a specific part of the minute because the fine detail of the kind listed was never discussed at Trustee meetings and that he absolutely had no recollection and thus denied income being so itemised. At no point, he testified, had he agreed to the plaintiff receiving 20% on the interest of the NedLoan income, dividends, VAT refunds and income for the reason that in these cases, if the formulae were to be implemented, the plaintiff would have to be earning an income even where no funds were raised by a project; and that the plaintiff would have earned 20% twice. According to Mr. Kruger, all that was discussed was the extension of the plaintiff's contract and nothing more.

[81] His testimony was also that the trustee meetings were never detailed, but rather that matters were discussed in broad strokes, upon consideration of such documents as the plaintiff may have produced at the meeting and on resumption, the earlier minutes would be produced for approval.

[82] It was his further testimony that the Trust acquired a deduction code and it was sold to or made available initially to FinEd and later to NedLoans in return for which the Trust earned a commission or income.

[83] Mr. Kruger, in his testimony said he notes that another meeting was held on 26 October 2010 during which the Board approved an increase to the plaintiff's commission

to 30%. He was not present at that meeting and cannot recall any such increase ever being agreed to.

[84] According to Mr. Kruger, the plaintiff largely managed the affairs of the Trust independently and was a good and successful business man with good knowledge. In this regard, they allowed him to operate fairly independently since they trusted his integrity and skill and that he was certainly not the kind of person who would be dictated to by a single trustee.

[85] Mr. Kruger denied the claims by the plaintiff that he was being persuaded by 1st defendant in a campaign to get rid of him. It was his evidence that the plaintiff's contract was terminated because of irregularities in his financial administration of the Trust. In his own words, Mr. Kruger stated further that from his personal point of view, he was largely satisfied with the services of the plaintiff. It was his evidence that the plaintiff was mainly responsible for the generation of substantial income to the Trust and, in many cases single-handedly succeeding in involving the Trust in very successful business activities.

[86] He testified further that he met with the accountants and was informed by Ms. Matthee about the irregularities as a result of which a meeting followed on 12 September 2013. The meeting was called by the plaintiff and amongst other things, the issues pertaining to the irregularities raised by the SGA were up for discussion. According to Mr. Kruger, as the notes reflected, the plaintiff claimed the calculations of the SGA were not entirely correct and, that he was apologetic and offered to correct things.

[87] Mr. Kruger testified that after the plaintiff was suspended on 13 September 2013 and he denies that the plaintiff was not afforded an opportunity to respond to the concerns raised by the Board.

[88] He went further to testify that the plaintiff stated that he disagreed with auditor's calculations and that he would meet with the SGA to resolve the issue and report back,

which he failed to do. According to Mr. Kruger, the plaintiff was simply suspended pending clarity on these issues until the subsequent termination of appointment for overpaying himself commission he was not entitled to.

[89] According to this witness, the Board approved the payment of 60% medical scheme and 7% pension fund for the plaintiff and that he was aware at the time, of the general practice in the employment industry for the employer and the employee to jointly contribute in almost equal shares and according to him, it was against this background that he understood the plaintiff to be inviting an agreement from the Trustees to contribute 7% of the employee's income to his pension fund.

[90] Mr. Kruger testified about Law Sure and stated that the plaintiff had informed the Trustees that the Trust would be purchasing a viable and ongoing business and was likely to earn substantial income therefrom. As a result, the Trust purchased shares from the plaintiff in the amount of N\$1 million which was paid directly to plaintiff.

[91] According to Mr. Kruger, the plaintiff breached his fiduciary duties when he was expected to act honestly and with integrity. It was his further testimony, regarding the plaintiff's claim about the first defendant's alleged enrichment that; he had no knowledge of the possibility of an interest in the fishing company; nor of the possibility of acquisition of some personal interest in C'est La Vie; that first defendant's interest in Entrepo and Urbn would have been held on behalf of the Trust; that the trustees indeed agreed to incur expenses for the first defendant's wedding as well as to advance loans to her on the basis that they would be repaid.

Ms. Elise Husselman

[92] Ms. Husselman testified that she was a financial manager engaged by the Trust as a bookkeeper from 2001 until 2015. According to her evidence, the plaintiff would instruct her to transfer lump sums to his account without proper commission calculations or submission of any documentary proof of calculations. Her testimony was also that

she became concerned with the involvement of the plaintiff's family members in the business of the Trust including the benefits received by them.

[93] It was her testimony that the plaintiff would instruct her telephonically or otherwise, to transfer funds to him on a number of occasions during a month. Her further testimony was that she would then complete a requisition note to reflect the payment made to him and that at the time, she had no idea how, why or for what purpose the payment was being made. It was her evidence that by year end, when the financial statements were prepared, all payments made to the plaintiff would be quantified and compared with the income earned by the Trust on the different projects. Ms. Husselman denied that neither she nor the accountants of the Trust prepared the commission calculations but that the commission claims were submitted to her by the plaintiff.

[94] Ms. Husselman further testified that sometime in 2013, she discussed the plaintiff's claims with the 1st and 2nd defendants and explained to them that he was claiming commission on gross income and that he also received commission on the VAT refunds. According to Ms. Husselman, claiming commission on VAT refunds did not sound right to her.

[95] She also, testified that the plaintiff kept the minutes of the meetings and that he was always in a rush whenever he required that documents be signed as was the case with the Law Sure contract.

[96] It was her testimony further, that she read the audit opinion and does not dispute its contents. She also testified that the plaintiff claimed commission twice on mere book entries and that the Trustees never investigated the Trust's books. According to Ms. Husselman, the plaintiff handled the managing affairs of the Trust and gave payment related instructions to her.

[97] She testified that the financial statements were produced for the 1st defendant's signature and that she would sign without checking and this was on assurance by the plaintiff that they were in order.

[98] Finally, Ms. Husselman testified that the plaintiff never paid his portion towards the medical aid and pension fund as the Trust paid the entire 100% and therefore, that he owed the Trust the balances of 40% and 5% on his monthly payment of N\$45 000. She also testified that plaintiff's daughter's medical aid was paid for by the Trust and that same had to be repaid but he never repaid.

Mr. Franco Geoffrey Feris

[99] Mr. Feris testified that he was the Chief Executive Officer of Santam Namibia and that he had personal knowledge of the insurance business then known as Law Sure. His testimony was that Santam acquired the underwriting short term insurance business and the short term policies from the plaintiff, with effect from 1 January 2009 in return for payment in the sum of N\$2 600 000. According to Mr. Feris, the plaintiff received N\$1 500 000 from these funds and it was reflected as a loan to him by Law Sure.

[100] He then also testified that he was informed about the sale of the business to the Trust about a year later despite it having become dormant after Santam acquired it. According to him, the business was non-existing when it was sold to the Trust, some of the same assets appear to have been resold subsequently and that he could therefore not see any value in the transaction concluded with the Trust.

Mr. Hans Friedrich Hashagen

[101] Mr. Hashagen testified as an expert on behalf of the plaintiff that he reviewed the defendant's expert notice and report and that he has the required expert knowledge and information to do so. It was his evidence that it was not clear to which irregularities the defendants' expert refers to. According to him, there is no report, documentation or other information that exists which defines the alleged irregularities and that same were

indeed committed by the plaintiff. He went on to testify that the defendants in fact rely on a letter from the SGA of 13 September 2013.

[102] In Mr. Hashagen's expert opinion, seeing that there is no report to the Public Accountants and Auditors' Board, reporting a material irregularity, the aforementioned letter neither confirms that a material irregularity exists nor does it contain any information to confirm that the plaintiff was involved in any irregular activities during the execution of his management duties at the Trust.

[103] It was also his testimony that he does not agree with the contention that VAT refunds are to be excluded as the minutes of the Trustee meetings are quite clear as specifically including VAT refunds.

[104] According to Mr. Hashagen, it would seem that the defendants' expert was instructed to calculate and quantify the Trust's counterclaim on a net income basis and that in his expert opinion, the expert should consider the facts and information available and use that data to establish the most appropriate basis and approach for the calculation and not merely perform what the defendants' instructions are. He testified further that if the expert believes that the net income approach would be the most appropriate and suitable under the circumstances, it would still be required to show that this approach was indeed the one intended by the parties during that period which, in his expert opinion, was not the case.

[105] Mr. Hashagen also went on to testify that the minutes of 26 October 2010 reflect an increase in the commission to 30% whereas the minutes of 6 April 2011 confirm the increase agreed to on 26 October 2010 and both minutes were duly signed by the chairperson.

[106] According to Mr. Hashagen, the minutes were prepared by the plaintiff in his capacity as secretary to the Board and it can therefore not simply be assumed that the minutes are not an accurate reflection of the proceedings.

[107] It was also his expert testimony that in principle, VAT refunds should not be considered as income but, it is important to consider the intention of the parties. The minutes of 17 October 2005 and the commission calculation sheets from 2005 to 2012, prepared by the SGA include VAT refunds as part of income for the purposes of calculating commissionable income and the inclusion thereof was never questioned since 2005.

Procedural issue

[108] Before embarking on the assessment and analysis of the evidence adduced by the respective parties, as chronicled above, it is fitting that I first deal with an issue that arose at the commencement of the trial. This revolves around rule 93(2), which has the following rendering:

‘Where a witness is called to give oral evidence under this rule his or her witness statement will stand as his or her oral evidence-in-chief unless the court orders otherwise.’

[109] Subrule (4), on the other hand provides that the witness should then read the statement into the record, following an admonishment by the presiding judge. In the admonition, it is also plain that the witness should read the statement into the record, which ultimately constitutes his or her evidence-in-chief, given under oath or affirmation, as the case may be.

[110] The practical problem that confronted the parties in this matter, was that some of the witness’ statements filed of record, were, probably on account of the complexity of the case, very long. For example, that of the plaintiff consisted of 168 paragraphs, running into some 68 pages. If the letter of the rule was to be followed, namely, that the statement had to be read into the record word for word, and constitute the plaintiff’s evidence-in-chief, it may have taken the plaintiff more than a week to complete the process. This is so because the witness’ statement, in turn, made reference to other documents, which were quoted in it and which, because of their importance, had to be read into the record as well.

[111] The question that confronted the court, was whether it was permissible, in the circumstances, to circumvent the process required by the rules to be followed in a mandatory manner, by abridging the process in a manner that would not only serve the purpose and spirit of the rule as a whole, but also ensure efficient use of court time and resources, considering that the case had been set down for a specified number of days, which would affect the completion of the trial negatively, if the letter of the rule was unyieldingly followed.

[112] Both parties, who filed joint heads of argument, were *ad idem* that the court, in exercise of its inherent powers, may, in the interests of justice, fairness and particularly the overriding objectives of judicial case management as encapsulated in rule 1(3), depart from the provisions of the rules in order to meet the justice of the case. I agree. It is often said that necessity is the mother of invention and necessity in this case, dictated, for the justice of the case, that the letter of the rule be departed from, without, however, violating the spirit thereof.

[113] In the peculiar circumstances of this case, as explained above, I allowed the plaintiff to confirm on oath that the statement in issue had been prepared on his behalf and that he had read it in its entirety. Furthermore, he confirmed the truthfulness of the contents thereof. He accordingly proceeded to deal with what were considered to be the salient aspects of the said statement, avoiding in the process reading every word therein, in order to redeem the time. I indicated that the reasons for adopting that approach would be rendered together with the full judgment at the end of the entire case. I do so presently.

[114] In *Stuart v Ismail*², the court acknowledged that, 'There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice'. In this regard, it appears well documented that this reservoir of power is confined to procedural but not to substantive

² 1942 AD 327

law. The question may arise whether the power that the court exercised in the instant case amounts to procedural and not adjectival or substantive law.

[115] The learned author Salmond³ states as follows:

‘Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained.’

I entertain no scintilla of doubt that when it comes to the rules of court, they are procedural in nature and regulate procedure regarding the conduct of matters that serve before the courts. In this regard, the rules become the midwife to deliver the ends of justice in each case. Put differently, the rules are the maid of justice and not the mistress herself.

[116] In this regard, the parties jointly referred to a few cases that illustrate the place and function of the rules of court. In *SOS Kinderdorf International v Effie Lentini Architects*⁴, the court reasoned as follows:

‘The Rules of Court constitute the procedural machinery of the Court and they are intended to expedite the business of the Courts. Consequently, they will be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible.’

[117] In *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others*⁵, the Supreme Court expressed itself as follows regarding the place and function of the rules of court:

‘After all, the rules are there for the court and not the court for the rules. They are intended to further the administration of justice and, on good cause shown in appropriate cases,

³ Salmond, *Jurisprudence*, 11th ed, p 503-4.

⁴ 1992 NR 390 (HC), 399-400I-B.

⁵ 2010 (2) NR 487 (SC) 518, para 41.

the court will draw on rule 27(3) or its inherent reservoir of powers to condone non-compliance in the interest of fairness and justice.

[118] Lastly, in *Paulus v Tuhafeni*⁶, this court observed as follows regarding the rules of court:

‘The general principle is that the rules should be observed and adhered to by all and sundry. This is trite. However, sight should not be lost of the fact that rules are there for the court’s convenience in the furtherance of the ultimate attainment of justice. Therefore, the court, in my view, should not be a slave of its own rules.’

[119] Having regard to the above-cited cases, I am of the considered view that the rules of court, although serving an important purpose, and are otherwise mandatory, there are certain instances where a slavish observance of the rules may lead to an absurdity or injustice that may not have been contemplated by the rule-maker. In those peculiar circumstances, the court should be at large to harness the application of the rules in such a manner that the attainment of justice and fairness, together with facilitation of the resolution of cases on the real disputes justly, speedily, efficiently and cost-effectively, should not be compromised.

[120] In the instant case, as stated earlier, if the court were to slavishly apply the provisions of rule 93, by compelling the applicant to read all the paragraphs of the witness’ statement, together with the multiplicity of documents attached or referred to therein, the result would be counter to what the rules were designed to achieve as the case may have dragged for very long, without advancing it in the material respects that the promulgation of rule 93 was designed to achieve. It is in such cases that the court should, in achieving the spirit of the rules generally, depart from slavishly following a part thereof that may unduly lengthen or serve to thwart the intention of the rule-maker.

[121] This, is, in my view such a case. It is for the above reasons, with the support of the parties, that the route of shortening the requirements, without sacrificing the objects

⁶ (CA 02/2017) [2018] NAHCNLD 40 (23 April 2018), para 5.

of the rule, was adopted. In doing so, I should pertinently observe, there was no injustice or prejudice caused to any party nor was a fracture in the *raison 'd'etre* for the promulgation of the rule in question procured thereby. In short, the larger objects of the rule were met, notwithstanding the short-circuiting of the process. The procedure followed resonated resoundingly with the overriding objects of judicial case management⁷.

Analysis of the evidence

[122] It is evident from the chronicle of the evidence above that the parties adduced disparate versions of what happened and which are largely irreconcilable. In such circumstances, the court is required, the disparity in versions notwithstanding, to make findings of fact to and pronounce on the probabilities of the case, ultimately having to make a conclusion as to whether the party on whom the onus to prove the case rests, has succeeded in so doing.

[123] In this regard, the leading authority on the proper approach in these circumstances, and which has been referred to in this court on numerous occasions is *SFW Group Ltd v Martell Et Cie And Others*⁸. This judgment has been followed in this jurisdiction, for instance in *Life Office of Namibia Ltd v Amakali*⁹, *Board of Incorporators of the African Methodist Episcopal Church v Kooper*¹⁰. The learned Judge in *SFW*, propounded the applicable approach as follows:

'The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a) the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn, will depend on a variety of factors, not necessarily in order of importance, such as (i) the witness' candour

⁷ Rule 1(3) of the High Court Rules.

⁸ 2003 (1) SA (SCA) p 14H-15E.

⁹ 2014 1119 (LC) p 1129-1130

¹⁰ (I 2344/2014) [2019] NAHCMD 139 (6 May 2019).

and demeanour; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of the other witnesses testifying about the same incident or events . . .’

[124] The above excerpt will be the proverbial lighthouse as the evidence adduced is analysed, in coming to a conclusion on whether each of the protagonists has shown on a balance of probabilities that it is entitled to the relief sought, considering that there is a claim and a counterclaim in this matter.

[125] Before I do so, it is important to make one major observation, coupled with a word of rebuke. This relates to the crafting of witness’ statements in relation to civil trials. In this regard, it became plain that some of the witnesses who testified on behalf of the defendants in particular, were ‘fed’ certain words by their legal practitioners. This became very apparent when the 1st defendant and the 3rd defendants, in particular, testified. Certain key words and phrases they had employed in their witness’ statements, and which they had read with consummate ease in their evidence-in-chief, turned to haunt them like a nightmare, when they were asked what those very words meant in a tough dose of cross-examination dutifully administered by Mr. Fitzgerald, for the plaintiff.

[126] The 1st defendant made reference to a tacit contract in her witness’ statement and as fate would have it, the first question asked of her in cross-examination was what a tacit contract means. To say the heavens fell may be an understatement. She panicked and I observed that she was visibly shaken. When she eventually was able to collect herself, as there was not much time to compose herself, she answered, ‘It is a contract that is correct’. The writing was on the wall. She did not know what she had read, signed and had stated under oath as being true.

[127] In this regard, there is no need to re-invent the wheel. Schimming-Chase AJ, had opportunity to deal with this very issue in *Josea v Ahrens*¹¹. At para 15, the learned Acting Judge made the following lapidary remarks about the drafting of witness' statements:

'A witness statement must, if practicable, be in the deponent's own words and should be expressed in the first person. The witness' style of speaking should as much as possible be adhered to. For example, words like "seriatim" or "inter alia" do not belong in the statement of a person who does not know what those words mean or the context in which they are used. A witness statement is not to be used as a vehicle for conveying legal argument, nor should it contain lengthy quotations from documents unless it is necessary in the circumstances of the case'

[128] It is abundantly obvious that the direction given by the learned Judge in this matter, was not adhered to, possibly because at the time the judgment was delivered, the witness' statements in this matter may already have been drafted. What needs to be underscored is that the language employed in witness' statements, must be that of the witness who will testify and be asked about the contents of his or her statement, including particular words or phrases that he or she may have regarded as having chosen to employ.

[129] In this regard, the use of legalese must be avoided, unless the witness concerned is a lawyer, who will have a full appreciation of what is meant by the words employed. Where words are put in the mouth of the witness, so to speak, it will do a great disservice to the witness, whose credibility may be shattered as a result of being unable to explain or support what they will have signed and at times under oath, as being a narration of facts relevant to the matter. Additionally, they will have taken an oath or affirmation, confirming that the statement is for all intents and purposes, one that constitutes their evidence-in-chief.

¹¹ (I 3821/2013) [2015] NAHCMD 157 (2 July 2015).

[130] I now revert to the evidence. The plaintiff was, in a blistering attack by the defendants' representatives, accused of being a poor and 'thoroughly unreliable witness', whose evidence under cross-examination, was punctuated with a reluctance to answer even the simplest questions. In this regard, he was further accused of being a witness who 'cannot be trusted to answer with unreserved honesty'. He was further accused of being opportunistic in his view of what he was entitled to be remunerated according to the minutes.

[131] In this regard, it must be observed that the criticism, in the main, related to cross-examination, in respect of the question of the interpretation to be attached to the minutes of the Trust, governing the plaintiff's remuneration. The plaintiff was taxed extensively on the difference between 'gross' and 'net', income, it being suggested that a calculation of his remuneration, based on the former, would render nonsensical the attempts to raise funds by the Trust and would amount to business suicide.

[132] In the plaintiff's defence, his legal team implored the court to find that he was a satisfactory witness and to have no regard to the criticisms leveled at the plaintiff for the reason that they are irrelevant. It must be noted that the majority of the criticisms levelled against the plaintiff, as stated, related to the meaning to be attached to the minutes and the computation of his remuneration.

[133] It does seem to me that the criticisms are irrelevant for the reason that the issues on which he was taxed and it is submitted he was an unsatisfactory witness in respect of, are interpretational in nature and they essentially form the core of what this case is about, namely deciding whether the remuneration is to be predicated on gross or net, based on the minutes of the Trust. This is an issue that was submitted to the court for determination and to that extent, the plaintiff's views or evidence thereon should be regarded as irrelevant.

[134] The plaintiff's legal team placed reliance for the treatment they asked the court to administer to the attack on *Novartis SA v Maphil Trading*¹². At para 27, the Supreme Court of Appeal expressed itself as follows:¹³

'KPMG, in the passage cited, explains that parole evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not the witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention.' (Emphasis added).

[135] I am of the considered view that this case neatly and correctly sums up the proper approach to interpretation of documents even in this jurisdiction. A situation should not be allowed, where a written document is presented to the court, for the parties to superimpose their parochial interpretation, in the face of what is clear or even unclear language that the court is tasked and well equipped to contend with, together with relevant circumstances, in order to come to a conclusion as to what the parties intended by employing the words in the document in question. In this regard, the parties to the contract, who may have vested interests in the adoption of a particular interpretation, would end up usurping the interpretation process, which is essentially the function of the court.

[136] Regarding the defendants' witnesses, other than what I have said about the content of their witness' statements, which was very unsatisfactory, 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.

¹² 2016 (1) SA 518

¹³ *Ibid* p 526A

[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, in the circumstances, is 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.

[139] It is also important to mention that Ms. McLean did not come out very clean from the cross-examination. Her 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', is liable to be rejected in view of her about-turn mentioned earlier. I pause to poignantly observe as well, that during the plaintiff's cross-examination, it was never suggested or put to the plaintiff that the minutes were falsified by him¹⁴. It could accordingly not lie in the defendants' mouths to try to make out such a serious case in their evidence-in-chief, when that had not been put to the plaintiff in cross-examination.

[140] With regard to Ms. Mclean, another issue to take into consideration is that it 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

¹⁴ Small v Smith 1954 (3) SA 434 (SWA) 438 E-H.

minutes must be refused in the light of her signature and the absence of countervailing considerations that would support her sudden *volte face*. In law, the principle *caveat subscripted*, 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.

[141] In amplification of this position, the remarks in the case of *Hugo v Council of the Municipality of Grootfontein*¹⁵, bear repeating. There the Supreme Court said:

‘It is a trite principle of the law of contract that a person who signed a contractual document thereby signifies his assent to the contents of the document. Maritz JA in *Namibia Broadcasting Corporation v Kruger and Others*¹⁶ paras 9-10 stated the following:

“[9] ... Fagan CJ remarked in *George v Fairmead (Pty) Ltd*

‘When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by so doing, his assent to whatever words appear above his signature.

[10] Absent any credible allegation of misrepresentation, subterfuge, dishonest concealment, duress or other exceptions to the general rule, the second to 22nd respondents are bound by the quantification of the severance payments reflected in their respective deeds of settlement with the appellant. They agreed to receive them in full and final settlement of their respective claims and, in that sense, their signatures not only sealed the quantum of their severance entitlements but also the fate of their application.’

[142] It must also be mentioned pertinently that there are some witnesses who were listed by the defendants but who were eventually not called. No plausible or any reason, for that matter, was provided for them not being called. In this regard, the 2nd defendant, Mrs. Maritz, Mr. Mandy and Ms. Matthee, were not called as witnesses. The latter, it is plain, played a pivotal role in the decision ultimately taken to suspend and later, terminate the plaintiff's position with the Trust, including the allegation that the plaintiff had falsified the minutes.

¹⁵ 2015 (1) NR 73 (SC) para 16

¹⁶ 2009 (1) NR 196 (SC).

[143] The failure of the defendants to call these witnesses, who appear to have been available and able to testify, must be held against them. In following this approach, the court walks in the footsteps of the remarks followed in *Conrard v Dohrmann*¹⁷, where the court relied on *Elgin Fireclay v Webb*¹⁸, where the court remarked as follows:

‘ . . . it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him. . . ’ See also *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd*¹⁹.

[144] There are no reasons proffered by the defendants nor are any apparent as to why the said witnesses, who could have shed light on some crucial parts of the defendants’ case, including why the plaintiff was found to have been on the wrong side of the law, leading to him being suspended and eventually terminating his association with the Trust. Ms. Matthee was crucial in this regard. She could also have explained why she found it fit to calculate the plaintiff’s remuneration on gross and not net and what happened in the meeting of 12 September 2013, at the offices of the attorneys and where the allegations that the plaintiff had been overpaid, were discussed by the plaintiff and Ms. Matthee.

[145] Mrs. Maritz also made unsavoury allegations in her witness’ statement about the plaintiff having falsified the minutes. She did not come forward to adduce that evidence. Considering how badly those who did fared, it is reasonable in the circumstances, to draw an adverse inference against the defendants in the circumstances for not calling witnesses who were otherwise able to testify on their behalf and who would can be said to have interned very crucial and relevant evidence in the vaults of their being.

[146] I am of the considered opinion, having regard to all the foregoing, that where the plaintiff’s evidence and that of the defendants, who testified is juxtaposed, I am fortified in relying on the evidence of the plaintiff, as it was more plausible. The mainstay of the

¹⁷ 2018 (2) NR 535 (HC)

¹⁸ 1947 (4) SA 744 (A) at 745.

¹⁹ 1979 (1) SA 621 (A).

defence case, particularly in respect of the allegations of impropriety levelled against the plaintiff, the defendants were unable to sustain in evidence as they merely capitulated in cross-examination, in my considered view.

[147] Ms. Husselman, on the other hand, was a witness against whom I find no ought. She, for the most part, struck me as a witness of truth and the plaintiff, although he did not call her, submitted that in the heads of argument that she was a creditworthy witness. I have no reason to hold a different view. Her evidence appears to have, for the most part, dovetailed with that of the plaintiff, although not called by him.

[148] Unfortunately, the defendants' legal team did not, in the written submissions, assist the court with its appraisal of the witnesses that were called by the defendants and this is not surprising, particularly having regard to how the majority fared in the witness' box as recounted above.

The plaintiff's remuneration

[149] The parties are *ad idem* that one of the key issues for determination, relates to the terms of the plaintiff's remuneration. Although the defendants initially appeared to cast a doubt on the source of the document, if any, on which the agreement between in the parties was predicated, the defendants, in their amended claim in reconvention, made specific reference to the minutes of the Trust.

[150] There are different sets of minutes, which it is common cause, governed the relationship *inter partes*. The first are minutes dated 20 November 1997, paragraph 14.2, whereof provides the following:

'The contract for the period 1 December 1997 – 31 December 1998 was renewed. Mr. Botes will be paid as follows: NAD 5000.00 / month and / or 20% commission whichever is the largest amount.'

[151] Minutes, dated 27 April 2005, at para 6, have the following rendering at p. 58:

'Danie Botes – Contract

The Board approved the contract of Mr. D. Botes as Executive Director as from 1 January 2006. Mr. Botes's remuneration will be based and (*sic*) 20% of all income that the MMCT will receive. Mr. Botes will be paid on a monthly basis.'

[152] A further set of minutes, dated 17 October 2005 bear repeating. They provide the following:

'Dale 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 all income received by the Michelle McLean Trust. Income will be calculated on all donations, grants, interest on NEDLoan (Pty) Ltd income, dividends, specified, unspecified, VAT refunds, excluding profit on sale of assets, insurance claim on assets and bank interest on current earned.'

[153] Another set of minutes is dated 26 October 2011, provides the following:

'Contract – D Botes

The Board took note of all the efforts of Mr. Botes to acquire a stake in new private ventures to ensure a sustainable (*sic*) 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%

[154] The last set of minutes, is dated 6 April 2011 and makes the following provision regarding the plaintiff's remuneration:

'Contract – D. Botes

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

[155] I am of the considered view that having regard to the entire case, it cannot be doubted that the minutes quoted above, were designed by the Trustees to constitute the agreement between the parties, i.e. the plaintiff and the Trust, in terms of the plaintiff's remuneration and the period of the contracts and the term of extension where applicable. It appears there is little or no dispute in this regard. All the parties referred to no other document that could have formed the basis of the agreement *inter partes*.

[156] The major question for determination, in this regard, is the interpretation to be accorded to the minutes in question. In particular, the question is whether the plaintiff was entitled to gross or net income. The defendants, in their heads of argument, referred generously to the questions posed to the plaintiff in cross-examination on this very issue. Whilst that might be useful to some degree, it must not escape our collective attention that matters of interpretation of written documents are the function and fall within the exclusive province of the court and not the parties thereto. The views and impressions of the parties, even if interesting, pale into significance because it is only the courts that are properly placed to decipher what the intention of the parties in reducing the document in question to writing is.

[157] Both parties, in their submissions, referred the court to the celebrated case of *Total Namibia v OBM Engineering*²⁰, which is now the *locus classicus* judgment that is followed in this jurisdiction regarding the interpretation of documents. They would obviously want to attach an interpretation to the judgment that fits their position. In that case O'Regan AJA made the following lapidary remarks:

'[19] For the purposes of this judgment, it is not necessary to explore fully the similarities and differences that characterise the approaches adopted in the United Kingdom and South Africa. What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian

²⁰ 2015 (3) NR 733 (SC) Para 19.

courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.’

[158] I should also mention that the defendants commenced their argument with a simple statement, attributed to Lord Steyn, namely, that in law, context is everything. I would add that the same conclusion appears to have been reached in the *Novartis* judgment (*op cit*), where the court remarked, ‘Words without context mean nothing.’²¹ In this regard, the defendants referred to the *Endumeni* case²².

[159] The defendants submitted that the documents must be interpreted from the standpoint that the Trust is a charitable one and that to fulfil its main objects, it needed as much funds as possible. It was further submitted that the plaintiff was engaged to primarily raise funds. If the minutes were construed, as the plaintiff did, that he was to be remunerated on gross, that would be inimical to the viability of the Trust as it would not be able to meet its objectives.

[160] It was, in this regard, further submitted that the interpretation advocated for by the plaintiff does not make any business sense for the reason that the plaintiff was entitled to commission even if he had raised no funds. It was accordingly submitted that when the minutes made reference to funds raised, those words should refer to funds available for use or distribution in the course of the plaintiff’s appointment. In this connection, it was pointed out that the plaintiff had not, in his adduction of evidence, made reference to the word ‘gross’. Finally, it was submitted that in South Africa, income generally means net income and that in that regard, the court must resoundingly find that the plaintiff was to be paid commission on the basis of net income.

[161] Needless to say, the argument presented by the plaintiff’s legal team, was a horse of a different colour. It was argued that the minutes used the words ‘all income’, which refers to gross income actually received by the Trust. It was further submitted that when regard is had to the minutes and the transparent manner in which the parties

²¹ *Novartis SA supra*. P 526D.

²² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SCA 593 AT 603F-604B, para 18.

implemented the terms, the only reasonable construction is that the plaintiff was entitled to commission based on all the income received by the Trust, save in those circumstances where any income may have been excluded.

[162] Both parties, for their submissions, referred to *Brown v Commissioner for Inland Revenue*²³, where the court dealt with the meaning of the word income. The court dealt with the issue as follows:

‘The next question to be considered is: what is the meaning of the word “income”. . . That word may have three possible meanings. It may mean, firstly, that which comes in i.e. all receipts in contradistinction 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. In delivering the judgment of the Judicial Committee of the Privy Council in *Lawless v Sullivan and Others* (6 AC 373) Sir MONTAGUE SMITH said at pp 378-379: “Their Lordships are unable to agree with this view of what would and would not be the “income” of a bank. It must always be borne in mind that the tax imposed on the income received during the fiscal year, and what therefore has to be ascertained for the purpose of assessment is the income for an entire year. There can be no doubt that, in the natural and ordinary meaning of language, the income of a bank or trade for 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. That alone is the income which a commercial business produces, and the proprietor can receive from it. The question is, whether the word ‘income’ in the enactment is to be understood in a different and what, for the purpose of taxation, would be a more onerous sense.’

[163] The defendants implored the court to follow the last definition of the word income employed in the judgment, since it was argued, it is a common sense approach and which is consistent with a statutory definition of income in legislation. The plaintiff’s team argued *per contra*, namely, that the use of the word must be considered in the context of the instant case. In this regard, it was submitted on behalf of the plaintiff that the *Brownstein* case and the authorities relied on therein are all contextually distinguishable

²³ 1939 AD 156 at 166-667.

from the instant case, where the document relied on deals with construction of the written terms of an employment relationship in a particular context.

[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 his 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 terms 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 net 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] Such a construction, in my view, has no evidential basis. It must, in this regard, be recalled that it was never, at any stage suggested or put to the plaintiff that the minutes were inaccurate in any respect, neither was it put or shown that the minutes did not accurately reflect the true intention of the Trustees. In this regard, there is nothing to

suggest that there was any mistake in the recordal of the minutes from what was the clear intention of the parties²⁴. 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.

[168] Mr. Maree argued, and quite forcefully too, that the context must not be taken out of the equation in interpreting the document. In this regard, he as stated earlier, emphasised that the Trust was a charitable one and that the interpretation contended for by the plaintiff would run counter to the objectives of the Trust as it would not be able to meet its obligations.

[169] In this connection, I agree with Mr. Fitzgerald that although the Trust was engaged in charitable work for the most part, the evidence shows indubitably that through the plaintiff's efforts, it did however move into a proper business environment and extended its wings into the property market and ventured into ordinary businesses, beyond what the ordinary charitable Trust would be expected to. In any event, I am of the considered view that the context contended for by the defendants should not serve to trump the words chosen to be used by the parties in the minutes to govern the plaintiff's remuneration.

[170] As much as Mr. Maree tried to demonstrate the unfairness, as he referred to it, of the plaintiff's interpretation, it would also have been quite bizarre for the plaintiff, who was engaged as a professional fundraiser, living off the toils of that profession, to work for months and not get any remuneration when the calculation of the income calculated on net so dictated. I accordingly find that the wording of the document must be interpreted in the manner contended for by the plaintiff as it is consistent with the language employed and the understanding even of professionals, namely, the Trust's auditors.

[171] In the premises, I am of the considered view that the plaintiff has established on a balance of probabilities that he is entitled to the payment of the amount in respect of

²⁴ Futeni Collections (Pty) Ltd v De Duine 2015 () NR ... (HC)

this claim. I will deal with the quantum thereof at the end of the judgment. In this regard, the court will draw assistance from the parties' respective experts, who will be expected to base the calculations on the interpretation given above to the Board minutes.

[172] It must be mentioned also that in view of the findings on credibility of the defendants' factual witnesses, it became clear that there was no admissible evidence that the plaintiff had withdrawn, transferred or appropriated funds to which he was not entitled in the sense testified in chief by the defendants' witnesses. In point of fact, both Ms. McLean and Mr. Kruger admitted under cross-examination that the dispute was about the interpretation as to what the plaintiff was entitled to. No evidence was led to show that the plaintiff had misconducted himself in the respects alleged in the defendants' pleadings.

[173] There is an email written by Ms. Husselman to the 1st defendant regarding some calculations. It is dated 9 September 2013²⁵. In it, she states that the plaintiff may have made some calculation mistakes and she also admits herself having made a mistake in the calculations. She offered to explain to the 1st defendant. I make reference to this to show what the Ms. Husselma, the defendants' witness' state of mind was regarding some of the questions hovering over the plaintiff's honesty.

Loss of income

[174] It is apparent from the analysis of the evidence that in view of the concessions extracted from the defendants' witnesses in cross-examination, that the defendants failed as held earlier, to show that the plaintiff had committed misconduct nor engaged in any act of dishonesty in relation to the remuneration. Although they had made serious and pejorative allegations against the plaintiff in their witness' statements and indeed in their evidence-in-chief, they disavowed these allegations in cross-examination. Ms. McLean admitted that the plaintiff had acted *bona fide* in claiming what he did and that the atmosphere had become toxic such that she did not sit down with him to try and

²⁵ P244 of the record.

resolve the differences particularly after having worked together with him for such a long time.

[175] It must be mentioned in this regard 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. Although witness' statements contained some allegations, these were jettisoned after cross-examination, leaving the court with only one version in the circumstances, namely, the unrivalled version of the plaintiff, that on a balance of probabilities, his removal was unjustified and unfair.

[176] In the premises, I am satisfied that the admissions made in cross-examination by the 1st and 3rd defendants amply demonstrate that there appeared to be a conspiracy to campaign to excise the plaintiff from the activities of the Trust. This was not negated by any admissible evidence on the part of the defendants. If they relied on professional advice for their decision, they did not call any of their advisors to testify about their findings so that they could be cross-examined accordingly. As indicated, 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.

[177] As will become evident, the plaintiff was first suspended and later removed on allegations of dishonesty that the defendants failed to sustain in cross-examination. I accept 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.

[178] The experts, namely, Mr. Hashagen and Mr. McHardy, appear to have had divergent views regarding the plaintiff's loss of income. In this respect, the former, took the view that in order to compensate the plaintiff fairly, the computation should take into account a period of 15 months. Mr. McHardy, for his part, was of the view that the fair

period to take into account, is 12 months for the reason that if the 15 month period is applied, there would have been a duplication of a period of about 3 months.

[179] I am of the considered view that the opinion by Mr. Hashagen should prevail. In this regard, he argued that the plaintiff has been out of office and not been able to perform his duties as required that would have earned him some income. It was his view that the plaintiff's position is more complicated because one needs to consider how the individual, the plaintiff, in this regard, drove the income generating unit in the past in order to earn an income and how that would affect the 15 month period. I am not persuaded that there is a duplication, having regard to the rationale provided by the Mr. Hashagen for the 15 month period calculation.

[180] There is evidence of email communication amongst some of the defendants, especially the 1st and 3rd defendants, and in which they strictly stated that they should keep the communication confidential. The communication related to the plaintiff²⁶. Furthermore, meetings deliberately excluding the plaintiff, who was a Trustee, were held in places other than the regular place of meeting with auditors and lawyers, certainly cause spasms of disquiet and would confirm the plaintiff's allegation that there was a conspiracy among the defendants to get rid of him.

[181] The 3rd defendant failed to answer why he did not approach the plaintiff to ask what was going on regarding the alleged overpayments.²⁷ Ms. McLean, for her part, admitted that this could and should have been done but the atmosphere had been poisoned, so to speak.

[182] Furthermore, the 3rd defendant made snide remarks about the plaintiff in an email entitled 'Poker'. The following exchange took place between Mr. Fitzgerald and the 3rd defendant in cross examination:²⁸

'Why was it necessary for you to describe it as Poker?

²⁶ Email from 1st to 2nd defendant dated 13 April 2013 (p226 of the record and one dated 1 May 2013 from 2nd to 1st defendant)

²⁷ Record p721 line 5.

²⁸ Record p714 from line 5.

Poker is a game my Lord.

Q: This was not a game. This was a very serious, very serious attempt to (indistinct) Mr Botes was it not?

A: No my Lord.

Q: Why call it Poker? Can you answer?

A: The computer ask you a subject, you cannot send a thing without a subject so I could have meant anything.

Q: That is, I have never liked the phrase but I am going to put to you what Mr. Marais put to Mr. Hashagen, and I will repeat what he said. I am being serious.

A: My Lord it is a difficult question to ask why did I know it, Poker.

Q: You cannot answer it.

A: Yes.

Q: Let us continue, keep yourself busy and see, I like the way the cards are hid in the deck, just remember the other guys are also thinking hard. The other guys are Danie are they not?

A: Yes My Lord.

Q: I am going to suggest to you notwithstanding your evidence to the contrary that there was a campaign to get rid of Mr. Botes which commenced around August?

A: My Lord I deny that. I wrote this email after a call from the Chairperson and she was really upset about things. So I just wrote her a letter and said think straight.

Q: You describe the subject as Poker alright?

[183] The witness failed to answer these question satisfactorily and his demeanour showed that he was disheveled by the cross-examination as I watched him. The fact that there were secret meeting held behind the back of the plaintiff, in my view and the coded language that the 3rd defendant used lead me to the conclusion that there was indeed a conspiracy to remove the plaintiff. There is no reason why he would not have been asked about the issues raised by the auditors when he had worked with and for the Trust for such a long period of time.

[184] It is accordingly clear that the plaintiff lost income as a result of the unlawful or at the least, the negligent actions of the defendants. I am of the considered view that the claim should be calculated on the basis of the unexpired period of the plaintiff's term, namely, from the time his term was terminated to the time he would have worked but for the termination.

Pension Claim

[185] In this part of the case, the defendants alleged that there is no agreement that the plaintiff could point to for the payment of pension. 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 claim²⁹.

[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. I accordingly find that the minutes did reflect the payment of pension fund for the plaintiff. Ms. Husselman was aware of the pension issue as part of the plaintiff's package, so to speak. I am accordingly satisfied that the plaintiff's claim in this regard must be sustained. The plaintiff's claim for pension is sound and has been proved.

Counterclaim

²⁹ McLeod v Kweyiya 2013 (6) SA 1 SCA

[187] It is unnecessary, in this regard, to deal extensively with the defendants' claim in reconvention. In dealing with the plaintiff's case, and particularly in weighing the evidence, I have to a large extent, dealt with the defence case. In the light of what has already been traversed in the judgment, relating to the defendants' allegations of appropriation of money, fraud and like epithets, it has been plain from the defendants' admission that this was a pure commercial dispute. It has not, for that reason been shown that the plaintiff unlawfully appropriated to himself money to which he was not entitled.

Lawsure

[188] In this claim, allegations of false misrepresentations were made by the defendants against the plaintiff. In essence, it was claimed that the plaintiff sold to the Trust an empty shell that was touted to make some money for the Trust when the defendant knew that it was in fact not so.

[189] In this regard, Mr. Franco Feris testified on behalf of the defendants. He confirmed that agreements were concluded between Lawsure and Santam Namibia. In his evidence, under cross-examination, Mr. Feris, however, admitted that the deduction code would indeed add value to the business.

[190] The plaintiff testified that the same asset was not sold twice and this evidence was not gainsaid. It is clear that the plaintiff disclosed the issue of Lawsure in the minutes of the Trust. Furthermore, it must not be forgotten that Ms. McLean was a director of Lawsure from November 2009 and would accordingly be expected to have known of the goings on in the business in that capacity. It cannot be that she knew nothing over this entire period of time.

[191] I accordingly find that the allegation that the plaintiff is guilty of non-disclosure has not been proven on a balance of probabilities, particularly given the disclosure reflected in the minutes of the Trust. The fact that the business did not become

profitable, should not, in my view colour the sustainability of the claim. In my view, this counterclaim should fail.

Order

[192] In the premises I am of the considered view that the following order should be granted against the First to Fourth Defendants (in their respective capacities as Trustees of the Michelle McLean Trust :

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.

Erratum

[193] I noticed that during the delivery of the order, I inadvertently omitted to make an order in favour of the plaintiff regarding the claim for loss of earnings. I had technical glitches with the laptop just before the delivery of the judgment. I have, in this regard, corrected the order accordingly.

[194] 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.

T.S Masuku
Judge

APPEARANCES:

PLAINTIFF: Mr. Badenhorst SC / M.J. Fitzgerald SC (with him D. Obbes)

Instructed by: Koep & Partners, Windhoek

DEFENDANTS: J. Marais SC (with him E. Schimming-Chase SC)

Instructed by: Engling, Stritter & Partners