REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

CASE NO: 1319/21

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

26-09-2024
Date

[redacted]
Signature

In the matter between:

NISSAN SOUTH AFRICA (PROPRIETARY) LIMITED **PLAINTIFF**

AND

SENYATSI, BENNITA PHASHA **DEFENDANT**

JUDGMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF E- MAIL / UPLOADING ON CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE SEPTEMBER 26, 2024

NTANGA AJ:

A. Introduction

1. Plaintiff is Nissan South Africa Proprietary Limited, a private company with Registration No. 1963/007428/07, as cited in the action.

2. Defendant is Bennita Phasha Senyatsi, as cited in the action. Defendant is a former employee of Plaintiff.

3. Plaintiff caused summons to be issued by the Registrar of this court against Defendant for payment of the sum of R412 209.98 plus interest and other ancillary relief. The claimed amount is in respect of pro rata costs of travel and monthly stipends paid to the Defendant. Which costs were incurred by Plaintiff for Defendant's participation in the African Business Education Initiative For Youth (ABE) of the Japan International Cooperation Agency designated for upskilling of employees.

B. Plaintiff's Cause of Action

4. According to Plaintiff's particulars of claim, Plaintiff's cause of action arises from a written agreement described as agreement for participating in the African Business Education Initiative For Youth (ABE) of the Japan International Cooperation Agency ("JICA Agreement").

C. Background

5. Plaintiff's cause of action arises from a written agreement entered into between Plaintiff and Defendant in terms whereof Defendant was nominated by Plaintiff to participate in the African Business Education Initiative for Youth of the Japan International Agency. The JICA Agreement was entered into on August 11, 2016.

6. Prior to entering into the JICA Agreement, Defendant was employed by Plaintiff effective on October 1, 2014, as a Fleet Manager.

7. The material terms of the JICA Agreement are as follows:

7.1 Nissan South Africa (Pty) Ltd ("NSA") uses various programmes, whether internally or externally, as part of the development of its key talent. One of such external programmes is the African Business Education Initiative for Youth (ABE) run by the Japan International Cooperation Agency (JICA).

7.2 The JICA Programme ("the Programme") is a structured developmental Programme, through which identified key talent, within the NSA employee talent pool, is awarded the opportunity to study full-time at a Japanese university, for a period of two years whereafter the identified candidate will undertake a 6 (six) month internship at an identified location within the global Nissan Cooperation workplace network.

7.3 NSA envisages that the Programme will contribute to its long-term strategy and viability, and the Programme will assist the Employee to develop an active role within NSA managerial structure after the Employee gains experience during the Programme.

7.4 NSA undertakes to subsidise the Programme by providing the following benefits to the Employee subject to all and compulsory deductions being effected:

7.4.1 personal travel expenses in the form of two return tickets between country of departure (Republic of South Africa) and Japan for the duration of the Programme;

7.4.2 a stipend as set out in Annexure 1 thereto in lieu of the Employee's salary for the duration of the Programme; and

7.4.3 ensuring that contributions towards the Employee's retirement fund, based on the total amount of the stipend as stipulated in Annexure 1, are effected.

7.5 NSA shall secure the Employee's employment after completion of the Programme and shall, based on the availability of roles upon the Employee's return, endeavor to provide the Employee with a role similar to and at the same job level the Employee occupied upon her departure.

7.6 NSA may, at its' discretion and based upon the Employee's performance during the Programme and availability of opportunities, agree on an accelerated talent programme with the Employee.

7.7 The Employee shall be afforded a month of leave for the month of August 2016 in order for the Employee to make proper preparation for the commencement of the Programme. Remuneration for the month of August shall not be adjusted.

7.8 The Employee is obliged:

7.8.1 to participate in the Programme in accordance with the below mentioned time periods:

7.8.1.1 a two-year academic study at a university in Japan commencing on August 27, 2016, ending on September 30, 2018;

7.8.1.2 6 (six) month internship period from October 1, 2018 to March 31, 2019, will be undertaken,
or any reasonable extended period as required by JICA or the internship programme, which will be negotiated with NSA prior to commencement;

7.8.2 to provide the Employer with a quarterly report on his/her progress during the Programme;

7.8.3 during the Programme to liaise with and report back to the Human Resources Department on all financial and

administrative related activities. In the event that the Employee requires any assistance in relation to personal matters then the Employee may engage with the Human Resources Department to facilitate any solutions if practically possible to do so;

7.8.4 at all times to bear in mind that she is a representative of NSA, both in her private and business capacity, and shall at all times during the Programme maintain and display behavior expected of a Nissan Employee;

7.8.5 at all times, display behavior that shall enhance the relationship between NSA and NML;

7.8.6 upon completion of the Programme, to remain in NSA's employ for a period of two and a half years; and

7.8.7 as NSA incurs significant costs in relation to this Programme, should the Agreement be terminated prior to the Employee completing the Programme and/or serving his agreed minimum post completion period as set out in Clause 5.5;

7.8.8 NSA reserved its right to claim and the Employee undertakes to refund to NSA:

7.8.8.1 the full costs of the Programme; plus

7.8.8.2 interest thereon calculated at a rate of prime plus 2%, on a pro rata basis.

7.9 Clause 14 of the JICA Agreement provides that:

"*The Employee acknowledges that after completion of the Programme, this Agreement shall become null and void and the provisions of the new Agreement to be entered into between the Parties shall apply*".

D. Plaintiff's Case

8. Plaintiff led its evidence through a single witness, Mr Letsholo who testified that he is an Industrial Human Resource Business Partner at NSA. He works in the contract management division of NSA, and he is familiar with the Programme. Notwithstanding that he was not involved in the drafting and execution of the agreement, he has knowledge of the JICA Agreement. The JICA Agreement falls under his division, and they attend to administration thereof, for instance, payments that must be effected in terms of the agreement. He described it as an acceleration Programme to which they upskill employees. He testified that NSA bears the costs for traveling, accommodation, food, the Programme and stipend.

9. He testified that the purpose of NSA's incentive for the Programme is to ensure existence of correct talent pool to enable the employees to plough back to NSA once the Programme is completed.

10. He testified that in fulfilment of its obligations NSA paid stipend in lieu of salary to the Defendant. NSA paid flights tickets for the Defendant's travel to and from Japan. He testified that Nissan Global is a service provider to NSA and that the expenses claimed in these proceedings were paid for by NSA.

11. He further testified that on her return after completion of the Programme, Defendant remained in the Plaintiff's employment for fifteen (15) months instead of thirty (30) months as agreed in the JICA Agreement.

12. Under cross-examination he testified that Plaintiff uses a travel agent, and its administrators pay American Express in relation to travel expenses. When asked about who paid for the expenses, he

confirmed knowledge of the fact that NSA paid for the travel expenses.

13. Further under cross-examination Mr Letsholo testified that from the onset NSA made a commitment that it will subsidise and sponsor the Programme. He disputed the version put to him that the money for the Programme came from Nissan Global and testified that NSA paid for the Programme. In any event, Plaintiff's case is not for the claim of Programme expenses but rather for stipend paid in lieu of salary and flight tickets.

14. Mr Letsholo conceded that he does not work in the finance department of NSA but confirmed that the expenses claimed were paid for by NSA. He further confirmed that the amount claimed was for a stipend paid to Defendant in lieu of salary plus flight tickets.

15. When asked about clause 14 of the JICA Agreement Mr Letsholo testified that the new agreement is in line with NSA's undertaking to offer Defendant a new contract of employment on her return from completing the Programme. He testified that Defendant was offered a new contract of employment in fulfillment of NSA's obligation in terms of the JICA Agreement. He disputed the Defendant's version put to him that the new contract of employment replaced the JICA Agreement and the previous contract of employment. He testified that the new contract of employment was entered into in fulfilment of NSA's obligation in terms of the JICA Agreement.

16. Also, when a version was put to him that Defendant will testify that the agreement of November 2018 replaced the two agreements (i.e. the employment agreement dated August 29, 2014, and the JICA Agreement), Mr Letsholo disputed this and testified that the last agreement was entered into to secure Defendant's employment in compliance with the JICA Agreement.

17. On absence of a repayment provision in the November 2018 contract of employment Mr Letsholo testified that it is a standard appointment letter. He testified that these are specific tailor-made requirements of NSA that they would like to be incorporated in the agreement.

E. Defendant's Case

18. Defendant pleaded lack of jurisdiction on the ground that in terms on clause 16 of the JICA Agreement, Plaintiff and Defendant consented and agreed to Magistrate Court's jurisdiction in respect of any litigation arising out of the agreement. However, at commencement of the proceedings, she decided to abandon this argument.

19. In her plea, Defendant admitted the terms of the JICA Agreement and pleaded that these terms were rendered null and void, based on the following:

19.1 Clause 14 of the JICA Agreement states:

"14. Acknowledgement

The Employee acknowledges that after completion of the Programme, this Agreement shall become null and void and the provisions of the Agreement to be entered into between the Parties shall apply".

20. Based on the signature of the new contract of employment and her appointment as a Product Manager, Defendant pleaded that the terms of the JICA Agreement were rendered *null and void*, and that the employment terms were then regulated by the provisions of the new contract of employment.

21. Defendant further pleaded that the terms of clause 4 and 5 of the JICA Agreement were not incorporated into the new contract of employment for the Product Manager position.

22. Clause 4 and 5 of the JICA Agreement set out obligations of both Plaintiff and Defendant arising out that agreement.

23. In essence, Defendant pleaded that her resignation was not in breach of the JICA Agreement and that her duty to refund Plaintiff had been nullified in terms of clause 14 of the JICA Agreement when the new contract of employment as a Product Manager was concluded.

24. Defendant closed her case without leading evidence.

F. Admissibility of Plaintiff's Evidence

25. Defendant argued that Mr Letsholo's evidence was entirely hearsay as he was not involved in the negotiation and conclusion of the JICA Agreement as well as the New Agreement. Secondly, Defendant argues that Plaintiff failed to apply for Mr Letsholo's testimony to be admitted under section 3(1)(c) of the Law of Evidence Amendment Act No. 45 of 1988.[1]

26. On hearsay evidence Section 3 of Law of Evidence Amendment Act provides that:

> "*3. Hearsay evidence*
> *(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-*
> *(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*

[1] Law of Evidence Amendment Act No. 45 of 1988.

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay.

(3) *Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsect.*

(4) For the purposes of this section-

*'**Hearsay evidence**' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;*

...".[2]

27. Zeffert and Paises describes the primary reason behind exclusion of hearsay evidence as "*its general unreliability – the fact that it rested for its evidential value on the untested memory, perception, sincerity and narrative capacity of a declarant or actor who was not subjected to the oath, cross-examination or any other procedural*

[2] Law of Evidence Amendment Act No. 45 of 1988.

devices to which our adversary system of trial procedure subjects a witness giving original evidence'.[3] *This is substantiated in reference to S v Molin 2008 (2) SACR 76 (CC), at para 34 where the Constitutional Court stated the 'rationale of excluding hearsay as inadmissible is a recognition of the unreliability and unfairness emanating from such evidence' and that its 'unreliability and susceptibility is said to be based on the so-called 'hearsay dangers' of insincerity and defective memory, perceptive powers and narrative capacity*".[4]

28. In President of the Republic of South Africa and Others v M & G Media 2011 (2) SA 1 (SCA) the Supreme Court of Appeal stated that:

"*[38] A court is not bound to accept the ipse dixit of a witness that his or her evidence is admissible. Particularly in cases of this kind, in which information is within the peculiar knowledge of the body, proper grounds need to be demonstrated for the admissibility of the evidence. Merely to allege that that information is within the 'personal knowledge' of a deponent is of little value without some indication, at least from the context, of how that knowledge was acquired, so as to establish that the information is admissible, and that it is hearsay, to enable its weight to be evaluated. In this case there is no indication that the facts to which Mr Chikane purports to attest came to his knowledge directly, and no other basis for its admission has been laid. Indeed, the statement of Mr Chikane that I have referred to is not evidence at all: it is no more than bald assertion*".[5]

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[3] Zeffert and Paizes: *The South African Law of Evidence* (2017) 3rd ed.

[4] S v Molin 2008 (2) SACR 76 (CC), 2008 (3) SA 608 (CC).

[5]President of the Republic of South Africa and Others v M & G Media 2011 (2) SA 1 (SCA) para 38.

29. It was clearly emphasized by the Supreme Court of Appeal that the court is not concerned with probability.[6] A bald assertion based on the position of a witness is not enough, the witness must clearly set out the basis for admission of his evidence and as the Supreme Court of Appeal has stated, there must be an indication that the facts came to his knowledge including how this came about.

30. Mr Letsholo in his evidence testified that: "*he works in the contract management division of Plaintiff, and that he is familiar with the Programme. Notwithstanding that he was not involved in the drafting and execution of the agreement, he has knowledge of the JICA Agreement. The JICA Agreement falls under his division, and they attend to administration thereof, for instance, payments that must be effected in terms of the agreement*".[7]

31. The issue then is whether this evidence meets the test as set out by the Supreme Court of Appeal in President of the Republic of South Africa and Others v M & G Media[8]. The Court is satisfied that Mr Letsholo in his evidence has set out basis that is sufficient for his evidence to be admitted.

32. In Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) the Supreme Court of Appeal stated that:

"*The mere assertion by a deponent that he 'can swear positively to the facts' (an assertion which merely reproduces the wording of the Rule) is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of the words*".[9]

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[6] President of the Republic of South Africa and Others v M & G Media 2011 (2) SA 1 (SCA) at para 39.

[7] See para 8 supra.

[8] President of the Republic of South Africa and Others v M & G Media 2011 (2) SA 1 (SCA) para 38.

[9] Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A).

33. In Howard & Decker Witkopen Agencies and Four-Ways Estates (Pty) Ltd. v De Sousa 1971 (1) 937 (T.P.D.) the court stated that:

"*The law in relation to the proof of private documents is that the document must be identified by a witness who is either (1) the writer or signatory thereof, or (2) the attesting witness, or (3) the person in whose lawful custody the document is, or (4) the person who found it in possession of the opposite party, or (5) a handwriting expert, unless it: (a) is produced under a discovery order, or (b) may be judicially noticed by the Court, or (c) is one which may be handed in from the Bar, or (d) is produced under a subpoena duces tecum, or is an affidavit in interlocutory proceedings, or (f) is admitted by the opposite party.*
Where the party against whom a private document, a deed of sale, not complying with the above, is sought to be relied on, has neither admitted its authenticity nor that the contents thereof are correct, its contents cannot be used either as evidence or purposes of cross-examination".[10]

34. In Metedad v National Employers' Employers' General Insurance CO LTD 1992 (1) SA 494 (WLD) the Court stated that:

"*This section invests the court with discretion, to be judicially exercised in the interests of justice. It seems to me that the purpose of the amendment was to permit hearsay evidence in certain circumstances where the application of rigid and somewhat archaic principles might frustrate the interests of justice. The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission. Moreover, the*

[10] Howard & Decker Witkopen Agencies and Four-Ways Estates (Pty) Ltd. v De Sousa 1971 (1) 937 (T.P.D.) at para-G.

fact that the statement is untested by cross-examination is a factor to be taken into account in assessing its probative value".[11]

35. In affirming the Metedad judgment the Supreme Court of Appeal in Makhathini v Road Accident Fund 2002 (1) SA 511 (SCA) stated that:

"*The purpose of the Act is to allow the admission of hearsay evidence in circumstances where justice dictates its reception*".[12]

36. The issue between the parties is whether Defendant is in material breach of the JICA Agreement and whether the new contract of employment has rendered the JICA Agreement *null and void* as envisaged in clause 14 of the Agreement. In interpreting the agreement, it is important to consider how the agreement was entered into and the intention of the parties. It is trite that effect must be given to what the transaction really is.[13]

37. It is not in dispute that the JICA Agreement was entered into between Plaintiff and Defendant, and neither is the authority of the signatory of the agreement on behalf of Plaintiff. Defendant's contention is that failure to call the person who signed the agreement on Plaintiff's behalf makes Mr Letsholo's evidence hearsay. In applying the factors or considerations set out in Section 3 of Law of Evidence Amendment Act it is important to consider what the Constitutional Court said in Kapa v S 2023 (4) BCLR 370 (CC) where the Court stated that:

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[11] Metedad v National Employers' Employers' General Insurance CO LTD 1992 (1) SA 494 (WLD).

[12] Makhathini v Road Accident Fund 2002 (1) SA 511 (SCA) at para 27.

[13] ERF 3183/1 Ladysmith (Pty) Ltd and Another v Commissioner for Inland Revenue 1996 (3) SA 942 (A) at 953 C-D. See also Zanndberg v Van Zyl 1910 AD 302.

"*Hearsay evidence is inadmissible, unless the court is of the opinion that it is in the interests of justice for it to be admitted, taking into account the factors referred to in section 3(1)(c)(i) to (vi)*".[14]

38. In this regard, in Kapa v S[15] the Constitutional Court followed the judgment of S v Ndhlovu 2002 (6) SA 305 (SCA) where the Supreme Court of Appeal stated that:

"*The problem, however, is that the provision conflates the admissibility of evidence with its reliability. That aside, statute's fundamental test, namely the 'interests of justice', as well as the criteria it posits as relevant to that test, must now be interpreted in accordance with the values of the Constitution and the 'norms of the objective value system' it embodies. Nothing in the statute inhibits this normative reconfiguration*".[16]

39. The JICA Agreement was entered into to enhance Plaintiff's objective of contributing towards its long-term strategy and viability. The Programme envisaged in the JICA Agreement was developed to assist Plaintiff's employees to develop an active role within Plaintiff's managerial structures after the Employee gained experience during the programme.[17]

40. The purpose of Mr Letsholo's evidence was to establish the contractual relationship between Plaintiff and Defendant as well as the intention of the parties when entering into the agreement, including inferences which can be drawn therefrom. This Court has no reason to doubt the reliability of Mr Letsholo's evidence and the reliability of the JICA Agreement. The Court is satisfied that Mr

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[14] Kapa v S 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC) at para 32.
[15] Kapa v S 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC) at para 32.
[16] S v Ndhlovu 2002 (6) SA 305 (SCA) at para 16.
[17] See clause 3.3 of the JICA Agreement.

Letsholo's evidence demonstrated the true intention of the parties to the JICA Agreement.

41. It is trite that the discretion to admit hearsay evidence should be exercised with due consideration of factors set out in the Law of Evidence Amendment Act No. 45 of 1988, an arbitrary rejection of hearsay evidence may constitute a material error in law.[18]

42. It does not appear to the Court that Defendant is prejudiced by failure to call the person who signed the JICA Agreement on behalf of the Plaintiff. The issue that arose is whether the JICA Agreement has become *null and void* on signature of the new contract of employment. This is a matter of interpretation which should consider factors as indicated above.

43. Upon consideration of the factors set out in section 3(1)(c)(i) to (vii) and circumstances dealt with herein above, the Court regards it in the interest of justice that Mr Letsholo's evidence be admitted as evidence.

G. Inference on failure to call available witness to testify

44. Defendant argued that adverse inference should be drawn for Plaintiff's failure to call the individuals who concluded the JICA Agreement. She argued that these individuals have knowledge of the facts and circumstances giving rise to both the JICA Agreement and the new contract of employment. Defendant relied on the judgment of Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 (1) SA 621 AD and quoted a summary of the finding of the then Appellate Division as follows:

"*The failure of a party to call a witness is excusable in certain circumstances, such as when the opposition fails to make out a*

[18] See Matsokoleng v Shoprite Checkers (2013) 2 BLLR 130 (LAC).

prima facie case. But an adverse inference must be drawn if a party fails to...place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavorable to him or even damage his case".

45. The paragraph quoted by Defendant is instead found in Tshishonga v Minister of Justice & Constitutional Development 2007 (4) SA 135 (LC).[19]

46. The Appellate Division in Munster Estates (Pty) Ltd v Killarney Hills (Pty)[20] followed the decision of Elgin Fireclays Ltd v Webb 1947 (4) SA 744 (A) where the Appellate Division stated that:

"*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 that such evidence will expose facts unfavourable to him. But the inference is only a proper one if the evidence is available and it would elucidate the facts*".[21]

47. When interpreting the judgment of Elgin Fireclays Ltd v Webb[22] the Appellate Division as it was then stated that:

"*In my opinion, however, it is to be doubted whether WATERMEYER CJ intended laying down a general and inflexible rule to be applied without more in every case where a party fails to call as his witness one "who is available and able to elucidate the facts". Whether the inference, that the party failed to call such a*

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[19] Tshishonga v Minister of Justice & Constitutional Development 2007 (4) SA 135 (LC) at para 112.

[20] Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 (1) SA 621 AD.

[21] Elgin Fireclays Ltd v Webb 1947 (4) SA 744 (A) at Para C-D.

[22] See note 20 supra.

person as a witness because he "fears that such evidence will expose facts unfavourable to him", should be drawn could depend upon the facts peculiar to the case where the question arises".[23]

48. It is important to consider all circumstances in this case whilst dealing with the issue of whether inference should be drawn against Plaintiff as argued by the Defendant. It is undisputed that the JICA Agreement was entered into between Plaintiff and Defendant. It is also undisputed that Defendant attended the Programme in Japan as set out in the JICA Agreement. It is also common course that at completion of the Programme, Defendant was offered a new contract of employment as stipulated in the JICA Agreement. Regarding the costs of the Programme, Defendant's submission was that the costs were paid by Nissan Global, which version was disputed by Plaintiff's witness who testified that Plaintiff is the one who paid the costs claimed against Defendant in these proceedings. The issue in dispute is whether when entering into the new contract of employment, the JICA Agreement became *null and void* as stipulated in clause 14.

49. Regarding the failure to call the individuals who entered into the agreement, no explanation was given by the Plaintiff. Correctly so, the Defendant invoked the trite principle that the court 'may draw inference against a party that fails to call a witness who is available and able to testify".

50. What then must be considered is whether there are issues that needed to be elucidated by the witnesses that were not called by the Plaintiff. In respect of two individuals who participated in the conclusion of the agreement the evidence is that they are no longer in its employ. One has retired and Mr Letsholo has no knowledge of the whereabouts of the other one. No explanation was given for the failure to call them as witnesses. Defendant argues that this failure

[23] See note 19 supra at para D-F.

is fatal to Plaintiff's case as these individuals would give evidence to the meaning of clause 14 of the JICA Agreement or the parties' true intention when the agreement was concluded.

51. Defendant further argued that no admissible evidence was adduced on behalf of the Plaintiff to sustain its reliance on the JICA Agreement and consequently the implied contention that the Defendant's obligations survived beyond November 1, 2018. I will deal with this issue later in the judgment.

52. Other than indicating that the individuals who were involved in the conclusion of the JICA Agreement were no longer in the employ of the Plaintiff, no averments were made by either Plaintiff or Defendant that their evidence would be unfavourable for either of the parties. The issue then is whether these individuals were in a better position to elucidate the facts in relation to the JICA Agreement better than Mr Letsholo. In his testimony Mr Letsholo indicated that he was familiar with the JICA Agreement and the Programme. He was responsible for administration related to the JICA Agreement. He understood the purpose and objective of the JICA Agreement. In essence, his evidence demonstrated that he is acquainted with the facts relating to the JICA Agreement.

53. To succeed in its case plaintiff must prove on a balance of probabilities the existence of a contract between itself and the Defendant. Also, it must prove that Defendant is in breach the material terms of the contract it based its cause of action on.[24]

54. The issue then is whether the failure to call individuals involved in conclusion is fatal to Plaintiff's case. The Court is of the view that Plaintiff proved existence of the contract between itself and Defendant. Plaintiff's evidence was sufficient in making out a case in respect of breach of contract. The JICA Agreement and the new

[24] Highveld 7 Properties (Pty) Ltd and Others v Bailes 199 (4) 1307 SCA.

contract of employment dated November 1, 2018, are two distinct agreements in that the new agreement was simply a contract of employment placing Defendant to a new position as envisaged in the JICA Agreement. The Court does not believe that the individuals who were involved in conclusion of the JICA Agreement would elucidate the facts relating to the agreement more than Mr Letsholo did in his testimony.

55. For the reasons set out above the Court therefore finds that no negative inference should be drawn against Plaintiff for failure to call the individuals who were involved during conclusion of the JICA Agreement.

H. On whether clause 14 of the JICA Agreement is a resolutive condition

56. Defendant argued that clause 14 of the JICA Agreement constitutes a resolutive clause. She argued that Plaintiff did not present admissible evidence to show that the wording of clause 14 of the JICA Agreement reveals the intention for the Defendant's obligations under clauses 5.6 and 9.1 to survive the termination of the JICA Agreement.

57. To substantiate her argument Defendant relied on the judgment of Gravitek CC v Cartmel Investment (Case No. 7526/2015) where the court held that:

"[19] A resolutive condition is the antithesis of a suspensive condition. The contract concluded between the parties is immediately binding with all rights and obligations coming into existence at the inception of the contract and will remain binding subject to the future event in the stipulated condition being fulfilled.

[20] If a resolutive condition is subsequently fulfilled, the agreement will terminate immediately with retrospective effect, with the

contracting parties being lawfully required to be restored to the position they were in prior to the conclusion of the agreement, that is the status quo ante".[25]

58. This Court is called upon to determine whether clause 14 of the JICA Agreement is a resolutive condition and whether conclusion of the new contract of employment was a fulfilment of a resolutive condition.

59. It is this Court's view that the new contract of employment was consequential to the JICA Agreement. It is illogical to suggest that the new contract of employment terminated the JICA Agreement.

60. Coming to clause 14 of the JICA Agreement, it is important to give effect to the commercial meaning of the agreement. This agreement gives reciprocal obligations to both Plaintiff and Defendant. Firstly, Plaintiff is obliged to appoint Defendant and pay expenses and/or disbursements on behalf of the Defendant as set out in the agreement. This includes payment of a stipend in lieu of Defendant's salary for the duration of the Programme. Secondly, Plaintiff is obliged on completion of the Programme to employ Defendant in a job position similar to the position she occupied before commencement of the Programme. In return, Defendant is obliged upon completion of the Programme, to remain in Plaintiff's employ for a period of two and a half years.

61. The new contract of employment is a distinct and separate agreement. It is consequential and flows from the JICA Agreement. The Court does not agree with the argument that the new contract of employment gave rise to a resolutive agreement as set out in clause 14 of the agreement. This argument fails to appreciate the clear distinction between the two agreements. In Wynus Car Care

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[25] Cravitek CC v Cartmel Investments CC and Others (7526/2015) [2019] ZAKZDHC 11 (21 June 2019.

Products (Pty) Ltd v First National Industrial Bank Ltd 1991 (2) SA 754 (A) the then Appellate Division stated that:

"*The argument fails to appreciate the clear distinction between separate agreements which are, for practical and commercial considerations, linked and interdependent and those which the parties in addition wish to be reciprocal in the legal sense. The transaction plainly involved more than the lease of the equipment and it is clear that the system would be inoperative and the equipment of no use to the appellant unless CICS performed in terms of the maintenance agreement and the services agreement...The transaction was a multi-faced one. It was for the parties to decide how they would formalize every aspect of their relationship. They elected to do so in three separate and distinct agreements and, unless the terms of the agreements considered as a whole clearly evince the intention that there would be reciprocity between the obligations undertaken in each, there is no room for an interference to that effect*".[26]

62. On interpretation of contracts the Court in V, C F v V, M (A5021/12) [2016] ZAGJHC 24 November 2016 stated that:

"*The fundamental consideration in determining the terms of a written contract or its application to an event that arose during the course of their relationship is to discern the intention of the parties from the words used in the context of the document as a whole, the factual matrix surrounding the conclusion of the agreement and its purpose or (where relevant) the mischief it was intended to address (KPMG Chartered Accountants (SA) v Securefin and Another 2009 (4) SA 399 (SCA) at para 39 and Novartis SA (Pty) Ltd v Maphil Trading Ltd 2016 (1) SA 518 (SCA at paras 27, 28, 30 and 35)*".[27]

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[26] Wynus Car Care Products (Pty) Ltd v First National Industrial Bank Ltd the 1991 (2) SA 754 (A) at 758 A-D.

[27] V, C F v V, M (A5021/12) [2016] ZAGJHC 24 November 2016.

63. Upon analysis of legal authorities, the Court in V, C F v V, M (A5021/12) [2016] ZAGJHC 24 November 2016 summed up the position in of applicable law of interpretation as follows:

"*Put in another way; a court is now at liberty to depart from the words used, even when they are clear and unambiguous when considered in the context of the document as a whole if, having regard to admissible background and surrounding factors, it is evident that they would lead to a result contrary to the purpose and intention of the parties or legislature as the case may be*".[28]

64. In Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) the Court acknowledged development of our law on interpretation of documents, legislation and contracts and stated that:

"...

[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own...Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production.

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[28]See note 27 supra.

Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard and production of the document".[29]

65. Whilst the Supreme Court of appeal clarified the law regarding interpretation of contracts, it clearly issued a caution to courts not to make a contract for the parties.

66. In Brisley v Drostsky (423/2000) [2002] ZAENGTR 2 (28 March 2022) SCA the Court stated that:

"*Aware of the then-existing objections (which are still raised today – in different words, but in substance the same) from academic and other sources against the enforcement of the non-variation clause, this court attached greater value to the parties' initial exercise of their contractual freedom than to their power to undo those initial choices without restraint. The legislature often does this by prescribing that certain types of contract must be in writing, as must all amendments to them. The parties do this by agreeing in advance that a contract comes into being only when certain formalities are complied with. The purpose is to limit or prevent disputes.*

[29] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA).

Naturally, the parties remain free to ignore the formalities and to behave as if a particular law does not exist. But if a dispute arises, anyone is entitled – and the court is obliged to apply the strict law. And why should it be otherwise in an autonomous contractual relationship? There is also a common myth that this type of provision exists only for the benefit of the economically powerful and that it produces inequality in contractual relationships. This is probably why the constitutional principles of equality was relied upon. But this serves to protect both parties. One can only wonder how the tenant would have reacted if the lessor had claimed that an increased rent had been agreed orally".[30]

67. The then Appellate Division stated in SA Sentrale Ko-op Graanmaatskappy BPK v Shifren en Andere 1964 (4) (A) stated that it would be an obvious deviation from the elementary and fundamental general principle that contracts freely and seriously concluded by competent parties will, in the public interest, be enforced.[31]

68. The Supreme Court of Appeal stated in Magna Alloys and Research (SA) Pty Ltd v Ellis 1984 (4) SA 874 (A) that it is in the public interest that persons abide by agreements they have entered into.[32]

69. Brisley v Drostsky (423/2000) [2002] ZAENGTR 2 (28 March 2022) SCA the court stated that:

"*The task of courts in general, and of this court in particular, is to weigh up these fundamental values, which sometimes come into conflict with one another, and when it seems necessary, to make adjustments, gradually and with caution.*

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[30] Brisley v Drostsky (423/2000) [2002] ZAENGTR 2 (28 March 2022) SCA.

[31] SA Sentrale Ko-op Graanmaatskappy BPK v Shifren en Andere 1964 (4).

[32] Magna Alloys and Research (SA) Pty Ltd v Ellis 1984 (4) SA 874 (A).

...

To all of a sudden give judges a discretion to disregard contractual principles when they have been deemed unreasonable or unfair is in conflict with this method. The result, after all, would be to disregard the principle of pacta sunt servanda, since the enforceability of contract terms will depend on what a particular judge considers to be reasonable and fair in the circumstances. The criterion is then no longer the law but the judge. From the contracting parties' perspective, they will not be able to act on the general expectation that, when there is a dispute between them, will be enforced according to its terms. They would have to wait and see if the individual judge regards the terms as reasonable and fair... Wide judicial discretion is not such a value, and we are not able 'to discern any societal value which is imperiled by the application of Shirfren or by the refusal to introduce a 'special duty theory' into contract law".[33]

70. In National Health Laboratory Service v Mariana Lloyd-Jansen van Vuuren 2015 (5) SA 426 (SCA) the Supreme Court of Appeal stated that the law of interpretation has evolved since the decision of Coopers & Lybrand & Others v Bryant 1995 (3) SA 761 (A)[34] where the Court set out the principles of interpretation as follows:

"*The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:*

(1) to the context in which the word or phrase is used with its interpretation to the contract as a whole, including the nature and purpose of the contract...

(2) to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted ...; and

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[33] See note 30 supra.

[34] Coopers & Lybrand & Others v Bryant 1995 (3) SA 761 (A).

(3) *to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions*".[35]

71. The Court in National Health Laboratory Service v Mariana Lloyd-Jansen van Vuuren followed decision of Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA)[36] where the Court held that:

"*Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly, it is no longer helpful to refer to the earlier approach.*"[37]

72. What seems to be the current legal position is that the words of the contract should be read in the context of the document as a whole and in light of the relevant circumstances.[38] The applicable law as clarified by the Courts is now that the enquiry is no longer restricted to the words used, the intended scope or purpose of the contract is also to be taken into consideration when interpreting a contract.

73. As indicated herein above, the purpose of the Programme envisaged in the JICA Agreement is to contribute to Plaintiff's long-term strategy and viability and develop the employee (in this case the Defendant) to develop an active role within Plaintiff's

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[35] National Health Laboratory Service v Mariana Lloyd-Jansen van Vuuren 2015 (5) SA 426 (SCA).

[36] Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA).

[37] See note 35 supra.

[38] See Joint Municipal Pension Fund v Endumeni Municipality and V, C F and V, M supra.

managerial structures after the Defendant gained experience from the Programme. It is apparent that the agreement does not envisage Defendant to immediately leave Plaintiff's employ after completion of the Programme. She is required to remain in the Plaintiff's employ for two and a half years after completion of the Programme.

74. Upon consideration of the intended scope and purpose of the JICA Agreement this Court finds that Defendant's obligation to remain in Plaintiff's employment survives termination of the agreement. This court finds that clause 14 of the JICA Agreement when considering its scope and purpose cannot be a resolutive condition.

I. Parol Evidence Rule

75. Where parties reduce their agreement to writing, with intention that the document be an integration of all that has gone before and hence the sole memorial of their agreement, no other evidence is admissible to contradict, vary, add to or subtract from the terms of writing.[39]

76. Defendant argues that the JICA Agreement was integrated into a written memorial of the parties' agreement and Plaintiff sought to contradict, add to or modify the writing by asking the honourable Court to ignore clause 14 without claiming rectification. She argued further that it is not competent for the Plaintiff to seek to amend, vary or contradict the provisions of the JICA Agreement under the guise of an exercise in interpretation.

77. In Coopers & Lybrand and Others v Bryant 1995 (3) SA 761 AD the then Appellate Division stated that:

[39] Hutchison et al, (2011) The Law of Contract, Oxford University Press: South Africa.

"The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract as a whole, including the nature and purpose of the contract, as stated by Rumpff supra;
(2) to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted…; and
(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions…".

78. Referring to the foregoing decision of Coopers & Lybrand and Others v Bryant, the Supreme Court of Appeal in Bothma-Batho Transport v S Bothma & Seun Transport stated that:

"That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former, being distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in

stages but is 'essentially one unitary exercise'. Accordingly, it is no longer helpful to refer to the earlier approach".[40]

79. In KPMG Chartered Accountants (SA) V Securefin and Another 2009 (4) SA 399 SCA the Court stated that:

"*First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add or modify its meaning (Johnson v Leal 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question)... Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (Delmas Milling Co Ltd v Du Plessis 1995 (3) SA 447 (A) at 455B-C). The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'.*

The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice...".[41]

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[40] See note 36 supra.

[41] KPMG Chartered Accountants (SA) v Securefin and Another 2009 (4) SA 399 SCA at 409-410G-J.

80. In Johnston v Leal 1980 (3) AD the court stated that:

"As far as the parol evidence rule is concerned, this rule may allow the admission of extrinsic evidence in cases where it would not be admissible by reason of the Act... The court in dealing with parol evidence must first interpret the document and then weigh the evidence sought to be adduced against the meaning of the document. If the evidence conflicts with the document, it is not admissible.

...

Although parol evidence may be admitted to show that a contract is void for illegality or failure to comply with the terms of a statute as stated by Hoffman Evidence, it appears from the case cited by him, i.e. Campbell Discount Co v Gall (1961) 2 All ER at 106, that the evidence admitted in that case was to show that the real transaction was not that which was reflected in the document (which had been in blank) and that accordingly, the real transaction was subject to the Hire-Purchase Acts. It appears from O'Connor v Hume (1954) 2 All ER at 306D-G that whilst parol evidence is not admissible to 'strike out' an important provision in a written agreement, it would be admissible if the instrument is affected by illegality".[42]

81. Having regard to the authorities mentioned herein above, what then needs to be determined is whether Mr Letsholo's evidence sought to vary, add or subtract from the terms of the JICA Agreement. The Court's evaluation of his evidence is that it provided circumstances in which the JICA Agreement came into being. Defendant pointed out that at no stage did the Plaintiff present admissible evidence on the meaning of clause 14 or argue that the wording of clause 14 of the JICA Agreement did not reflect the intention of the parties.

[42] Johnston v Leal 1980 (3) AD at 931-932G-H.

Indeed, there was no evidence proffered which sought to suggest that clause 14 of the JICA Agreement is not a true reflection of the intention of the parties. The Court has indicated above that the effect of clause 14 of the JICA Agreement is a matter of interpretation. This Court aligns with the principle set out in KPMG Chartered Accountants (SA) V Securefin and Another 2009 (4) SA 399 SCA where the Supreme Court of Appeal stated that interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses.[43]

82. It is this Court's finding that based on the evidence adduced before it, the parties agreed on the underlying nature and purpose of the JICA Agreement, the issue of parol evidence does not arise. Having taken into account the contents of the JICA Agreement, its purpose, what it meant to achieve and having considered the contents of the JICA Agreement as a whole, the issue of parol evidence should not enter the discussion.

J. Onus

83. It is trite that Plaintiff who sues on a contract must prove existence of the contract. Plaintiff must satisfy the Court that there is in existence a contractual relationship between itself and the Defendant that entitles it to institute a contractual claim against the Defendant. That is in so far as the onus in relation to the merits. Secondly, Plaintiff bears the onus to prove that it is entitled to the amount that it is claiming. In this case, Plaintiff bears the onus to prove that the amount of R412 209.98 is due and payable by the Defendant.

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[43] See note 41 supra.

84. In Pillay v Krishna and Another 1946 (A) 946 the Court stated that:

"*Commenting on this passage Solomon CJ, said in Spain's case, at p 79: ... In this statement of the law by Kotze JP, the Natal Provincial Division in its judgment in this case concurred, and I think we should also accept it, except in so far as it refers to the onus being placed on the Respondent. For the onus to prove his case always lies on the Appellant: if, in the circumstances stated by Kotze JP, no evidence is given by the Respondent, provisional sentences will be granted: on the other hand, if evidence is called by the Respondent, it will be for the Court to determine whether, in the circumstances, a sufficiently clear case has been made out by the Appellant to justify the granting of provisional sentence*".[44]

85. In Goliath v MEC: Health Eastern Cape 2015 (2) SA 97 (SCA) the Court pointed out that there is an important distinction between an onus of proof and an obligation to adduce evidence.[45] The evidential burden may shift from the Plaintiff, but the onus does not. This is primarily because the onus is important for determination of which party should fail on a given issue. What the Court is called upon to do is at the end of the trial to determine whether based on evidence adduced before it, Plaintiff has discharged the onus of proof resting upon it on a preponderance of probabilities.

86. In South Cape Corp. v Engineering Management Services 1977 (3) AD the Court stated that:

"*As was pointed by Davis, A.J.A. in Pillay v Krishna and Another, 1946 at pp. 952-3, the word onus has often been used to denote, inter alia, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defense, as the case may be, and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his*

[44] Pillay v Krishna and Another 1946 (A) 946.

[45] Goliath v MEC: Health Eastern Cape 2015 (2) SA 97 (SCA).

opponent. Only the first of these concepts represents onus in its true and original sense

...

In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ("weerleggingslas"). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other".[46]

87. In these proceedings, only the Plaintiff adduced evidence, there is therefore no argument regarding the shifting of evidential burden. What this Court is left with is to determine whether on analysis of all evidence adduced before it, Plaintiff has satisfied its onus and whether a sufficiently clear case has been made out by the Plaintiff to justify granting judgment in its favour.

88. In Ex Parte Minister of Justice: In re R v Jacobson and Levy 1931 AD the Court stated that:

"*If the party on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and the evidence "calls for an answer" then, in such case, he has produced prima facie proof, and, in an absence of an answer from the other side, it becomes conclusive proof...*".[47]

89. In Monteoli v Woolworths (Pty) 2000 (4) SA 735 WLD the court stated that:

"[25] It is absolutely trite that the onus of proving negligence on a balance of probabilities rests with the plaintiff.

...

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[46] South Cape Corp. v Engineering Management Services 1977 (3) AD.

[47] Ex Parte Minister of Justice: In re R v Jacobson and Levy 1931 AD.

[27] Sometimes, however, a plaintiff is not in a position to produce evidence on a particular aspect. Less evidence will suffice to establish a prima facie case where the matter is peculiarly in the knowledge of the defendant.

...

[29] In such situations, the law places an evidentiary burden upon the defendant to show what steps were taken to comply with the standards to be expected. The onus nevertheless remains with the plaintiff".[48]

90. At issue is whether Plaintiff has discharged the onus of proving its case and if so, whether the evidential burden shifted to the Defendant. Before addressing this issue, it is important to note that Plaintiff relied on a single witness testimony to support its case. The Court is required to exercise judicial discretion when evaluating single witness testimony. It is trite that such testimony should be clear and satisfactory in all material respects.[49] On evaluation of evidence adduced by the Plaintiff the Court is of the view that Mr Letsholo's evidence was clear and satisfactory. No negative inference could be made by the Court on the probability and truthfulness of his testimony. There was no indication of this witness breaking down under cross-examination.

91. In respect of merits, Plaintiff has satisfied the existence of a contractual relationship between the parties that would entitle it to institute a contractual claim against the Defendant. Concerning clause 14 of the JICA Agreement, the Court has already made a ruling that this is not a resolutive condition as indicated

[48] Monteoli v Woolworths (Pty) 2000 (4) SA 735 WLD.

[49] See S v Artman and Another 1968 (3) SA 339 (AD) and R v Mokoena 1956 (3) SA 81 AD.

hereinabove. The Court finds that Plaintiff discharged its onus to establish existence of a contractual relationship between Plaintiff and Defendant. In any event, the existence of the JICA Agreement is not in dispute, at issue is whether clause 14 of the JICA Agreement rendered the agreement *null and void* on conclusion of the new contract of employment, which should consequently result in falling away of obligations set out in the JICA Agreement.

K. Do obligations set out in the JICA Agreement survive termination of the agreement?

92. On whether the obligations set out in the JICA Agreement survive termination of the agreement, this Court is of the view that this is a matter for interpretation as such it is a matter of law and not of fact and, accordingly is a matter for the Court and not for witness.

93. Obligations of the parties in terms JICA Agreement are already set out herein above.[50] It is common cause that the new contract of employment entered into between Plaintiff and Defendant made no reference to the obligations set out in the JICA Agreement.

94. The Court has set out herein above the law that obtains in our country in relation to the interpretation of contracts, statute and documents.

95. Whilst the parties did not seriously argue novation, it is worth considering whether parties considered novation in their agreement. In National Health Laboratory Service v Mariana Magdalena Lloyd-Jansen Van Vuuren 2015 (5) SA 426 (SCA) the Court stated that:

[50] See Para 7 above.

"*It follows that in order to establish whether novation has occurred, the court is entitled to have regard to the conduct of the parties, including any evidence relating to their intention*".[51]

96. The Supreme Court of Appeal in National Health Laboratory Service v Mariana Magdalena Lloyd-Jansen Van Vuuren followed the decision of Proflour (Pty) Ltd & another v Grindrod Trading (Pty) Ltd t/a Atlas Trading and Shipping & another where the Court referred to the decision of Electric Process Engraving and Stereo Co v Irwin 1940 AD 220 where the Court stated at 226-227 that:

"*The law on the subject was clearly enunciated as far back as 1880 in the well-known case of Ewers v The Resident Magistrate of Oudtshhoorn and Another, (Foord) 32, where DE VILLIERS, C.J. said: The result of the authorities is that the question is one of intention and that, in the absence of any express declaration of the parties, the intention to effect a novation cannot be held to exist except by way of necessary inference from all the circumstances of the case*".[52]

97. Having considered the foregoing authorities on novation, the Court is of the view that taking into consideration the intention of the parties in the JICA Agreement there is no indication of intention to novate. The two agreements are distinct in that the JICA Agreement relates to the Programme as indicated therein and the second agreement is a contract of employment consequential to the JICA Agreement. The Court has already set out the purpose of the JICA Agreement herein above. This includes the obligations of the parties thereto.

98. The Court has already made a ruling that clause 14 of the JICA Agreement does not constitute a resolutive clause. The Court

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[51] See para 35 supra.

[52] See note 35 supra and Electric Process Engraving and Stereo Co v Irwin 1940 AD 220.

therefore does not agree with the submission that when the parties entered into a new contract of employment it rendered the obligations set out in the JICA Agreement as of no force or effect.

99. Clause 3.3 of the JICA Agreement indicates the purpose of the Programme as set out in the agreement. Clause 4 of the JICA Agreement sets out Plaintiff's obligations which include securing Defendant's employment after completion of the Programme. Clause 5 of the JICA Agreement sets out the Defendant's obligations and terms of her participation in the Programme. Upon completion of the Programme the Defendant was obliged to remain in Plaintiff's employ for a period of two and a half years. In terms of clause 9 of the JICA Agreement Defendant was obliged to compensate Plaintiff full costs of the Programme plus interest should the agreement be terminated prior to the employee completing the Programme and/or serving the agreed period in Plaintiff's employ as set out in clause 5.

100. It is common cause that Defendant attended the Programme until completion. Secondly, Defendant received a stipend and benefits from Plaintiff as envisaged in the JICA Agreement until completion of the Programme. Upon completion of the Programme Plaintiff fulfilled its obligation by employing Defendant in terms of the new contract of employment. The new agreement was simply an employment contract of the Defendant after the completion of the Programme, unlike the JICA Agreement whose purpose was to contribute towards Plaintiff's long-term strategy and viability and to assist Defendant to develop an active role within Plaintiff's managerial structures after Defendant gained experience during the Programme. As stated herein above, the new contract of employment is consequential to the JICA Agreement, and it was an implementation of what had been agreed in the JICA Agreement following completion of the Programme. Defendant continued to be

in the employ of Plaintiff for 15 months instead of 30 months as required in terms of clause 5.6 of the JICA Agreement.

101. In essence, and as the Court put it in a similar matter in the decision of National Health Laboratory Service v Mariana Magdalena Lloyd-Jansen Van Vuuren followed the decision of Proflour (Pty) Ltd & another v Grindrod Trading (Pty) Ltd t/a Atlas Trading and Shipping & another, the new contract of employment was a continuation of the JICA Agreement as envisaged in clause 4.2 of the JICA Agreement. The Court does not agree with the submission that when the new contract of employment was entered into, the JICA Agreement ceased to exist. This Court has already made a ruling that clause 14 is not a resolutive condition based on the reasons stated above.

102. The Court is satisfied that having read the words of the JICA Agreement in the context of the agreement as a whole, the purpose and the factual matrix, the Defendant's obligation in terms of clause 5.6 of the JICA Agreement did not cease to exist when the parties entered into a new contract of employment. To accede to the interpretation as submitted by the Defendant would not make commercial sense as this will defeat the purpose of the agreement. It is the Court's finding that this obligation survived termination of the JICA Agreement on completion of the Programme.

L. Quantum

103. In relation to quantum, Plaintiff claimed payment of the sum of R412 209.98 being the pro rata costs for travel and monthly stipends paid to the Defendant. Plaintiff submitted that it is not claiming for the costs of the academic programme. To substantiate its claim, Plaintiff relied on the flight tickets and pays lips.

104. The amount claimed represent fixed expenses incurred in relation to the travel costs of flight tickets from the Republic of South Africa to Japan and monthly stipend paid to Defendant in lieu of the salary for the duration of the Programme. Plaintiff's evidence is that these expenses were paid by the Plaintiff i.e. Nissan South Africa (Pty) Ltd.

105. Plaintiff relied on a spreadsheet attached to its particulars of claim as annexure ("NSA5") to substantiate its claim for the sum of R412 209.98.

106. During cross-examination it was put to the Plaintiff's witness that the amount of R25 806, 94 which seems to be used as average amount does not appear in the pay slips relied on by the Plaintiff, the response was that Plaintiff spent R35 000.00 per month and the amount of R25 806. 94 is the balance after statutory deductions. This response is not sustained by the pay slips. The net monthly salary indicated in the pay slips varies from month to month. Annexure NSA5 shows a long list of net pay from September 2016 to September 2018 and the amounts indicated therein vary from month to month.

107. It was put to Plaintiff's witness that when you divide the amount of R670 980.50 by twenty-six months you get the sum of R25 806.84 and if you divide the same amount by thirty months you get R22 366.01. It was also put to the Plaintiff's witness that half of the sum of R670 980.50 is R335 540.25. On calculation of the figures appearing in the spreadsheet, the Court agrees with the figures indicated by the Defendant during cross-examination.

108. Defendant argued that the costs of the Programme were not paid by Nissan South Africa (Pty) Ltd but instead was paid by Nissan Global. Plaintiff's witness insisted that the money was paid from Plaintiff's funds and not Nissan Global as put to him.

109. Notwithstanding the version put on the Plaintiff's witness regarding the party who made payment for the traveling and stipend claimed against the Defendant. There is no evidence before Court indicating that these costs were paid by someone else. It is not in dispute that Defendant traveled from the Republic of South Africa to attend the Programme in Japan and that the flight tickets were arranged by the Plaintiff. It is also not in dispute that for the duration of the Programme, Defendant received monthly stipend from the Plaintiff as determined in the JICA Agreement.

110. Regarding the actual amounts in respect of the stipend the court has a difficulty with the amount of R25 806.94 indicated as a net monthly income. The Court agrees with the calculation submitted by the Defendant that when you divide the amount of R670 980.50 by twenty-six months you get the sum of R25 806.84 and if you divide the same amount by thirty months you get R22 366.01. Therefore, for the period of thirty months the correct amount should be R22 366.01. If you multiply this amount by fifteen months you get the sum of R335 490.25. This is in respect of the monthly stipend paid to Defendant in lieu of the monthly salary.

111. In respect of flight tickets, the amount indicated in the spreadsheet is the sum of R35 031.29. Half of this amount and as correctly pointed out by the Defendant is R17 515.64.

112. The total amount after recalculation is therefore R353 005.89.

113. Notwithstanding the apparent miscalculation of the costs by Plaintiff, the court is satisfied that it has proved its quantum and is entitled to a reduced proven amount.

114. Under the circumstances, Plaintiff is entitled to a reduced proven amount of R353 005.89 calculated as follows: R335 490.25 being the half of the total amount of R670 980.50 recorded as total net

salary for the duration of the Programme plus R17 515.64 being the half of the amount R35 031.29 recorded as total costs for flight tickets.

115. I therefore make the following order:

1. It is declared that the obligation recorded in clause 5.6 of the agreement concluded on August 11, 2016, continued to exist notwithstanding the conclusion of a new contract of employment on November 1, 2018, between Plaintiff and Defendant.

2. It is declared that Defendant is liable to the Plaintiff to pay an amount R353 005.89 pursuant to clause 5.6 of the JICA Agreement.

3. It is declared that Defendant is liable to the Plaintiff for an interest on the amount of R353 005.89 at the rate of 09.00% (prime lending rate of 07.00% plus 02.00%) per annum with effect from November 2020 (date of demand) until the date of final payment.

4. The Defendant is directed to pay the costs of suit on a party-to-party scale.

M NTANGA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of Hearing: 27 June 2024
Date of Judgement: 26 September 2024
Appearances:

Plaintiff's Counsel: Adv M R Maphutha
Instructed by: Kamfer Attorneys Incorporated

Defendant's Counsel: Adv LSA De Haan
Instructed by: Maenetja Attorneys