IN THE ARBITRATION
BEFORE A R SHOLTO-DOUGLAS SC

between:

THE UNIVERSITY OF STELLENBOSCH	Claimant
and	
JURIE WYNAND ROUX	First Defendant
JOHANNES CHRISTIAAN DE BEER	Second Defendant

FINAL ARBITRATION AWARD

Introduction

1. By summons issued out of the Western Cape Division of the High Court on 19 June 2015, the University of Stellenbosch ("*the University"*) claimed the payment of damages from the first defendant ("*Roux"*) and the second defendant ("*De Beer"*) on the strength of allegations that they had breached their employment contracts with the University. A subsidiary claim against De Beer related to a claim that he had undertaken to pay a sum of money to the University. On 15 May 2019, the parties agreed to refer their disputes for determination by this arbitration.

2. It was recorded in the written arbitration agreement that the disputes submitted to arbitration were those set out in the pleadings. The parties agreed that I

would have the powers conferred by the Arbitration Act, 42 of 1965, the High Court Rules and the arbitration agreement and would be bound by precedent as though I were a Judge sitting in the High Court of South Africa, Western Cape Division, Cape Town. I am also charged with determining the incidence of costs incurred in the arbitration.

3. The arbitration is, as is customary, private and confidential. While the existence of the arbitration and this final arbitration award is not regarded as confidential, the entire record of the arbitration proceedings are confidential, unless the parties agree otherwise, or it is so ordered.

4. During the arbitration, oral evidence was adduced during two tranches of nearly three weeks in duration. Argument followed over three days. In excess of twenty lever arch files of documentation were placed before me. The volume of evidence was reflective of the fact that Roux in particular had adopted an approach to the pleadings of meeting all of the substantive allegations made by the University with bare denials and carefully avoiding disclosing his defence until fairly late stage in the proceedings. Given admissions and concessions subsequently made, the issues in dispute of not as broad as may be suggested by the pleadings.

5. Despite the fact that the arbitration proceedings are to be regarded as private and confidential, the parties have agreed that this award may be made public. In order to accommodate both considerations – the private and confidential

nature of the arbitration and the public nature of the award – I shall endeavour to exercise care in disclosing material in the arbitration record that is not reasonably necessary for the purposes of explaining my award.

6. The parties to the proceedings are familiar with the facts presented in evidence and a comprehensive analysis of that evidence in the circumstances seems to me to be undesirable. Furthermore, the issues in dispute were narrowed both by amendments to the pleadings and in the evidence as the arbitration progressed.

7. Both Roux and De Beer are accountants. Roux obtained an honours degree in financial accounting and an LlB degree. They were both employed by the University during the period relevant to this arbitration, namely 2002 to September 2010.

8. Roux was employed by the University from 23 May 1994 to 30 September 2010. He concluded a written contract of employment on 10 June 1994. He was initially employed as a Financial Administrative Officer and rose fairly rapidly through the ranks so that between 2002 and 2007 he held the position Director: Finance and, from 2007 to 2010, the position of Senior Director: Finance and Asset Management. He reported to Mr Manie Lombard ("*Lombard*"), who held the position Senior Director: Finance and then Chief Director: Finance. De Beer reported to Roux until the latter's resignation. At

the time of his resignation from the University, De Beer held the position of Deputy Director: Student Fees Office.

9. Both held positions in the University's finance department as well as in the University's rugby club, Maties Rugby ("*the rugby club*" or "*Maties Rugby*"). Roux held the position of treasurer and thereafter chairman of the rugby club during the periods 2002 to 2004 and 2005 to 2010, respectively. After Roux left the University in September 2010, De Beer assumed the position of chairman of the rugby club.

The University's accounting system

10. By reason of their positions, Roux and De Beer were able to access the University's computerised financial accounting system. To understand the University's case, it is necessary to deal briefly with the evidence in this regard. This was given in the main by Lombard, Mr Roy Waligora ("*Waligora*") of KPMG Services Proprietary Limited ("KPMG"), Riaan Basson ("*Basson*"), an accountant in the Department of Finance who reported indirectly to Roux, and Roux himself.

11. The accounting system operated on a departmental structure in which, by 2012, there were approximately 11,000 active cost centres recording income and expenditure. Of these, approximately 600 fell within the academic (or faculty) environment (referred to also as the "*central budget*").

12. A Dean of a faculty had overall responsibility for the cost centres with in his or her faculty. Each department within that faculty had its own cost centre. A cost centre was similar to a bank account in that expenditure within the cost centre could only be applied against an existing budget and the cost centre could not go into deficit without specific approval.

13. There were two broad types of cost centres, a budget cost centre and a balance cost centre. A budget cost centre received an annual approved budget. Any positive difference between the annual budget and actual expenses constituted a surplus, which was available for application according to the University's policies in the following year. A balance cost centre was used to account for funds that were used on an ongoing basis. The closing balance was transferred into the following period.

14. The University's financial year end is 31 December. Each year, the University's Department of Finance is responsible for producing the annual financial statements of the University for auditing purposes. For this purpose, all faculty budget cost centres are closed off (i.e. the funds allocated to those accounts are transferred) to a consolidated cost centre identified as 'B300'. Cost centre B300 is then closed off to cost centre 'B260', also a consolidated cost centre. This closing off is effected by altering the opening balance of B260 using a program that was described by Waligora as "*essentially a financial reporting tool*" designated "*FFB121P*".

15. The results of B300 and B260 were included in the consolidated trial balance, which formed the basis for the preparation of the financial statements. This gave the total result for the University, including income derived from its three income streams, the first being the state subsidy and earmarked funds emanating from the Department of Higher Education and Training; the second being student fee income, including accommodation fees; and the third made up of research income, donations and bequests to the University and income derived from commercial innovation and similar activities.

16. After the University had closed its case and shortly before the commencement of the second session of evidence, Roux amended his plea so that the following facts in relation to the University's accounting system became common cause:

    16.1. The Council approved the University's consolidated budget, comprising the central budget, the housing budget and the budget for third-stream income.

    16.2. The University's finance department annually prepared a central budget.

    16.3. The term third-stream income denotes income other than that in the form of a state subsidy or student fees received by the University and may emanate from sources such as research contracts, commercial income and donations.

16.4. At the commencement of the financial year, the University's finance department allocated the central budget, as approved by Council, to budget cost centres.

16.5. During the financial year the actual expenditure incurred, and income earned by the departments was recorded in the electronic accounting system and allocated to the appropriate cost centres.

16.6. At the end of the financial year, the budget cost centres, which then reflected the actual expenditure incurred and income earned for the year, were closed off against the budgeted amount allocated to the particular cost centre at the commencement of the financial year to determine the University's financial performance for the year.

16.7. Only the University Council or its authorised delegate had authority to approve expenditure from the unrestricted reserves of the University.

17. The correctness of these admissions has in any event been established in the evidence.

18. The annual result for (or surplus of) the University was transferred to the University's reserves. These reserves consisted of restricted and unrestricted funds that had accumulated over many years and from various sources, including the annual financial result of the University. As their designations

indicate, restricted funds could be used for particular purposes only, whereas unrestricted funds (which were either earmarked or unearmarked) could be applied to a broader range of expenditure.

19. The reserves of the University accumulated from various sources, including such surplus as may have been present in B260. Thus, B260 did not itself constitute the reserves of the University, but any surplus showing on B260 contributed to those reserves.

20. An allegation in the particulars of claim that remained denied was this:

> "*The University's annual result is accounted for by the transferring of any unspent balances to reserves, more particularly unrestricted reserves"*

21. Lombard confirmed in his evidence that this was the case. As I understood Lombard's evidence, the surplus reflected in B260 fell into the unrestricted reserves of the University. Roux took issue with this. His thesis was that reserves could only be created by the Council of the University when it approved the budget at the beginning of a financial year. It was at that stage that a "*crystallisation*" of the University's reserves took place. It was not possible, so the argument went, for such surplus as may be reflected in B260, a cost centre that long predated the decision by the Council to allocate such surplus to the reserves of the University, also to constitute the University's unrestricted reserves.

22. I assume that this line, which was never pleaded, was adopted in order to counter the allegation in the pleadings that Roux had "*altered the unrestricted reserves*" of the University. I have no difficulty with the proposition that at a particular point in time every year the reserves of the University are determined. But that can only ever be as a snapshot in time. The surplus, if there is one, is retained on the University's books after that snapshot continues and constitutes the reserves of the University.

23. So too, if there is a depletion of the surplus in a cost centre, such as B260, that depletion will ultimately negatively affect the reserves of the University, whether because at the time of the depletion the reserves are reduced, or because when the reserves are "*crystallised*" (when Council approval is given to the annual financial statements), the value of those reserves is diminished.

24. The University's funds in its central budget remain the University's funds until they are expended in a budgeted and authorised manner. This much was in effect conceded by Roux in the following passage of his cross-examination:

> *"MNR BURGER: Wat ek ook vir u wil stel, is dat die fondse in die sentrale begroting wat manifesteer as die surplus, dat dit bly altyd die fondse van die Raad. Dit raak nie die fondse van die Raad as die Raad dit in die middel van die Raad (sic, should be "jaar") goedkeur nie. Dis altyd Raadsfondse. Dit behoort nie aan iemand anderste in die tussentyd nie.*

MNR BURGER (sic, should be ROUX): Wel, mnr Burger, in beginsel is u korrek, vir elke sent vir wat binne-in die Universiteit val."

Roux's conduct

25. The University's accounting system was computerised. Roux was one of two people who had access to FFB121P, a program in the computerised accounting system that allowed him to alter the opening balances of budget cost centres.

26. Roux used FFB121P to allocate funds to four cost centres within the rugby club, designated H260, H261, R593 and R594 ("*the four cost centres*"). The four cost centres fell outside of the central budget. In other words, they were reliant not on first or second stream income, but on third stream income. As explained above, third stream income excludes income from the central budget.

27. The allocations to the four cost centres were in turn allocated to fund expenditure incurred by the rugby club or allocated to De Beer to spend directly or to provide what were termed 'bursaries' to rugby-affiliated students and third parties. In any event, the funds allocated to the four cost centres were ultimately utilised for the purposes decided upon by Roux and De Beer and exited the University's financial system in the manner attested to by Waligora.

28. The spending of these funds occurred (for the most part at least) procedurally correctly in the sense that the procedure required by the University for the

expenditure of funds allocated to cost centres was followed. It was, however, the University's case that no funds allocated to the four cost centres by Roux's use of FFP121P constituted a permissible allocation of the University's funds.

29. The use of FFP121P did not leave an audit trail on the computerised accounting system. (Roux testified that a documented audit trail was left in the form of written notes that had been collected and stored in a box. While the box could not be found, I accept, based on the corroborating evidence of Basson and the concessions of other witnesses, that it existed). However, the fact that FFB121P had been used to allocate funds to the four cost centres would not have been apparent to a user of the computerised accounting system. In that sense, the use of FFB121P to allocate funds to the four cost centres left no audit trail.

30. The University discovered that Roux had allocated funds to the four cost centres in this manner during the course of an investigation by KPMG, launched in November 2012, into perceived irregularities in the student fees office. During the investigation, members of the KPMG audit team approached Lombard with a query concerning the difference in closing and opening balances in cost centres H260 and H261. This enquiry led to the conclusion that the opening balances on the cost centres had been manipulated using FFB121P and that this had also occurred in relation to cost centres R593 and R594.

31. In total, an amount of R35 312 004 was allocated by Roux from the University's reserves to the four cost centres using FFB121P. In addition, Roux committed the University to expending an amount of R4 340 276 on a project known as the Western Province Rugby Institute ("*the WPRI*"). That amount was paid from cost centre 9740, a cost centre within the rugby club, from the allocation made by Roux to cost centre R593. The amount allocated to this cost centre was insufficient to pay the full amount and the cost centre accordingly ran into 'overdraft' to the extent of R1 804 398.

32. The total loss alleged to have been suffered by the University as a result of Roux's actions is accordingly R37 116 402 (R35 312 004 plus R1 804 398).

The disputed issues

33. In its particulars of claim, the University alleges that Roux breached his contract of employment, as a consequence of which it suffered a loss of R37 116 402, which it claims as damages. This amount was made up of the R35 312 004 transferred to the four cost centres and the R1 804 398 shortfall on cost centre R593. In addition, an amount of R5 011 002 was claimed jointly and severally from Roux and De Beer.

34. The University's claim against Roux was divided into two parts:

34.1. the first, under the heading "*(a) R35 312 004*", was premised on an allegation of breach of contract constituted by the allocation of the University's reserves to the four cost centres; and

34.2. the second, under the heading "*(b) R 1 804 398*", related to a claim that Roux had breached his contract by causing the University to pay the sum to the WPRI without authority and without the University being contractually obliged to do so.

35. In argument, the University abandoned its claim against De Beer, save for an amount of R1 904 511, which is unrelated to any claim pressed against Roux. In essence, it abandoned its claim that Roux and De Beer be held jointly and severally liable for payment of the R5 011 002 claimed from Roux.

36. The University bears the onus of establishing the contract it relies upon, its breach, the fact that it suffered damage as a consequence of the breach and the quantum of damages. Although all of these issues were placed in dispute, it became clear during the course of the arbitration that the quantum of the amounts allocated by Roux to the four cost centres and the amount paid to WPRI were not themselves in dispute.

37. As I have said, the University was assisted in this regard by concessions and admissions made by Roux during the course of the arbitration. The result was

that the issues as defined in the pleadings as originally formulated were substantially narrowed.

38. This process of piecemeal admissions, frequently made after the evidence had established the facts admitted, was criticised by counsel on behalf of the University, who submitted that although the rules of Court apply to these proceedings, rule 22(2) was ignored by Roux in his pleading. There is merit in this criticism. The way Roux pleaded his case indicated a reluctance on his part to disclose his case. This reluctance persisted during the cross-examination of the University's witnesses. To the extent that this was possible, no version was put to them. The effect of this was to put the University to the proof of the majority of the allegations made in its particulars of claim and thus to unnecessarily prolong the arbitration. It also precluded Roux from attempting to prove a case he had not pleaded. More on this in due course.

The terms of the contract – Roux

39. The University's claim against Roux is squarely based on a breach of his employment contract.

40. It is common cause that it was a term of his employment contract that he would be bound by the laws, statute and regulations of the University. In fact, in his plea he goes further and quotes the terms of his letter of appointment:

> "*U aanstelling en voortgesette indiensneming is onderworpe aan die Universiteit se dissplinêre prosedure en enige ander regulasies van die Universiteit asook reëls vir die orderlike bestuur en bedryf van die Universiteit soos van tyd tot tyd deur Raad bepaal."*
>
> *"Ek die ondergetekende, verklaar hiermee dat ek my aan bogenoemde diensvoorwaardes en aan die wette, statute, kodes, prosedures en regulasies van die Universiteit onderwerp."*

41. It was common cause that Roux was obliged to administer the University's assets in accordance with the statutory and regulatory framework of the University, and that he was required to act in a manner consistent with the University's policies and principles. Roux's evidence was that as a senior member of the department of finance, he considered himself bound by the University's financial policies.

42. However, Roux denied that it was tacit or implied term of his employment contract, as amended from time to time, alternatively one of the *naturalia* thereof, that he was required to act in a manner consistent with the statute of the University as it applied at the relevant time during his employment and the University's policies and principles as applied at the relevant time during his employment, including its principles of financial management.

43. This denial is inconsistent with the admission quoted above to the extend that it constitutes a denial that Roux was required to act in a manner consistent with

the University's policies and principles inasmuch as they constitute "*wette, statute, kodes, prosedures en regulasies van die Universiteit"*.

44. While Roux admitted that he was required to administer the University's assets, he denied that he was obliged to do so only as and when authorised to do so ("*the authority issue*").

45. Roux admitted owing the University a fiduciary duty of loyalty, good faith and honesty, but he denied that he owed any contractual duty to the University to render his services in good faith by acting honestly, within the statutory and regulatory framework, not to work against the University's interests, or place himself in a position where his interests conflicted with those of the University.

46. I have difficulty in comprehending an *ex lege* fiduciary relationship between employer and employee that is not in itself an implied term of the employment contract. As the authors of the work *Labour Law* in LAWSA volume 24(1) 3ed part 1 put it at paragraph 223 (which is headed "*Basic Principles"*):

> "*From the moment that an employment relationship is established between an employer and an employee there exists* ex lege *a fiduciary relationship (implied term) between the two parties. When rendering his or her services the employee must ensure that his or her services are executed in good faith and that they in no way detract from the relationship of trust. This obligation was explained as follows (*in *Premier Medical & Industrial Equipment v Winkler* 1971 (SA) 866 (W) at 867)*:*

'There can be no doubt that during the currency of his contract of employment the servant owes a fiduciary duty to his master which involves an obligation not to work against his master's interests. It seems to be a self-evident proposition which applies even though there is not an express term in the contract of employment to that effect.'"

47. At paragraph 209, the authors say the following:

"*There are two essential aspects of the employment relationship that affect the employee's duty to make his or her services available, namely that:*

(a) the services are rendered in terms of a subordinate relationship which exist between the employer and the employee; and

(b) on conclusion of the contract a fiduciary relationship arises between the parties which means that the employer and employee are in a position of trust towards each other.

The employee must at all times render his or her services subject to these two essentials. The specific duties of an employee need not be stipulated in a contract of employment because these are imposed on him or her ex lege*, that is on account of the existence of the contract. This means that every employee shall fulfil these obligations unless the contract of employment provides to the contrary."*

48. In *Phillips v Fieldstone Africa (Pty) Ltd and another* 2004 (3) SA 465 (SCA) it was said that:

"There is no magic in the term "fiduciary duty". The existence of such a duty and its nature and extent are questions of fact to be adduced from a

thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship."

49. It is in any event an implied term of all employment contracts (unless agreed to the contrary) that the employee is obliged not to work against the employer's interests and not to place himself in a position where his interests conflict with those of the employer (*Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at para 25).

50. I accordingly find that in addition to his admitted obligations to administer the University's assets in accordance with the statutory and regulatory framework of the University, and to act in a manner consistent with the University's policies and principles, Roux was under a contractual obligation to act loyally, in good faith, honestly and in accordance with the extent of his authority.

Breach – Roux

51. The University alleged that Roux's conduct as set out in the particulars of claim was carried out while he purported to act as an employee of the University, in breach of his contract of employment.

52. He has denied both aspects of this allegation, that is including the allegation that he was purporting to act as an employee of the University when the conduct complained of occurred.

53. As to the denial of the first allegation, I can only assume that it was made *per incuriam*. In any event, it is clear from the evidence that when he allocated funds to the four cost centres, he did so as an employee of the University and subject to the terms of his employment contract. This much appears to be clear from Roux's denial of the breach of his employment contract.

54. I have already summarised the University's complaint regarding Roux's conduct. In a nutshell it is that during the relevant period, using FFB121P and without authority to do so, Roux altered the unrestricted reserves of the University in a total amount of R35,312,004.

55. What is referred to in the particulars of claim as the unrestricted reserves comprises or includes the surplus created or held in B260.

56. There is a suggestion in Roux's heads of argument that the University failed to quantify how much of the funds allocated to the four cost centres came from B260. However, the evidence of Lombard and Basson was that Roux allocated funds from B260 to the four cost centres.

57. This was also Roux's evidence if it is understood correctly. Roux crossed swords with counsel for the University during his cross-examination on the source of funds that were allocated to the four cost centres. It was put to him that the source was B260. He denied this, saying that the source of funds was in fact a number of other cost centres. However, the point he was making was that the funds were housed in cost centres other than B260 and were transferred to B260 prior to their allocation to the four cost centres. I do not, in any event, see how it matters, given that it was common cause that the source of the allocations was the University's funds.

58. In the circumstances it becomes necessary to consider whether the admitted use of FFB121P to allocate funds to the four cost centres constituted a breach of Roux's contract of employment.

59. The unauthorised and unbudgeted allocation of funds from one cost centre to another for the purposes of allowing that other cost centre to expend monies thus allocated to it without having followed the budgeting procedure described above amounted to a clear breach of Roux's contract of employment unless he was authorised to act as he did.

60. Particularly given the very senior position in the University's Department of Finance that Roux held during the relevant period, his employment contract required of him to comply with the procedures established by the University for budgeting and allocating money to cost centres.

61. Instead of complying with these obligations, Roux flouted the principles and practices of budgeting and accounting that were well-known to him by allocating unbudgeted funds to third stream cost centres by employing a program he knew would not leave an audit trail on the University's computerised accounting system. In so doing, he acted contrary to the interests of the University, dishonestly and in bad faith. The question as to whether or not he was authorised to act as he did therefore arises.

The authority issue

62. Roux denied the allegation in the particulars of claim that he was not authorised to allocate funds to the four cost centres as he did.

63. It was common cause that Roux was one of two employees of the University authorised to use FFB121P. He clearly had authority to do so in relation to closing off B300 to B260. The issue was not whether Roux was entitled to use the program, but rather whether he was entitled to do so to allocate unbudgeted funds to the four cost centres.

64. He was clearly not. He most certainly knew this. He was, at the relevant time, very senior employee of the University in its Department of Finance and was aware of the University's regulatory framework, the financial principles and financial policies or guidelines applied by it.

65. Absent some form of authority to allocate the funds he did to the four cost centres, he acted in breach of his employment contract to the extent that it imposed on him a duty of loyalty, good faith and honesty and a duty to comply with the procedures established by the University for budgeting and allocating money to cost centres.

66. In argument, it was contended on behalf of Roux that he relied principally on the authority of the Rector, Prof Russell Botman, and that of one of the Vice-Rectors, Prof Julian Smith.

67. The precise content of the authority alleged to have emanated from Prof Smith is elusive. Reference was made in argument to the following passages:

> *"Mnr Burger, ek het nou al herhaaldelik getuig en ek gaan aanhou dieselfde storie sê ter wille van die feit dat ek dieselfde vraag oor en oor gevra word. Elke jaar as deel van die afsluitingsproses, het ek in gesprekke getree met die omgewings, en in terme daarvan is daar besprekings gewees rondom wat is daar verdere behoeftes voor; wat is verdere goed wat ons moet voorsien en dies meer.*
>
> *Op grond daarvan het ons besluite geneem rondom transformasie; diversiteit; rugby; studente-verenigings; MFM; ek het dit al voorheen genoem, ek sê dit weer. My getuienis oor dit gaan nie verander nie. Ek sê dit herhaaldelik."*

and

"In terme van studente-omgewings sal dit die rapporteringslyne wees binne die studente-omgewing. So in hierdie geval sal dit die Vise-Rektor, gemeenskapsinteraksie en personeel wees wat op daardie stadium dit gedoen het, want dit was die rapporteringslyn vir die studentekomponent."

68. Reference was also made – as a more general description of Roux's interactions with Prof Smith – to a 25-page passage of Roux's evidence in chief.

69. I have found in none of these passages any support for the contention that Prof Smith authorised Roux to transfer University funds to the four cost centres. Prof Smith controlled a budget for the sports department as a whole, which he no doubt had authority to allocate to the different sporting codes in proportions determined by him. That budget totalled in the order of R44 million during the relevant period, 2002 to 2010. The amount actually allocated to the rugby club during that period from the Maties Sport budget was little more than R1 million. It is inconceivable that Prof Smith purported to authorise Roux to make additional budget allocations, not approved by Council, to the rugby club to a value almost approximating the entire budget allocated to him and exceeding the budget actually allocated to the rugby club by multiple of some 35.

70. There was something of a debate during argument as to whether or not what Prof Smith said to Roux was inadmissible as hearsay evidence. It arose in the

context of a comment made during Roux's cross-examination to the effect that Prof Smith was not going to be called as a witness.

71. To my mind, the hearsay debate is a red herring. The reported speech of Prof Smith does not establish the authority contended for. I would have thought that more relevant than the hearsay nature of the reported speech was the fact that Prof Smith was not called by Roux to corroborate Roux's version regarding authority. Given that I do not regard Roux's evidence of what he was told by Prof Smith as establishing an authorisation to transfer University funds to the four cost centres, it is not necessary to embrace this debate further.

72. It is necessary to return to the claim raised during argument that Roux's authority to allocate funds to the four cost centres emanated from Prof Botman. Prof Botman served as Rector of the University from 2007 to 2013. He passed away on 28 June 2014, prior to the institution of the action giving rise to this arbitration.

73. One of the few positive allegations made by Roux in his pleadings was introduced by an amendment to his plea effected on 28 October 2019. Roux pleaded that it was an express, alternatively tacit, alternatively implied term of his contract of employment that he was required to give effect to the instructions of the Rector of the University. He alleged that during or about 2007, Prof Botman instructed him to take all steps necessary to ensure the effective transformation of Maties Rugby as an important part of the University

and its brand and mission, in order to ensure its greater representation of all South African communities, in accordance with the University's transformation policy.

74. I am unable to discern from the amended plea any allegation to the effect that Prof Botman's instruction to Roux constituted authority to allocate funds to the four cost centres.

75. If that was what was intended to be pleaded, it was not sustained on the evidence. Roux himself gave no evidence that he had been authorised to effect such transfers, nor could he have believed that what was conveyed to him by Prof Botman amounted to such authority. While Roux testified to an overarching conversation at the Neelsie cafeteria at the University during 2007 and to various related discussions before and thereafter, he did not say in terms that Prof Botman had given him authority to allocate funds to the four cost centres.

76. The highwater mark of his evidence was a suggestion that such allocations were done as a consequence of Prof Botman's general instruction, rather than in terms of a presumed or actual authorisation. In Roux's words:

> *Ek sê nie hy het vir my 'n oop hand gegee nie; ek sê nie hy het vir my enige beperking of 'n onbeperking gegee nie. Ek stel dit glad nie. Ek sê die Rektor het vir my gesê ek kan alles in my vermoë doen ten einde dit (transformation) te bevorder. Dit is wat ek aan u stel.*"

77. Apart from the fact that no authority to make the allocations was ever recorded, there are two considerations that counteract any suggestion that Roux was authorised to act as he did. The first is that Prof Botman was still the Rector of the University when the KPMG forensic investigation was undertaken under the leadership of Waligora. Prof Botman at no stage responded to the investigation relating to the allocation of funds to the four cost centres by suggesting that he had authorised them. Waligora met with Prof Botman on several occasions to report on the progress of the investigation. His evidence in this regard was the following:

> "*... we didn't find any evidence of authority for that transfer from the reserves and I think I was asked yesterday about the Rector's authority and what the Rector had approved or what his authority was. It is true that we did not look at his authority specifically but we did report our finding to council at certain times and the Audit Committee and I have had the benefit of several interactions with Prof Botman and at no time was I given the impression that transfer from the reserves had been approved."*

78. I conclude that Prof Botman did not give authority to Roux to make allocations to the four cost centres. This renders it unnecessary to consider whether Prof Botman himself had the necessary authority to in turn authorise Roux to act as he did and whether Roux would nonetheless be under an obligation to obey Prof Botman's instructions irrespective of his authority to give them.

79. The only other basis for suggesting that he had authority to allocate funds to the four cost centres was that during the course of any particular year Roux on

a number of occasions allocated funds to cost centres in the ordinary course of his duties. That may well be so, but it cannot seriously be suggested that the allocation of funds to the four cost centres occurred in the ordinary course of Roux's functions or employment.

80. It was clear from Lombard's unchallenged evidence that B260 (or any other facet of the University's reserves) was not a source of funds that could be dipped into from time to time to make allocations to cost centres. A passage from his evidence in chief demonstrates this:

> *"MNR BURGER: In normale omstandighede, hoe dikwels behoort die verantwoordelike persoon toegang te kry tot B260? Wat is die noodsaaklikheid om toegang tot daardie kostepunt te kry gedurende 'n jaar?*
>
> *MNR LOMBARD: Dit word nie deur die loop van 'n jaar aangewend nie en sou net kon wees as die Raad byvoorbeeld 'n bepaalde uitgawe daaruit wou goedkeur, maar vir die res is dit net op jaareinde wanneer die resultaat van die universiteit bepaal word en daar 'n surplus, of, wat gelukkig nog nie in my tyd gebeur het nie, maar as daar 'n tekort is, sou jy die tekort ook teen die beskikbare balans, teen B260 kon afsit met goedkeuring van die Raad."*

81. It was submitted on behalf of Roux that no restriction was ever placed on his use of FFB121P. The argument appears to be that because Roux had authority to use FFB121P and because he was not instructed that he could not use the program to make unbudgeted and otherwise unapproved allocations to cost centres, he indeed enjoyed such authority.

82. That submission entirely ignores the nature of the position held by Roux. Not only was he, as suggested by his counsel, the person with the greatest knowledge of FFB121P (and thus, presumably, what it was intended to be used for), but in the positions he held in the Department of Finance, he was placed in a position of extraordinary trust where reliance on his honesty, integrity and trustworthiness would have gone without saying.

83. It also contradicts Roux's case that he was authorised by Prof Botman to allocate unbudgeted funds to the rugby club or that he had the authority generally to make such allocations, as was submitted on his behalf (but not pleaded). If it was within Roux's remit to employ FFB121P as and when he determined it appropriate, there would have been no reason for his having to rely on the instruction from Prof Botman.

84. I cannot accept that Roux honestly believed he was authorised to act as he did simply because no one had told him otherwise. The fact that he closed off the R593 and R594 cost centres and the fact that no further allocations were made from B260 to the four cost centres is strongly indicative of the fact that he knew he was acting improperly and in breach of his employment contract. So too is the fact that the approximately R400 000 that remained in H261 was left as "spares" for De Beer to spend on unbudgeted expenditure.

85. The only program available to him that would not disclose these allocations on the audit trail of the computerised system was FFB121P. An allocation to any

of the four cost centres using any other method, such as a journal entry, would have been detected (or at least capable of being detected). Roux knew what he was doing and wished to conceal his conduct.

86. Lombard, Ms Kotze (the employee of the University responsible in the finance division for the financial management systems, specifically the process of opening, closing, loading and maintenance of cost centres), Prof van Huyssteen (a former Dean of the faculty of Agricultural Sciences, Vice Rector of Research, acting Chief Director of Innovation, acting Rector and, from 2008, Executive Director of Finance) and Basson all testified that the differences between opening and closing balances of the four cost centres could only have been the result of the irregular manipulation the opening balances of the four cost centres. The program that was used was FFB121P.

87. When Basson saw how frequently Roux had used FFB121P over the relevant period, he expressed surprise, indicating that such use was "*verskriklik baie*", particularly when compared to Roux's successor's use of the programme. Roux testified that his predecessor had explained the use of FFB121P as part of the year-end process. However, his knowledge that the program could be used to allocate funds to cost centres 'H' and 'R' did not emanate from his predecessor, nor did he explain this process to his successor.

88. Presumably to counteract the contention that he acted secretively to conceal his use of FFB121P to alter the opening balances of the four cost centres, Roux

testified that Basson was aware of this conduct. The following exchange between Roux's counsel and Basson (prior to Roux giving evidence) evidences his response:

"MNR FAGAN: Nou u is steeds van die Universiteit van Stellenbosch, en ek wil graag regtig nie vir u enige moeilikheid maak met mnr Lombard of enige iemand anders nie, maar net om vir u te stel, mnr Roux sal getuig dat u getuienis nie juis is rakende u onkunde oor die verskuiwing van saldo's tussen kostepunte nie. Ek stel dit aan u - ek gee vir u geleentheid om daarop kommentaar te lewer.

MNR BASSON: Sê mnr Roux dat ek bewus was dat hy oordragte gedoen het tussen H en R-kostepunte toe nie?

MNR FAGAN: Nie spesifiek nie, maar oor die gebruik van 121P vir die verskuiwing van, of verandering van begin- en eindsaldo's van kostepunte. Was u bewus daarvan?

MNR BASSON: Tussen B300 en B260? Ja.

MNR FAGAN: En anders as dit?

MNR BASSON: Hy't dit uitgedruk en dit was gedoen gewees. Daar was nie enige uitdrukke van R-kostepunte in H-kostepunte wat ek van bewus is nie.

MNR FAGAN: En anders as B260 en B300, was u bewus van enige ander kostepunte waar dit gedoen is?

MNR BASSON: Kostepunt? B003 moes, is ook reggestel gewees, ja.

MNR FAGAN: En enige ander?

MNR BASSON: Enige ander kostepunte? Nee, nie wat ek kan van onthou nie.

MNR FAGAN: Goed. Mnr Basson, ek wil nie met u in geskil tree nie. Mnr Roux se getuienis gaan verskil van u s'n, en ons gaan argumenteer op die waarskynlikhede dat u sou bewus."

89. The following exchange took place during Roux's examination in chief:

> *MNR KUSCHKE: Nou u mag onthou dat 'n proposisie is aan mnr Basson gestel in kruisverhoor. Ek sal weer vir u sê wat die proposisie was. Dis aan hom gestel dat hy bewus was dat u oordragte gedoen het tussen H en – nee jammer, wat aan hom gestel is, is dat hy bewus was van die gebruik van 121P vir die verskuiwing van of verandering van begin en eindsaldo's van 20 kostepunte. Was hy? Hy was?*
> *MNR ROUX: Hy het letterlik 'n meter en 'n half van my gesit wanneer ons deur die proses gegaan het, so hy was bewus.*

90. It was followed by this passage in cross-examination:

> *"MNR BURGER: Hy het dit geweet. En in besonder is dit u getuienis dat hy geweet het van die skuiwe na wat ek van nou af aan die vier kostepunte gaan noem – H260, H261, R593 en 594. Hy was daarvan bewus.*
> *MNR ROUX: Dit is my getuienis. Ek sal dit graag wil kwalifiseer deur te sê dat hy sekerlik nie bewus was van een en elke skuif nie maar dat hy wel bewus was van die hoeveelheid fondse wat geskuif is, gegewe die feit dat ons in die opstel van die finansiële state en die balansering van die fondse daardie totale verskuiwings baie duidelik was.*
> *MNR BURGER: En sou hy dan ook geweet het dat u die program 121P daarvoor gebruik het?*
> *MNR ROUX: In terme van die verskuiwing van die fondse ja.*
> *MNR BURGER: Korrek. En sou u dan ook geweet het dat die oorsprong van daai fondse was B260?*

MNR ROUX: Dat die oorsprong uit die B reeks was definitief, en elke geval B260 sou ek nie dit kon sê nie.

MNR BURGER: Sou hy geweet het dat die meerderheid van daardie skuiwe van B260 sou kom?

MNR ROUX: Hy sou dit geweet het mnr Burger.

MNR BURGER: Dit beteken dat sy getuienis grootliks verkeerd is wat hy aan hierdie arbitrasie gelewer het."

91. The resolution of this dispute appears to me not to be critical in determining Roux's liability to meet the University's claims. It was, as can be seen, hardly explored in any detail. The only basis offered by Roux for contradicting Basson's evidence was that the two had worked through the "*process*" together. Quite what this process was, is unclear. When Basson was cross-examined, the process referred to was the year-end closing of the accounts, commencing in 2004.

92. Basson was taken aback when he was confronted with the allegation made in cross-examination that he was aware of Roux's use of FFB121P to allocated funds to the four cost centres. Whether he was startled by a revelation of his knowledge of what Roux had done or surprised by a suggestion at odds with his own knowledge, is impossible to discern with certainty, although the probabilities suggest the latter.

93. While it was put to Basson that Roux's evidence would differ from his, it was not explained to him in what respects this would be so. It may be that in considering the transcript of the evidence, the extent of the difference is apparent, but it may not have been apparent to Basson during the cut and thrust of cross-examination.

94. It was suggested that the conflict between Roux and Basson's evidence on this issue could be decided on the probabilities. I am not convinced that this is correct. One or other of Basson or Roux did not give truthful evidence. I am not prepared to make any adverse credibility finding on so sparse a basis as was presented. Particularly because, in my view, there is no need to do so. Roux acted secretively. Whether or not he chose to share that secret with Basson is of no moment. Certainly, Roux's use of FFB121P was not drawn to the attention of the University.

95. Roux complained in the submissions made on his behalf that he had been "targeted" by the University. The submission has its origin in the following passage of Roux's evidence under cross-examination:

> "*Mnr Burger, foute van die Universiteit van Stellenbosch en soos ek die afsluitingsproses vir u verduidelik het, en hoe dit op 'n daaglikse basis in ons dagtake gewerk het, hulle het al die afdelings van die Universiteit Stellenbosch, al die verskillende direkteure, rektore en dies meer, was daar 'n daaglikse handeling rondom die teboekstelling van transaksies, die*

uitvoering van opdragte, die uitvoering van transaksies, die verandering in terme van kostesentrums, waarnatoe geld skuif, en dies meer.

As ek die gesprek met 'n Dekaan gehad het en hy't my gevra om 'n bepaalde afsluiting te hanteer van een na 'n ander, dan het ek dit so gedoen. Om in my dagtaak elke keer wanneer ek 'n gesprek met 'n Dekaan, 'n navorser of enige iemanderster te hê, om dit dan op te volg met 'n epos om te sê, "ek bevestig net die volgende gesprek", sou ek nooit by my werk uitgekom het nie.

Die hoeveelheid transaksies en aksies wat op 'n dagtaak gebasseer is, sou dit basies ontmoonlik gemaak en dit was nie nodig nie, want ek die opdrag gekry en ek het die opdrag uitgevoer. Ek het die opdrag te boek gestel.

Ek het die oudit spoor daarvan gelos en niemand het in 10 jaar vir my gesê ek het dit verkeerd gedoen nie. Niemand het in 10 jaar betwyfel wat daar gebeur het nie, want ek het bloot my opdragte uitgevoer."

96. The argument, following the line taken by Roux in his evidence, was that the University had taken issue with his allocation of R37 116 402 to the four cost centres, when these were no different from the allocations made by him on a daily basis in respect of innumerable other cost centres.

97. The fallacy in the argument is evident from the quoted passage of Roux's evidence. In the example he gives, the Dean of a faculty requests him to close off (i.e., transfer a balance from) one account within the faculty to another account within the same faculty. Both fall within the budget of the faculty. His authority for doing so is the request from the Dean. His method of doing so is to effect a journal entry, which leaves an audit trail. Had Roux been asked who

had authorised him to allocate funds from the one account to the other, his answer would have been the Dean of the faculty. He could not have provided a similar answer to the same question posed in relation to the allocation from B260 to the four cost centres.

98. Apart from the legitimate use of FFB121P, for example in the closing off of B300 to B260, Roux did not point to an instance where he used that program to allocate funds from the reserves of the University to cost centres in circumstances where that expenditure had not been budgeted or otherwise authorised, other than in the case of the four cost centres.

99. The facts do not justify the inference contended for on behalf of Roux, namely that because KPMG decided that Roux had acted wrongly in allocating funds to the four cost centres in the manner he did, the University had "*targeted [Roux] by way of hindsight*" by picking out "*four cost centres out of some eleven thousand, and in respect of about R37 million out of billions of rands*". Indeed, there is no suggestion in the evidence or elsewhere that Roux allocated funds to any other of the approximately 11,000 cost centres using FFB121P.

100. Roux no doubt had authority to make allocations of funds to cost centres. Those allocations were either budgeted for or subsequently authorised. Roux did not have the capacity or the authority to determine how the funds of the University were to be allocated from its reserves. The examples he gives of instances where he allocated funds to cost centres do not establish an

entitlement or authority to have done what he did in allocating substantial funds to the four cost centres.

101. I cannot find on the evidence that Roux was authorised to allocate funds to the four cost centres.

102. I accordingly find that the University has established his breach of his employment contract in the terms pleaded.

The WPRI

103. The University alleged in its particulars of claim that during the period 28 July 2008 to 26 March 2010, Roux caused the University to pay R4 340 276 to or on behalf of the WPRI in terms of an obligation that, without authority, Roux had incurred in terms of an agreement he had reached with Western Province Rugby (Pty) Ltd.

104. These payments were recorded in a cost centre designated "*WP Rugby Instituut"* (number 9740), for which Roux was responsible. The only source of funds for cost centre 9740 was a journal entry effected on 15 August 2010, shortly before Roux's departure from the University, by which R2 535 878 was transferred from cost centre R593.

105. This amount was insufficient to meet the full amount paid, leaving a deficit on the cost centre of R1 804 398 at the time of Roux's departure from the University. The deficit was made up of 16 individual payments made out of cost centre 9740. This deficit was required to be funded out of the University's unrestricted reserves.

106. The University alleged that Roux was liable to repay the R1 804 398 shortfall to it on the basis that it had been paid "*without the knowledge or authorisation of the Council (or its authorised delegate)*". In addition to alleging that the payments were unauthorised, the University alleged that the payments were not consistent with its processes, policies and principles, because Roux had failed to make application or obtain authorisation for this expenditure and had made payments on behalf of the University without there being any legal obligation to do so.

107. The allegations in the particulars of claim were initially met by a bald denial, which was amplified in Roux's amendment of his plea on 28 October 2019 by the allegation that:

> "*… the first defendant pleads that several members of the University's senior management and members of the Audit and Risk Committee of the University served as members of the board of Stellenbosch University Sports Performance Institute (Pty) Ltd, Western Province Rugby (Pty) Ltd and the management committee of the Western Province Rugby Institute. These included Mr Jannie Durant, Prof Julian Smith, and Prof Leopold van*

Huyssteen who were all involved in the discussions and arrangements in respect of that Institute."

108. The upshot of this amplification is that Roux alleged that other persons involved with the University were involved in the discussions and arrangements in respect of the WPRI. In keeping with Roux's approach to his pleadings, there is no express allegation that any of the persons he mentioned authorised the conclusion of a contract with the WPRI or authorised (or were empowered to authorise) any of the payments.

109. As a matter of fact, the evidence did not establish that any representative of the University was aware of the relationship between the University and the WPRI in the context of payments of University funds to the WPRI by Roux. Roux accepted that Durand was not a representative of the University at the relevant time. He only became involved at the University as a member of the Council and the audit and risk committee in 2011. Prof van Huyssteen's evidence was that he was unaware of the WPRI. Lombard was equally unaware. He testified that when he instructed Basson to contact the WPRI during the course of the KPMG audit, the WPRI informed Basson that their contact person had been Roux. Prof Smith was not called to testify on behalf of Roux.

110. The University's evidence was squarely to the effect that Roux had no authority to enter into any agreement with the WPRI or to make any payments

to it, for its benefit or on its behalf. Lombard's evidence under cross-examination was as follows:

> "*MNR KUSCHKE:* *Dat Mnr Roux hoegenaamd geen magtiging gehad het om die kontrakterings sfeer om die Universiteit te verbind tot die uitgawes wat gevloei het onder die WP Rugby Instituut kostepunt nie? Was dit die klagte teen 13 Desember 2013?*
>
> *MNR LOMBARD:* *Soos ek so pas gesê het is dit wyer as dit, dit gaan ook oor die - daar was geen begroting voorgelê en goedgekeur daarvoor nie.*"

111. In evidence, Roux admitted that the expenditure of R1 804 398 was incurred during the period 2008 to 2010 and that he was the person responsible for incurring the expenditure. This expenditure remained unfunded in the accounts of the rugby club. Roux's attitude was that on his departure from the University (when the source of funds allocated by employing FFB121P dried up), this shortfall became the responsibility of the rugby club.

112. In argument, Roux's counsel submitted that this claim was speculative and unsustainable. It was contended that three different manifestations of the claim emerged from the statement of claim, the findings of KPMG and the evidence of Lombard, being: (a) that of payment without the knowledge or authorisation of Council as pleaded in the statement of claim; (b) that of the failure to flag a potential conflict of interest as emerges from the KPMG final report dated 13 December 2013; and (c) that of concluding a contract without authorisation as a Lombard testified.

113. It was argued that no evidence was presented on behalf of the University that the knowledge or authorisation of the Council was required before payments to the WPRI could be made. This, so it was argued, was fatal to the University's case because it had not alleged that the funds came out of the unrestricted reserves and were for that reason under the control of the Council. It was emphasised that the only allegation of breach discernible on a fair reading of the statement of claim was payment without knowledge or authorisation of the Council.

114. In my view these criticisms are unfounded. The issue of authority to conclude the contract and authority to make payment to or on behalf of the WPRI is raised squarely in the particulars of claim. As touched on above, three separate allegations of breach are discernible from the particulars of claim:

114.1. that the payment was made without the knowledge and authorisation of Council;

114.2. that Roux failed to make application for the expenditure and to obtain the requisite authorisation from the Council or its authorised delegate; and

114.3. that Roux made payments by the University without any legal obligation on the University to do so.

115. The allegation of an absence of a legal obligation arises, on the University's case, because no contract was concluded with the WPRI in terms of which it became liable to make payment of the amount in question.

116. The University did not rely on KPMG's finding of a potential conflict of interest, and that is accordingly irrelevant for the purposes of its pleaded claim. I agree with the submission made on behalf of Roux that the evidence by Lombard to the effect that Roux had not been authorised to sign any contract between the University and the WPRI is not material, given that no such agreement was signed. The University's complaint, however, is one that without any authority to do so, and without the University being under any legal obligation to do so, Roux used the University's funds to pay expenses related to the WPRI.

117. A further contention advanced is that Roux was authorised to sign contracts on behalf of the University by virtue of being a delegate of Lombard. This is correct. However, Roux himself testified that he would not have signed a contract by which the University acquired shares in a company (the idea was for the University to acquire 50% of the shares in the WPRI) without going through the requisite process, which meant requesting legal services to vet and approve the contract.

118. The difficulty is that he committed the University to the payment of large sums of money without even concluding a contract. The fact that he did so with

money allocated from B260 to the extent of R2 535 878 is problematic for the reasons already dealt with under the main claim.

119. The fact that the WPRI may have been "*a good thing for Maties Rugby*" is neither here nor there: being a 'good thing' is no justification for the misallocation of University funds. Likewise, the fact that Lombard approved cost centre 9740, which was assigned to Roux, takes the matter no further. As appears from Lombard's cross examination, the approval of the cost centre was a perfunctory administrative function. It certainly did not amount to authority to conclude a contract or to pay some R4.3 million to a private company without authority and without the University having agreed to assume that obligation by signing the contract (which had been drafted but apparently not completed).

120. I accordingly find that the University established the breach of contract alleged against Roux in relation to this aspect of the claim.

Damages in respect of Roux's breach of contract

121. In formulating the relief sought against Roux in its heads of argument, the University indicated that while it still claimed payment of the full amount of R37 116 402 from Roux, it did so differently from the way in which its claim was formulated in the particulars of claim. It allocated R32 776 127 to the first heading and R4 340 276 to the second heading on the basis that that figure represented a loss occasioned by the payments to WPRI.

122. That change was effected without formal amendment, an issue raised by Roux's counsel during argument. I am, of course, bound to determine the issues defined by the pleadings (*Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare* 2008 (2) SA 609 (SCA) at par 30). I do not, however, discern that the issues to be decided are any different by virtue of the altered formulation of the relief sought. I do not read *Hos+Med* as prohibiting an arbitrator from awarding damages in a quantum not expressed in the pleadings. Nonetheless, and so as to avoid any controversy, I will deal with the quantum of the University's claim as it was pleaded, without finding that I am precluded from following the approach adopted by the University in its heads of argument. The end result is in any event the same.

123. The University's claim is presented as one for general damages arising from the breach by Roux of his contract of employment. The allegation is simply that as a result of the facts pleaded and the headings (a) and (b) of the particulars of claim against Roux "*the University has suffered damages in the amount of R37,116,402 and Roux is indebted to the University in that amount*".

124. In presenting its argument on the damages that should be awarded to it as a result of Roux's breach of contract, the University drew parallels with the requirements for the delict or crime of theft. Unfortunately, this caused some confusion, with Roux's counsel going so far as to submit that the University had changed its case entirely and was now relying on an allegation that Roux had committed a delict. That was not the University's case. It never alleged or

established that Roux stole the University's money. The claim is based on a breach of contract and the value in the many references to the concept of theft in other circumstances was to draw attention to the fact that this could occur in circumstances where the victim was deprived of its right to control the use of its money (*S v Boesak* 2000 (3) SA 381 (SCA) par 99).

125. Rather, as it recognises in the heads of argument, the University's complaint is that it suffered a loss by reason of Roux appropriating the University's funds by allocating them to the four cost centres as he did. By doing so, he assumed control of the University's funds, which he spent, or caused or allowed to be spent, albeit following the correct procedures, in circumstances that deprived the University of the benefit of its funds. As a result of his conduct, the University was deprived of its right to spend the misallocated money as it saw fit and in accordance with its own procedures.

126. This resonates with the University's pleadings, which allege that by his conduct, Roux effectively reduced the University's unrestricted reserves.

127. The authors of LAWSA op.cit. at 254 say, principally on the authority of *Atlas Organic Fertilizers v Pikkewyn Ghwano* 1981 2 SA 173 (T) at 204 and *Victoria Falls & Transvaal Power Co v Consolidated Langlaagte Mines* 1915 AD 1:

"If an employee does not comply with his or her duties in material respects, his or her employer may not only cancel the contract and dismiss the employee, the employer may also, if he or she has suffered damages as a result of the conduct of the employee, claim those damages. The employer is entitled by means of damages to be placed in the same position as he or she would have been if the employee had complied with the conditions of the contract.

At common law, the amount of his or her damages is therefore the difference between his or her present position and the position in which he or she would have been had the employee not committed breach of contract."

128. The University has alleged a loss sustained as a result of a breach by Roux of his contract of employment. It must therefore show not only that it has done so, and the quantum thereof, but also, in the ordinary course, that the damages it claims serve to place it in the same position as it would have been had Roux complied with his contractual obligations.

129. Roux raised a number of arguments in relation to the question of damages. The first of these is that the University should have alleged and proved special damages.

130. The University's case was that the damages it claimed were general damages, that is damages that flowed naturally and generally from the kind of breach committed by Roux. Roux contends that it was wrong in so doing.

131. The distinction between general and special damages arising from a breach of the contract was authoritatively drawn by Corbett JA in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687:

> *"To ensure that undue hardship is not imposed on the defaulting party . . . the defaulting party's liability is limited in terms of broad principles of causation and remoteness to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach (Shatz Investments (Pty) Ltd v Kalovyrnas 1976 (2) SA 545 (A) at p 550). The two limbs, (a) and (b) of the above-stated limitation upon the defaulting party's liability for damages correspond closely to the well-known two rules in the English case of Hadley v Baxendale (1854) 150 ER 145, which read as follows (at p 151):*
>
> > *'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'*
>
> *As was pointed out in the Victoria Falls case [1915 AD 1, 22] the laws of Holland and England are in substantial agreement on this point. The damages described in limb (a) and the first rule in Hadley v Baxendale are often labelled "general" or "intrinsic" damages, while those described in*

limb (b) and the second rule in Hadley v Baxendale are called "special" or "extrinsic" damages.'

132. More recently, in *MV Snow Crystal: Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) par 35, the test was reiterated as follows:

"*To sum up therefore, to answer the question whether damages flow naturally and generally from the breach one must enquire whether, having regard to the subject-matter and the terms of the contract, the harm that was suffered can be said to have been reasonably foreseeable as a realistic possibility. In the case of 'special damages', on the other hand, the foreseeability of the harm suffered will be dependent on the existence of special circumstances known to the parties at the time of contracting*."

133. Can it be said that the loss occasioned by the misapplication of an employer's funds in breach of his contract by employee *"flow naturally and generally from the kind of breach of contract in question"* or *"can be said to have been reasonably foreseeable as a realistic possibility"*? In my view the answer is manifestly yes. The loss occasioned is not of a nature ordinarily regarded in law as being too remote to be recoverable unless actually or presumptively contemplated.

134. It was argued on behalf of Roux that the natural consequence of a breach of his employment contract insofar as they incorporated the universities rules and regulations would be the institution of disciplinary proceedings. To my mind,

that confuses the correct approach to the determination of the nature of the damages required to be proved.

135. The argument appears to be that a claim for damages is excluded by virtue of the option of disciplinary proceedings available to the University. But there would be no substance to such an argument because there is nothing in the contractual material (a concept advisedly expressed in wide terms given the various documents relied upon by the University) that suggests that the University abandoned or waived its right to claim damages in favour of the right to pursue disciplinary proceedings exclusively.

136. Furthermore, it is not the natural consequence of the breach that is relevant, but the nature of the damages that flow from that breach.

137. The submission that a contract of employment is not the kind of contract that would usually result in damages being imposed on the employee for breaching its terms is contradicted by the passage in LAWSA *op.cit*. at paragraph 254, quoted above. I regard that statement as correctly expressing the law.

138. Roux points to the fact that there is no express term of the employment contract that anticipates damages for breach. There need be no such express term. The absence of such a term takes the matter no further.

139. A further point raised is that the effect of an allocation of funds to a cost centre is not that the funds leave the University or even the University's bank account. But that is precisely the purpose of the allocation of the funds: the money allocated is intended to be used to pay funds out of the University. That is indeed what occurred as a matter of fact. It is not in dispute that the funds allocated to the four cost centres by Roux found their way out of the University. The fact that the correct procedures may have been followed in expending the proceeds of the allocations does not render the expenditure legitimate where the source of the expenditure is allocations made in breach of Roux's contract of employment.

140. It was submitted that the person responsible for a cost centre did not ordinarily have to apply to Council for authorisation prior to making a payment out of funds allocated to that cost centre. That is as may be, but cost centres were not ordinarily allocated funds other than in accordance with the University's budgeting process. Roux was not entitled to allocate funds to the four cost centres and payments made from those cost centres did not take on a cloak of legitimacy merely because the correct procedure was followed in authorising and making the subsequent payments.

141. I accordingly find that it was not necessary for the University to plead and establish special damages in the circumstances of this case. Its case is based on a claim for general damages aimed at placing it in the position it would have occupied had Roux complied with his contractual obligations.

142. Roux contends that the University failed to prove the amount of damages that it suffered as a result of his breach of contract. It was submitted that the University had failed to produce the best evidence available of its monetary damages. That it is an obligation resting on a plaintiff claiming damages to place the best evidence available before the court cannot be doubted. A court cannot be expected to *"embark on conjecture in assessing damages where there is no factual basis in the evidence or, an inadequate factual basis for an assessment"* (Monumental Art Company v Kenston Pharmacy (Pty) Ltd 1976 (2) SA 111 (C) at 118E).

143. But there is no invitation to indulge in speculation or conjecture in this matter. The amount of money lost to the University as a consequence of Roux's breach, both in respect of the allocation of funds to the four cost centres and in relation to the payment required to be made to rectify the deficit in R593, is established merely by having regard to the admitted transactions.

144. It is artificial to say, as a Roux does, that after the allocation of funds, but before they are spent, they remained an asset of the University, and that therefore no damages are suffered merely as a result of the reallocation of the funds. It is artificial because it ignores the subsequent payment out of the University of those same funds. The funds are no longer available to the University because they were allocated to the four cost centres in breach of Roux's contractual obligations and, having been so allocated were, unsurprisingly, spent.

145. Roux contended that the University had not pleaded a calculation of the amount by which its patrimony had been reduced. There was no need to do this. It is clear from the particulars of claim that the reduction of its patrimony of which the University complains is precisely the sum allocated to the four cost centres by Roux and subsequently paid out of the University, coupled with the deficit in R593, which the University was obliged to make up. The University proved a reduction in its patrimony equal to the amount of its claim in the sense that its reserves would, over the relevant period, have been greater than they were to the extent of the loss it suffered.

146. It is therefore incorrect to submit, as Roux did, that it is impossible to tell what position the University would have been in had Roux performed his employment contract properly.

147. In *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* (*supra*) the court held:

> *"The agreement was not one for the sale of goods or of a commodity procurable elsewhere. So that we must apply the general principles which govern the investigation of that most difficult question of fact the assessment of compensation for breach of contract. The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party."*

148. The University pleaded that its damages were equal to the amounts mis-allocated from B260 and the deficit on cost centre R593. This was met by the pleading of a bare denial.

149. Rule 22(2) provides:

> "*The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies* (emphasis added)."

150. The authors of Erasmus Superior Court Practice comment as follows regarding the underlined portion of the rule:

> "*What is required of the defendant is that he states the grounds of his defence with sufficient precision, and in sufficient detail to enable the plaintiff to know what case he has to meet … In some cases, even if the defendant deals with all the allegations in the plaintiff's combined summons or declaration, his defence will not properly appear. A bare denial of the plaintiff's allegations may in certain circumstances not fully convey to the plaintiff the nature of the case he has to meet. An explanation or a qualification of a denial will, for example, be necessary where the denial is partial or where it implies some positive allegation by way of explanation upon which the defence will rest.*"[254]

151. Roux's pleaded case is not that his conduct caused the University to obtain some advantage from the transfers out of B260. Had that been his case, he

would, in accordance with rule 22(2), have been required to plead such as much.

152. Roux gave notice of his intention to call an expert to give evidence on the financial benefit to the University in the form of the enhancement of its reputation resulting from increased television viewership of its rugby matches that it enjoyed as a consequence of the expenditure of funds improperly allocated to the four cost centres. On more than one occasion during the course of the arbitration, the University indicated that it would object to the introduction of such evidence on the basis that it was not foreshadowed in Roux's pleading. The matter was not pressed on behalf of Roux and no expert was called to give the evidence foreshadowed.

153. Against this background it was argued that the University had failed to prove its damages because it had failed to show the extent of the benefits it had obtained by virtue of the expenditure of the funds allocated to the four cost centres. It was contended in Roux's heads of argument that because the onus was on the University to show "*the difference between the economic position which [it] would have enjoyed had there been no breach and the position in which [it] found itself as a result of the breach*", an onus rested on the University to plead and prove the extent of any benefits it obtained.

154. The normal method of determining contractual damages is to determine what compensation is required to put the innocent party in the position it would have

occupied had the contract been properly performed (so-called positive *interesse* or expectation interest, rather than negative *interesse* or reliance interest). The quoted formulation is that for determining negative *interesse* when that is appropriate in a contractual setting.

155. The amount of money required to place the University in the position it would have occupied had Roux not breached his contract, but performed it properly, is pleaded to be the amount claimed in the particulars of claim. Roux did not plead, for example, that the money expended by the University had been used to acquire some asset, the value of which should be taken into account in assessing compensation. Absent that pleading (and proof of the allegations), I disagree that it was incumbent upon the University to prove the nature, extent and value of any benefit obtained as a result of the expenditure of funds improperly allocated to the four cost centres.

156. A related issue is whether the University was required to show that it had received no "compensating benefits" in the sense that this term is used to denote a collateral benefit that may be taken into account in determining the quantum of damages.

157. I am not convinced that the collateral source rule (as it is termed by the writers) applies on the facts of this matter. It is generally recognised that the 'rule' applies where the plaintiff has received some benefit from a third party, such as a gift, the proceeds of an insurance policy or the savings of income tax

(Visser & Potgieter Law of Damages 3rd ed pages 266- 273, par 10.17). I proceed, however, on the assumption that it does.

158. The distinction is drawn between the damage caused by an event and any benefits that may also be caused by such an event in the following passage from Visser & Potgieter Law of Damages *op.cit.* par 10.2.4:

> "*The correct analysis of problems regarding the collateral source rule and the effect of compensating advantages reveals that one is not dealing with the assessment of damage but with a calculation of compensation. Thus damage is determined without referral to the benefits resulting from the damage-causing event. However, when the appropriate amount of damages is to be calculated, it must be considered if, and to what extent, the beneficial consequences of the damage causing event should influence the award to which a plaintiff is entitled.*"

159. If compensating benefits are relevant in the context of this matter, the question arises as to which of the parties was obliged to prove their presence or absence and, if applicable, their quantum.

160. Roux submitted that the only onus that rests on a defendant from whom contractual damages are claimed pertains to mitigation. He relied in this regard on a passage in Harms Amler's Precedents of Pleadings, 8th ed page 116 and *Everett and another v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C) at 201H. The reference in Amler's is authority only for the proposition that the onus to establish a failure to mitigate rests on a defendant. *Everett* at the referenced portion says much the same thing. Neither are authority for the proposition that

there is only a mitigation onus cast on a defendant in such circumstances or that the onus to show the absence of compensating benefits rests on a plaintiff.

161. On the other hand, there is authority for the proposition that the onus to establish a compensating benefit rests on the defendant, as the following passage from Visser & Potgieter Law of Damages at page 265 para 10.16, with my emphasis, shows:

> *"The principle is well known that a plaintiff has the onus to prove the extent of his or her loss as well as how it should be quantified (expressed in an amount of money). However, in terms of the correct approach to the collateral source rule, it does not relate to the assessment of damage but concerns the normative question whether the particular benefits have to be deducted from an amount of damages; in other words it relates to the adjustment of an amount of damages in favour of a defendant. It would therefore be logical to accept that, once a plaintiff has proved his or her damage and quantified such loss, any subsequent reduction thereof in favour of the defendant is a matter that the latter has to prove.... However, if the incorrect theory is adopted that the collateral source rule relates to the assessment of damage, it will be for a plaintiff to prove that particular benefits do not reduce his or her damage (and damages)."* (Emphasis added.)

162. The underscored portion of this passage refers in a footnote to two cases, *Standard General Insurance Co Ltd v Dugmore NO* 1997 (1) SA 33 (A) and *Minister van Veiligheid en Sekuriteit v Japmoco BK* 2002 (5) SA 649 (SCA).

163. *Dugmore* dealt with the question, in the context of a delictual claim for damages, whether consequential benefits received or receivable by a plaintiff reduced his claim to the extent of the benefits. Two benefits accrued to the plaintiff as a result of the delict of which he was a victim. The majority of the court held that the first benefit – a monthly disability pension – was deductible from the plaintiff's loss but held that the second benefit – that under a group accident insurance policy – was not. The case thus dealt with the application of the so-called collateral source rule. At page 44E of the report, Olivier JA, held as follows:

> *"To begin with, the appellant* [the defendant in the court *a quo*] *must show (according to Dippenaar's case) that the benefits were payable "under the contract of employment". Given that this formulation must be applied in a flexible manner, it means, in my view, at least that the employee should be able to rely on the contract of employment as the source of his entitlement to the benefits. Such entitlement must appear from or originate in his contract of employment."* (The reference to Dippenaar's case is to *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A)). (Emphasis added.)

164. In *Japmoco*, the respondent, a second-hand car dealer, instituted action against the appellant for damages on the basis that members of the South African Police Service had co-operated with a syndicate of car thieves to sell stolen cars. Certain of the vehicles were sold to a second-hand motor vehicle dealer, Pro-fit, which in tum sold the vehicles to the respondent. The appellant argued (in the alternative) that the respondent had failed to prove the quantum of his

damages, as the respondent had concluded a co-operation agreement with Pro-fit and had received certain repayments from Pro-fit which could not be quantified.

165. In dealing with the argument that the appellant had failed to establish the quantum of its damages, the court held:

> *"Waar 'n eiser, soos hier, die omvang van sy skade prima facie bewys, berus dit by die verweerder om aan te toon dat daar sekere voordele is wat die eiser toekom en wat na regte van die skadevergoedingsbedrag afgetrek moet word (vgl Visser en Potgieter Skadevergoedingsreg te 215). Word daardie feit deur die verweerder bewys of deur die eiser erken, maar die omvang daarvan is onseker, berus dit by die eiser, wat beter as die verweerder daartoe in staat is, om dit te kwantifiseer, ten einde te bewys wat die balans is waarop hy teenoor die verweerder op betaling geregtig is."* (Emphasis added.)

166. While these *dicta* may be *obiter* and thus not binding on me, they are highly persuasive, and I respectfully agree with the learned authors of Visser & Potgieter Law of Damages that it is for the defendant who wishes to rely on compensating benefits to plead and prove their existence. Whether what the learned authors refer to as an onus is truly that, or an evidential burden, is not a matter I need to decide in this award. Reliance on authorities such as *Soar h/a Rebuilds for Africa v JC Motors en 'n Ander* 1992 (4) SA 127 (A), *Hazis v Transvaal and Delagoa Bay Investment Corporation Ltd* 1939 AD 372 and *Desmond Isaacs Agencies (Pty) Ltd v Contemporary Displays* 1971 (3) SA 286

(T) is misplaced principally because those cases deal with mitigation and not compensating benefits.

167. Roux neither pleaded nor proved the existence of compensating benefits.

168. As far as the WPRI claim is concerned, it is common cause that Roux paid R1 804 398 in the manner described above. It is not disputed that he did so from cost centre R593 in circumstances where that cost centre had insufficient allocated funds to meet that payment. The result was that the University had to rectify the deficit in cost centre R593 by allocating funds to it from the University's contingency reserves. It suffered a loss to that extent.

Conclusion – Roux

169. I find, in conclusion, that Roux's conduct in allocating the University's funds to the four cost centres constituted a breach of his employment contract which gave rise to the University suffering damages in the amount alleged in the particulars of claim, namely R35 312 004. I find also that he breached his contract of employment by incurring expenditure of R1 804 398 on behalf of the University in relation to the WPRI when he was not authorised to do so and in circumstances where the University had not in fact incurred such an obligation. The total sum of the damages is, therefore, R37 116 402. This is the sum claimed in the particulars of claim when the deduction of the now-

abandoned joint and several claim against both Roux and De Beer is ignored. It is also the sum claimed in the University's heads of argument.

De Beer

170. By the time the matter was argued, the case against De Beer had narrowed substantially. A single claim remains.

171. The University's case against De Beer was, as with Roux, premised on his breach of his employment contract giving rise to the University sustaining damages. It was also premised on an undertaking given by De Beer.

172. As to the breach by De Beer of his employment contract, the University alleged that during the period 25 January 2006 to 1 November 2012 and in breach of his contract of employment, De Beer used fictitious receipt transaction codes to record receipts in a total amount of R1 942 195 in the University's computerised accounting system in circumstances where that money had not been received by the University. (The difference between R1 942 195 and the R1 904 511 claimed appears to have been ignored in the prayer. The difference is, in any event, *de minimis*. Nonetheless, it was explained during argument that the figure of R1 904 511 failed to account for monies transferred during 2006 and 2007, which I was informed the University was not claiming.)

173. As to the claim based on De Beer's undertaking, the allegation is that he undertook to pay an amount of R1 904 511 to the University.

174. The point was taken in oral argument on behalf of De Beer that the University had failed to seek an order for specific performance. There is no specific allegation in the particulars of claim to the effect that De Beer breached his undertaking to pay. However, a fair reading of the particulars of claim makes it plain that this was the intention. The University claimed R1 904 511 of a larger sum of money from De Beer on the basis of an agreement in terms of which De Beer consented to the appropriation by the University of his pension benefits in that amount.

175. This is reiterated in the University's replication. Most significantly, however, it is recognised in De Beer's plea. There he admits the agreement (or at least the offer that was accepted by the University) but seeks to avoid its consequences on a number of different grounds, including that it is void, unenforceable, and must be read subject to tacit terms so that, ultimately, he alleges that the University is not entitled to rely on it.

176. It is manifest that both parties understood the claim to be one also premised on a breach of the undertaking. I cannot accept, as was submitted, that the only purpose of pleading the undertaking was to reduce the quantum of the claim from R1 942 195 to R1 904 511. The issue of compliance with the undertaking clearly arises on the pleadings.

177. In my view, the pleading of the terms of the agreement to pay a sum of money to the University and the claim in the prayers of that sum of money amounts to a claim for specific performance.

178. The University also seeks declaratory relief on the basis that De Beer agreed to relinquish his pension benefits in settlement of the debt and that the jurisdictional requirements of section 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956 ("*the PFA*") have been met.

Contract of employment – De Beer

179. The features of De Beer employment contract relied on by the University are the same as those relied on by it in relation to Roux. His plea in relation to those allegations mirrors that of Roux. On the strength of my findings in relation to Roux above, I find that it was incumbent on De Beer, in terms of his contract of employment, to act in good faith, with honesty, in the interests of the University and in compliance with its regulations, rules and procedures of financial management.

180. It is alleged that De Beer breached his employment contract by manipulating 66 student debtor accounts to show that payments had been received on those accounts where that was not the case. This created the false impression that there was a credit balance on those student accounts that could be used to offset

debits made against those accounts, or that debits on the accounts were paid by applying the fictitious credits.

Breach – De Beer

181. De Beer denied any breach of his employment contract. De Beer's response to the allegation that he had misrepresented receipts on the student accounts was to:

181.1. deny that he had used fictitious receipt transaction codes to record receipts in the amount claimed;

181.2. deny that the fictitious receipt codes were shown as payments received by the University;

181.3. deny that the sundry debtors arising from the fictitious transactions were irrecoverable and required a write off by the University; and

181.4. plead that *"(t)he alleged transactions constituted legitimate payments in settlement of legitimate expenses and/or debts of the University (owed by itself through its own rugby club); and (a)t the time of entering of the transactions, the said expenses and/or debts were due and owing by the University's rugby club"*.

182. The pleading of legitimate payments quoted in paragraph 181.4 above is at odds with the denials that precede it. For reasons already dealt with in relation

to Roux, the reliance on the alleged legitimacy of the payments does not assist De Beer: it was not for De Beer to create the misleading impression that credits had been legitimately applied to student accounts where in fact that was not the case. Doing so allowed him to use the University's funds improperly and dishonestly to meet expenses of the rugby club as the discussion below shows.

183. The University called four witnesses to testify in support of its claim against De Beer: Lombard, Waligora, and Ms Swart and Mr Immelman (the latter two both accountants within the University's student fees division, who reported to De Beer).

184. De Beer did not testify, nor did he call any witnesses. During oral argument the significance of this was emphasised by reference to *Di Giulio v First National Bank of SA Ltd* 2002 (6) SA 281 at par 29, where the following is said:

> "*Once the party bearing the onus of proof has made out a prima facie case, his opponent is burdened with an onus of rebuttal. Should he fail to discharge this onus of rebuttal, prima facie evidence would be regarded as sufficient evidence for purposes of discharging the main onus of proof. Even more so would this be the case if he has personal knowledge of facts or information relevant to the discharge of such onus, but fails or refuses to testify. Under such circumstances an adverse inference may be drawn against him."* (References omitted).

185. The adverse inference in a case such as this is that De Beer was himself unable to testify, or produce witnesses who were able to testify, in contradiction of the evidence adduced by the University.

186. The evidence of the four University witnesses was to the effect that De Beer had unlawfully made payments from student accounts created in circumstances where either the identified student had never been registered as a student at the University, or that student was no longer a student of the University. De Beer had used fictitious receipt codes to conceal payments from these student accounts.

187. In heads of argument it was raised behalf of De Beer that the University had not established that the 66 payments in issue had been made irregularly. What I have said in relation to this defence raised by Roux applies equally here. It is not the procedural irregularity or otherwise of the payments made, but the irregular creation of the funds from which those payments were made. The irregularity of the subsequent payments takes their nature from the manner in which the funds used to meet them were created.

188. There cannot in my view be a finding other than that De Beer acted improperly and in breach of his contract in misrepresenting the existence of funds by creating fictitious receipts. De Beer's conduct in so doing was clearly in breach of his employment contract.

The acknowledgements

189. When De Beer was confronted by Lombard, he admitted what he had done.

190. Waligora testified that he had met with De Beer, who was legally represented, on several occasions regarding the irregular payments from the student fees office. De Beer admitted his wrongdoing. KPMG prepared a statement for De Beer's signature. De Beer considered the statement and made minor changes to the document, indicating that he was satisfied that the corrected version accurately recorded his position. He did not, however, sign the document. Nonetheless, he took time to consider the document and make tracked changes where he regarded this as necessary. He did not meet the obvious inference that in its corrected form this was indeed his own statement.

191. In his statement, De Beer admitted that the payments processed by him and certain members of his staff on the strength of cheque requisitions he authorised from the University's bank account were effected without permission or authority or a formal agreement with students and service providers. He admitted that the transferring of debt relating to unauthorised student payments in an amount of R1 904 511 (i.e. the amount claimed) constituted "*unauthorised payments*" and acknowledged that he was responsible for any loss to the University arising from his "*conduct of irregularly approving payments*".

The pension agreement

192. This statement reflects an earlier agreement concluded between De Beer, represented by his attorneys, and the University in terms of which De Beer agreed to the appropriation by the University of his pension benefits in the amount of R1 904 511 to repay the University some of the damages it had suffered due to his breaches of his employment contract. The agreement was initially concluded orally and subsequently confirmed and modified during the exchange of correspondence between attorneys acting for De Beer and the University ("*the pension agreement*").

193. In its replication, the University pleaded reliance on four items of correspondence, being:

193.1. a letter addressed by De Beer's attorney to the University dated 14 November 2012 in which De Beer acknowledged that he had manipulated the University's accounting system to effect payments on behalf of the University without reflecting those payments on the various cost centres of the University;

193.2. a further letter addressed by De Beer's attorneys to the University, dated 11 January 2013, in which it was indicated that De Beer did not intend to deny his misconduct and in which he offered to pay the amount of R1 904 511 from his pension benefit;

193.3. a letter dated 16 January 2013 from the University's attorneys to De Beer's attorneys in which the agreement to pay R1 904 511 by way of deduction from De Beer's pension benefits was accepted; and

193.4. a letter from De Beer's attorney confirming that the content of the previous letter was acceptable to De Beer.

194. In his plea, De Beer admitted that a letter from his attorney of 14 November 2012 recording the pension agreement was what it purported to be. He also admitted that he had offered the appropriation by the University of his pension benefits. The pension agreement as expressed in the correspondence is unequivocal. It is an agreement to make payment in the amount of the University's claim by way of deduction from De Beer's benefit from his pension fund (and the withholding of his leave pay – an issue that does not arise in this matter).

195. It was submitted in the heads of argument that on a proper interpretation, the relevant letters do not express an agreement by De Beer to the appropriation by the University of his pension benefits in the relevant amount. I cannot agree with this. Nor can I agree with the contention that it was a term of the pension agreement (whether express or tacit) that the agreement to pay R1 904 511 was provisional pending a more accurate quantification and conditional upon the University being able to prove it had suffered damages. The agreement as

expressed in the correspondence is clear and does not allow for a different interpretation or the importation of a tacit term at odds with its express terms.

196. De Beer pleaded that the pension agreement was concluded in circumstances that rendered it voidable as a result of mistake or misrepresentation. However, as De Beer himself failed to testify or call any witnesses on his behalf, those defences cannot be sustained.

197. De Beer raised a defence to the declaratory relief sought that remained available to him without having testified, that under the PFA. He pleaded that the pension agreement purported to reduce, transfer or cede the pension benefits due to him by a registered fund as envisaged by section 37A of the PFA. He alleged that this was not permitted by the PFA because the agreement does not contain any admission of liability for an amount due by De Beer to the University in respect of compensation for any damage caused to the University by reason of any act contemplated by section 37D(1)(b) of the PFA.

198. Section 37A(1) provides in relevant part that:

> *"Save to the extent permitted by this Act, ... no benefit provided for in the rules of a registered fund ... shall ... be capable of being reduced, transferred or otherwise ceded, ..."*

199. However, an exception is recorded in s 37D(1)(b)(ii)(*aa*):

"*A registered fund may ... deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of…compensation ... in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which the member has in writing admitted liability to the employer ... from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned."*

200. The word "*misconduct*" used in this section has been construed as misconduct of which dishonesty is an element or component (*Moodley v Scottburgh/Umzinto North Local Transitional Council and Another* 2000 (4) SA 524 (D) at 532C-F *sed contra,* albeit *obiter, Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund* 2007 (1) SA 142 (N) at para 17. *Highveld Steel and Vanadium Corporation Limited v Oosthuizen*, 2009 (4) SA 1 (SCA) at para 17 suggests dishonesty may be a requirement.)

201. Whatever interpretation is to be given to the section, it should be clear from the findings I have expressed above that any damages suffered by the University were suffered as a result of De Beer's dishonest misconduct.

Damages

202. In his heads of argument, De Beer summarised his defence to the allegation that the University had suffered damages as a consequence of his conduct as follows:

202.1. the University has failed to prove that it has suffered damage as a result of any alleged breach by De Beer of the terms of his employment contract;

202.2. the University has failed to prove the amount of damages suffered as a result of De Beer's alleged breach of contract; and

202.3. the University is not entitled to an award declaring that any monetary order granted against Second Defendant falls within the ambit of section 37D(1)(b)(ii) of the PFA.

203. As pointed out above with reference to Roux, had the funds reallocated by De Beer not been employed in the manner they were, they would have been available to the University for legitimate purposes. De Beer's use of these funds in breach of his contract of employment (incorporating the University's financial policies) caused the University to suffer damages. The University is entitled to be put in the position it would have been had De Beer acted in accordance with his contractual obligations, namely a position where it would have had funds that it could spend in accordance with its own decisions, authorisations, and budget.

204. For reasons I have already traversed, I cannot agree with the proposition that the University was obliged to go further than it did and establish that the expenditure improperly incurred would not otherwise have been incurred. Had there been no budget allocated for the payment of, for example, the

accommodation of rugby players, no member of the University's staff was entitled to cause such payment to be made, particularly not by manipulating the accounting system of the University.

205. De Beer pleaded that the University had a duty to mitigate its loss by failing to take reasonable steps to recover any of the debts allegedly due to the University and by writing off recoverable debts. He did not, however, adduce any evidence to discharge the onus he bore in that regard (*Everett v Marian Heights (Pty) Ltd* (*supra*) at 201G–H).

206. In his heads of argument, De Beer raised an issue that was not raised during the evidence or on the pleadings. It had its origins in the fact that prior to the commencement of the KPMG investigation, the University had undertaken an earlier internal audit. It was assumed by De Beer's counsel that the figure of R1 904 511 had been obtained by KPMG from the internal auditors. Reference was made to the fact that in De Beer's unsigned statement the amount was reflected as an estimate "*based on the preliminary information provided to me by KPMG*". The point seems to be that the University did not prove the quantum of its claim because it went no further than to claim a provisional amount.

207. What appears to have been overlooked is that these events were overtaken by the acknowledgements of indebtedness conveyed by De Beer's attorneys to the University and reflected in the pension agreement and his statement (albeit as

an estimate). It was also overtaken by the fact that the University proved in evidence that De Beer had made funds available through his manipulation of the accounting system that would otherwise not have been available to make the payments in question. De Beer has shown no basis on which he can avoid the consequences of his admissions and acknowledgements.

208. It follows that the requirement of section 37D(1)(b)(ii) of the PFA that damages must be caused to the employer before the exception can operate, has been met and that the University is entitled to an award declaring that any monetary award granted against De Beer falls within the ambit of section 37D(1)(b)(ii) of the PFA.

209. I agree with De Beer's counsel that such an award is only binding as between the parties to this arbitration. It cannot bind the pension fund for the simple reason that it was not cited as a party to the action or the arbitration. There is no *lis* between the University and the pension fund and I do not intend by granting the award sought to suggest otherwise.

Conclusion – De Beer

210. In conclusion in respect of De Beer, I find that the University established a breach of his employment contract giving rise to damages in the amount of R1 904 511, which amount the University is in any event entitled to recover from De Beer in terms of the pension agreement.

Costs

211. Costs must obviously follow the event. How these are to be allocated between the two defendants is a matter for taxation in accordance with clause 7 of the arbitration agreement. I should, however, indicate that by far the majority of the time consumed by the arbitration was devoted to the case against Roux and that, in relation to De Beer, a substantial portion of the University's case against him was abandoned shortly before argument. He nonetheless persisted in his defence of the remaining claim.

Other issues of costs

212. In June 2020, Roux applied to amend his plea ("*the opposed amendment application*"). The application was opposed by the University, but not by De Beer. In dealing with the issue of potential wasted costs occasioned to De Beer by the delay caused by the application I said the following:

> *"The second defendant played no role in this application. However, the application has interrupted the arbitration and may have caused the second defendant to suffer wasted costs. This issue was not fully ventilated at the hearing of the application and I would prefer to reserve the issue of the second defendant's wasted costs for determination in due course."*

213. De Beer has raised no cost prejudice resulting from the application and I accordingly intend to make no order as to the costs of this interim application in relation to him.

214. Also during June 2020, De Beer applied for leave to recall Ms Swart as a witness ("*the application to recall Ms Swart*"). I made the following award:

> *"In the circumstances, the award I make is that the application to recall Ms Swart the purposes of cross examination on this issue is refused. The second defendant did not seek a costs award and I was not addressed on the issue of costs by Mr Burger SC for the plaintiff. I shall accordingly make no order in this regard and the parties can raise the issue of costs to be dealt with at the end of the arbitration, if so advised."*

215. The issue of costs was not raised again. In the circumstances, I regard it as appropriate to make the costs of this application costs in the cause.

Interest

216. The University claimed interest at the prescribed rate *a tempore morae.* No date of *mora* more certain than the date of service of the summons was established. I therefore intend awarding interest on the capital awards from the date of service of the summons on each of Roux and De Beer.

Award

217. I accordingly make the following award:

217.1. the first defendant is to pay the plaintiff the sum of R37 116 402;

217.2. the second defendant is to pay the plaintiff the sum of R1 904 511;

217.3. both amounts shall bear interest at the prescribed rate from the date of service on each of them of the summons commencing the action until payment in full;

217.4. in the case of the second defendant, I declare as between him and the plaintiff, the monetary order granted in terms of this award falls within the ambit of section 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956;

217.5. the defendants are ordered to pay the plaintiff's costs of suit in the proportions determined on taxation, such costs to include those consequent upon the employment of two counsel;

217.6. no order of costs in relation to the second defendant is made in the opposed amendment application; and

217.7. the costs of the application to recall Ms Swart are to be costs in the courts.

Correction of award

218. It was agreed that any award I made would be published by e-mailing it to the attorneys representing the parties. In terms of the arbitration agreement, the parties are afforded a period of seven days after publication of the award to apply to me to correct the award to the extent that it contains any clerical or typographical errors, or any patent errors arising from any accidental slip or

omission, errors in computation or any errors of a similar nature. Given the timing of this award, I would have no objection to a mutually agreed extension of this period.

A R SHOLTO-DOUGLAS S.C.

Arbitrator

23 December 2020