IN THE ARBITRATION APPEAL BETWEEN

JURIE WYNAND ROUX First Appellant

JOHANNES CHRISTIAAN DE BEER Second Appellant

and

UNIVERSITY OF STELLENBOSCH Respondent

AWARD OF THE APPEAL TRIBUNAL

1. During June 2015, the respondent ("US") instituted a High Court action against the appellants in which it claimed damages jointly and separately against each of them, based on their alleged breaches of contract as former employees of US. After the exchange of pleadings, the parties submitted the disputes that had arisen from their pleadings to arbitration before Mr A Sholto-Douglas SC ("the arbitrator").

2. Subsequent to the completion of more than the customary pre-hearing procedures, a lengthy hearing of evidence occurred in the course of which various witnesses of US and the first appellant testified, and the presentation of argument was conducted before the arbitrator. The second appellant chose not to testify in the arbitration hearing. The arbitrator published his award on 23 December 2020. The relevant aspects of the evidence heard by him appear from his award. He upheld the claims of US against Mr Roux and one against Mr de Beer. Thereafter, each of the appellants delivered a notice of appeal whereby the appeal before us was initiated. Counsel provided us with useful written and oral argument.

3. It was common cause that:

3.1 the first appellant ("Mr Roux"), a qualified accountant holding an LLB degree, had been employed by US during the period May 1994 to September 2010. During the last three years of such employment, he held the position of Senior Director: Finance and Asset Management, and he reported to Mr Lombard ("Mr Lombard") to whom more detailed reference is made later;

3.2 the second appellant ("Mr de Beer"), also a qualified accountant in the employ of US, reported to Mr Roux, and held the position of Deputy Director: Fees Office;

3.3 both Mr Roux and Mr de Beer held senior positions in US's rugby club, Maties Rugby.

4. The essence of US's pleaded claim against Mr Roux was that:

4.1 he had, in breach of his contract of employment, and without the knowledge and authority of US, used a specific software program that formed part of the respondent's electronic accounting system in order to re-allocate funds totalling R35 312 004 from US's so-called unrestricted costs centre to four other costs centres, and which funds were misapplied from the Rugby Club cost centres;

4.2 he had, in addition, again in breach of his contract of employment and without authority, caused a further amount of R1 804 398 to be paid from the funds of US to Western Province Rugby (Pty) Ltd or the Western Province Rugby Institute ("WPRI");

4.3 the respondent suffered damages in a total amount of R37 116 402 resulting

from his conduct.

5. Its pleaded claims against Mr de Beer were three in number. At the conclusion of the evidence, US abandoned two of those claims, leaving only its claim (b), which was for payment of an amount of R1 942 195 for determination. The essence of that claim was that:

5.1 Mr de Beer had, in breach of his contract of employment with the US, used fictitious receipt transaction codes in order to record receipts in a total amount of R1 942 195 in US's electronic accounting system, none of which had been received;

5.2 the fictitious receipts were shown as payments received by US in various student debtor accounts, but the applicable amounts had been reallocated to a sundry debtors account for which Mr de Beer was responsible, but which remained fictitious transactions, which were irrecoverable and had to be written off by US. He thus misrepresented US's receipts in its accounting records, thereby causing US to suffer damages in the amount of R1 942 195.

6. We commence with the case against Mr Roux.

THE CORE ISSUES IN THE CASE AGAINST MR ROUX

7. The core issues in the case against Mr Roux that formed the subject matter of debate in the hearing before us were, in essence, the following:

7.1 the applicable terms of his contract of employment with US;

7.2 whether Mr Roux had breached his contract of employment;

7.3 whether such a breach had caused US to suffer damages and, if so, the quantification thereof;

7.4 whether the expenditure from the cost centres to which Mr Roux had allocated funds was "legitimate".

8. The nature and extent of these disputes require a consideration of the relevant parts of the pleadings that bear on the issues.

The applicable terms of Mr Roux's employment agreement

9. Concessions were made on behalf of Mr Roux in relation to some of the terms of his employment contract that had a bearing on the obligations that were alleged to have been breached by him. Consequently, it was ultimately not disputed that, in the capacities in which he was employed by US between 2002 and 2010:

9.1 he was obliged to act in a manner consistent with the statute,[1] codes, procedures and the regulations of US, and with the policies and principles approved by the Council of US;

9.2 he owed his employer, US, a duty of good faith, which entailed that he was obliged not to work against the interests of US;[2]

[1] Article 11 of which provides, in summary, that the Council of US exercises a general and supervisory responsibility in respect of, *inter alia,* operational matters and institutional policy and strategy, and that it controls the assets of US.

[2] Mr Roux's ultimately amended plea, vol24.1, p148, paragraph 8; *Ganes and Another v Telecom Namibia Ltd,* 2004 (3) SA 615 (SCA), paragraph 25.

9.3 he was obliged to utilise the US's assets only as and when authorised to do so, and in accordance with the statutory and regulatory framework of US.[3]

The arbitrator, correctly in our view, remarked that in the position that Mr Roux held in the US's Department of Finance, he had been placed in a position of trust where its reliance on his honesty, integrity and trustworthiness were essential.

10. US alleged that its principles of financial management included the following, at the relevant time:

10.1 "*Die verkryging en aanwending van geld en vaste bates geskied in ooreenstemming met beginsels van deugdelike regering (good governance) en algemeen aanvaarde rekeningkundige praktyk;*[4]

10.2 "*Finansies word bestuur in terme van een geïntegreerde begroting…"*

10.3 *"Die begroting is 'n sentrale instrument in strategiese en veranderingsbestuur en verg 'n nul basis (zero-base) benadering";*

10.4 "*Begrotings word ontwikkel binne 'n langtermyn finansiële plan, gebaseer op 'n US sakeplan en die planne van afdelings".*[5]

11. Mr Roux was, in the ultimately amended version of his plea, not prepared to admit that

[3] This was the subject matter of an implied term pleaded by US (statement of claim, vol 24.1 p8, paragraph 9.2), which was conceded in argument as constituting a term of Mr Roux's employment contract.
[4] The well-known acronym "GAAP" will henceforth be used for this concept. It was conceded during argument of the appeal that Mr Roux was obliged to comply with GAAP.
[5] Statement of claim, vol24.1, p10, paragraphs 13.3-13.6.

these formed part of the US's governing financial management principles at the time.[6] A reading of his plea reveals that, instead of making any positive statements as to the principles of financial management that were, on his version, applicable at the relevant time, he mostly contented himself with bare denials. A question was put to his counsel during argument as to which principles of financial management had, according to Mr Roux himself, been of application at the relevant time, if not those pleaded in detail by US. The question did not yield a useful answer. Mr Roux's strategy was in various instances glaringly evasive, consisting, as it did, of reams of bald denials in his ultimately amended plea. His evidence was no different – evasive and argumentative, and smacked of sophism.

12. Nonetheless, accepting the evidence of Mr Lombard, who testified on behalf of US, we find that the principles of financial management listed in paragraph 10 above were applicable at the relevant time. They had, after all, been specifically recorded in US's code and were applied.

13. Since it was, at the hearing of the appeal, not disputed that Mr Roux's contract of employment included, at least, the term listed in paragraph 9.3 above, it is not necessary to address the detailed argument presented on his behalf to the effect that the US had failed to prove all the terms of his contract.

Mr Roux's breaches of his employment contract

14. The specific aspects of the breach by Mr Roux of his contract of employment on which US relied fall to be assessed against the pleaded details of US's financial system.[7] They were, in essence, as follows:

[6] Mr Roux's ultimately amended plea, vol 24.1, p149, paragraph 11.
[7] Statement of claim, vol 24.1, pp11-13, paragraphs 14-23.

14.1 US's finance department prepared an annual budget according to which amounts were allocated to various departments or other components within US. That budget fell to be approved by the Council of US;

14.2 US's accounting system related to some 11 000 cost centres in which income and expenditure were recorded, each cost centre representing a department, similar to, but not a bank account, which was not permitted to go into a negative (overdraft) without the necessary approval. These cost centres were ultimately reflected in the general ledger in its accounting system. The approved budget was recorded at the beginning of a year across the various cost centres;

14.3 during a particular financial year, the actual income earned and the expenditure incurred were recorded in the electronic accounting system, and allocated to the appropriate cost centres. At the end of the financial year,[8] the budget cost centres were closed off against the budgeted amount allocated to each such cost centre at the commencement of that year, so as to determine the financial performance of US for that year;

14.4 the unspent balances were transferred to reserves, specifically, unrestricted reserves;

14.5 expenditure from unrestricted reserves could only be authorised by the Council or its authorised delegate.

Of US's pleaded allegations referred to above, only that set out in paragraph 14.4 was

[8] Which accorded with a calendar year.

specifically challenged.[9]

15. Mr Lombard, a qualified Chartered Accountant who occupied the position of Senior Director, Finance in the employ of US between 2003 and 2007, and that of Chief Director Finance from and after 2007, endorsed the content of the statement in paragraph 14.4 above in his evidence. To the extent that Mr Lombard's evidence was irreconcilable with that of Mr Roux, we prefer that of Mr Lombard.

16. More importantly, he testified that:

16.1 all of US's funds constituted its reserves, consisting of two categories, being:

16.1.1 restricted, and

16.1.2 unrestricted

reserves.

The former constituted funds derived from donors, sponsors etcetera, and were known as "buitefondse". The latter were funds that could only be spent on authority of the US Council.

16.2 The funds that formed the subject matter of Mr Roux's actions in question were not "buitefondse" because they did not derive from donors or sponsors. Thus, they constituted unrestricted reserves, which could only be spent on the authority of the Council, or its delegate. This, unsurprisingly, gave rise to

[9] Paragraphs 20 and 21 of the statement of claim, vol 24.1, p12; Mr Roux's plea, vol 24.1, pp149-149A, paragraphs 12A to 12H.

questions concerning Mr Roux's authority to act as he was alleged to have done in the instant case.

17. The pleaded breaches of his contract of employment of which US accused Mr Roux were, in summary, as follows:

17.1 using the financial computer programme FFB121P ("the programme") and without the knowledge of or authorisation by the Council or of an authorised delegate thereof, Mr Roux altered US's unrestricted reserves in an amount of R35 312 004, details of which were set out in paragraph 24 of US's particulars of claim;

17.2 in particular, funds forming part of the unrestricted reserves were allocated by Mr Roux through the use of the programme in order to:

17.2.1 increase the funds available for cost centre H260 (known as "Rugby Beurse") by R13 058 833;

17.2.2 increase the funds available for cost centre H261 (known as "RK Rugby Klub behoeftigheid/meriete") by R4 093 383;

17.2.3 increase the funds available for cost centre R593 (known as "Uniondale stigting") by R15 598 310;

17.2.4 increase the funds available for cost centre R594 (known as "Pawiljoenfonds SRVK") by R2 201 478;

whereafter Mr Roux re-allocated those funds to various cost centres, some to

Maties Rugby which were then spent by Maties Rugby, and some to Student Fees to enable Mr de Beer to spend the funds directly or to allocate them to students as "bursaries". A schedule of these allocations appear from a table that formed part of paragraph 24.5 of the particulars of claim.

17.3 Details of the spending of a total amount of R21 246 153 of the funds so re-allocated to Maties Rugby appear in paragraph 24.6 of the particulars of claim.

17.4 US alleged that its Council had not intended that its unrestricted reserves be allocated to Maties Sport, and that they were made available to the latter by Mr Roux in breach of his contract of employment using the programme, which left no audit trail, and which was not in accordance with GAAP or with US's principles of financial management, and for which no Council approval had been sought or granted.[10]

17.5 US thus concluded that Mr Roux had reduced its unrestricted reserves without leaving any record thereof, and that he had misrepresented its accounting records and misapplied its assets, causing its patrimony to be reduced, and it to suffer damages in an amount of R35 312 004. In the context of this case, the word "misapplied" includes the concept of causing the funds in question to be spent in a manner not intended by the Council, thereby rendering them unavailable to US.

17.7 A further breach consisted of him having caused US to pay an amount of R1 804 398 to or on behalf of WPRI without authorisation, which payments

[10] Mr Roux had, however, caused the transactions in question to be printed out, which printouts were retained in Rotatrim boxes. This, said Mr Roux, constituted an audit trail of the transactions. Mr Lombard was aware of the fact that boxes had been kept in the safe, but he was not entirely sure as to their contents. Mr Roux did not provide any rational explanation why, in respect of only these irregular transactions, no electronic trail was kept.

were made without any legal obligation on US to do so and which resulted in a misapplication of US's assets, and consequent damages that US suffered in that amount.

The total amount of the damages claimed by US against Mr Roux thus aggregated to R37 116 402.

18. Reverting to the question of whether Mr Roux had breached his employment contract, Mr Lombard testified that:

18.1 Once approved by Council, available funds other than "buitefondse" were allocated to budget cost centres, all of which fell within the central budget, and that funds allocated in terms of the budget could be transferred or closed-off to a balance cost centre. Those cost centres fell outside of the central budget.

18.2 Faculty budget cost centres were initially closed-off to cost centre B300, but any portion of the budget that remained unspent was electronically transferred to a linked balance cost centre so that such amounts were available to be spent in the subsequent year. Cost centre B300 was closed-off to B260, using the programme. Thus, all budget cost centres were closed off to B260, but balance cost centres were closed off themselves, so as to render funds available at financial year end to be available for the next year.

18.3 The funds that Mr Roux had allocated to the four cost centres referred to in paragraph 17.2 above derived from US's accumulated unrestricted reserves. These allocations were despite his evidence to the contrary clearly not part of his daily financial management activities .

18.4 The four cost centres identified in paragraph 17.2 above to which Mr Roux had allocated restricted funds constituted balance cost centres, i.e., cost centres that received “buitefondse”. Some of those were restricted reserves in the sense that expenditure was restricted by the conditions imposed by donors or sponsors.

19. Mr Roux, on the other hand, asserted that after the closing-off in B260 had occurred and was reported to the Council, the result was not that B260 represented unrestricted reserves, because the Council could decide how to apply the result in B260, e.g., by effecting transfers to the strategic fund or the contingency fund or to other cost centres for purposes of expenditure. However, since the reserves from which the allocations had been made by Mr Roux did not derive from “buitefondse”, they constituted unrestricted reserves, requiring the authority of Council for the application thereof.

20. The result is that the allocations that Mr Roux had effected and which thus increased the opening balances of the cost centres referred to in paragraph 17.2 above constituted irregular manipulations, even if Mr Roux had been “authorised” to effect such allocations. The evidence concerning Mr Roux’s conduct was, in respect of the cost centres referred to in paragraphs 17.2.1, 17.2.3 and 17.2.4 above, corroborated by that of Mr Waligora, a forensic accountant whose evidence was presented by US as expert testimony. It was, in respect of the cost centre referred to in paragraph 17.2.1 above also corroborated by Ms Swart, Prof van Huyssteen and Mr Basson, all of whom testified on behalf of US.

21. Once it is accepted (as we do) that the allocations to those four cost centres derived from the unrestricted reserves of US, it is not necessary to resolve the dispute that formed part of Mr Roux’s argument as to whether the source from which Mr Roux had allocated reserves to the four cost centres referred to in paragraph 17.2 above was the

cost centre B260 or another.

22. Against this background, the principal basis of US's complaint against Mr Roux was that he lacked the authority to access the unrestricted reserves of US and to make them available to those four cost centres.

23. Mr Roux's response to this issue was vaguely contained, firstly, in paragraphs 5.2 and 5.3 of his ultimately amended plea.[11] His evidence in this regard was to the effect that he had received the required authority from the former principal of US, Prof Botman, and from one of the vice-principals, Prof Smith.[12] Mr Roux's reliance on this evidence was rightly rejected by the arbitrator, as not having constituted the necessary authority to act in the manner in which he had. Very little, if any, reliance was placed thereon in the argument of Mr Roux's appeal. The consequence is that Mr Roux acted in breach of, at least, the term of his contract of employment referred to in paragraph 9.3 above in relation to the first leg of US's claim against him, particularised in paragraphs 24-27 of the statement of claim.

<u>The expenditure of the funds that Mr Roux had allocated to the four cost centres</u>

24. A further issue that formed a substantial pillar of Mr Roux's argument in the appeal relating to that part of US's claim, was that US's pleaded case was not that the allocation of funds to the four cost centres (referred to in paragraph 17.2 above) had been expended. The pleaded claim, so the argument went, was merely that the funds in question had been misallocated, and not what had ultimately been done with those funds. This contention, however, overlooks the allegations that were contained in paragraphs 24.6 and 27.2 of US's particulars of claim. The spending and

[11] Pleadings, vol 24(1), p147.
[12] Details thereof appear in paragraphs 67 and 68 of the award: vol 2, pp22-23.

misapplication of US's funds were pertinently raised therein.

25. A considerable body of evidence was, without objection, adduced on behalf of US in relation to the manner in which the components of the re-allocated funds that had derived from the unrestricted reserves were applied or rather "misapplied" by Mr Roux.[13] This included the evidence of Mr R Waligora, which was based on a series of documents that he had prepared and that became known as "Roy1" to "Roy8", and the detailed annexures thereto. This detailed evidence was not addressed by Mr Roux.

26. The funds that Mr Roux had allocated to the four cost centres referred to in paragraph 17.2 above ended up in the cost centres of the Rugby Club. This much was endorsed by the "Roy1" to "Roy8" series of documents and the annexures thereto. These funds were ultimately recorded in the financial statements of the Rugby Club under the heading of "Diverse Income". This much was conceded by Mr Roux under cross-examination. He had, until September 2010, served as the executive chairman of the Rugby Club, and oversaw its financial management and control.

27. Some of the funds that had ended up in the cost centres of the Rugby Club:

    27.1 found their way into Mr Roux's personal account, which he said was a repayment of amounts that had been owing by the Rugby Club to a student. It turned out that an amount that Mr Roux had arranged to be paid to this student as a bursary was in truth for rental, which was alleged to have been owing by the Rugby Club to this student, but who had no longer been a student of US;

    27.2 were said by Mr Roux to have been spent on rental and food for rugby players,

[13] As alleged in paragraph 27.2 of US's statement of claim.

but which expenses had been shown in the financial statements as bursaries;

27.3 and, specifically, those in cost centre R593 were used by Mr Roux to pay for travel and subsistence, clothing, refreshments, golf balls, entertainment, and for a house dance for one of the residences.

28. Mr Roux's pleaded suggestion that he had been authorised to apply these funds "for the purpose of transformation" was correctly rejected by the arbitrator. The result is that Mr Roux lacked the necessary authority to allocate US's unrestricted reserves to the four cost centres referred to in paragraph 17.2 above, and to apply those funds through the Rugby Club as he did. The fact that Maties Rugby was still part of US is thus irrelevant. US thus succeeded in establishing the allegations in paragraph 27 of its statement of claim, referred to in paragraph 24 above.

<u>The suggested "legitimacy" of the expenditure of US's unrestricted funds</u>

29. A component of Mr Roux's response to US's claim, albeit that it was not specifically pleaded, was that the US's funds in question had been legitimately expended from the four cost centres (referred to in paragraph 17.2 above). In particular, he said that these expenses had occurred "*in die normale gang van die Rugby Klub en sy uitgawes".* This was, so it was argued on behalf of Mr Roux, not controverted by Mr Lombard or KPMG (i.e., a reference to Mr Waligora and his team).

30. However, whether the expenditure of the said funds in the manner in which this had occurred would, in normal circumstances, have qualified as legitimate expenditure by the Rugby Club of its funds overlooks the following core points:

30.1 the allocation of the funds to the four cost centres that ultimately ended up in

the funds of the Rugby Club from where they were expended, had not been budgeted or authorised. These funds could thus not have been legitimately applied in the manner they were;

30.2 therefore, the misapplication of US's unrestricted reserves for purposes other than what had been budgeted and authorised ultimately placed those funds beyond the reach of US in the sense that they could no longer apply the funds for purposes that could and would have been authorised by its Council. The funds, having been expended, were irretrievable.

Whether US suffered a loss and the quantification thereof

31. A further substantial component of Mr Roux's defence to US's claims was that the US had not established that it had suffered any loss, nor did it establish the quantum thereof.

32. The first aspect of this defence was that US had not shown that it had suffered a patrimonial loss in the sense explained in various well-known leading decisions, particularly those of the former Appellate Division.[14] The fundamental rule is that the person who suffered a loss should be placed in the position he would have occupied had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party.[15]

33. It was thus argued that since US's complaint was merely that the funds in question had been allocated to a cost centre, there was no reduction in US's patrimony, because

[14] Specifically, *Dominion Earthworks (Pty) Ltd v MJ Greef Electrical Contractors (Pty) Ltd,* 1970 (1) SA 228 (A).
[15] Reference was made to, *inter alia, Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd,* 1977 (3) SA 670 (A) at 687B-F.

US had only one bank account. No funds had, it was submitted, left US's bank account.

34. It has, however, been found earlier herein that US had established the allegations that had been made in paragraph 27 of its statement of claim in that Mr Roux had not only incorrectly and without authority allocated the unrestricted reserves in question to the four cost centres referred to in paragraph 17.2 above, but that they had been misapplied, in accordance with the evidence of Mr Waligora, as depicted on "Roy1" to "Roy8".

35. The finding of the arbitrator endorsed herein that Mr Roux had placed the funds in question beyond the reach of US in the sense that it could no longer apply the funds for purposes that could and would have been authorised by its Council, and that such funds, having been expended, were no longer retrievable, inevitably results in the conclusion that US's patrimony was reduced in the sense intended in the decisions on which reliance was placed on behalf of Mr Roux.

36. The next component of the issue under discussion is whether US established the quantum of its loss. Here, it was argued on behalf of Mr Roux that:

36.1 the quantum of US's claim, which had been supported by the evidence of Mr Waligora, could not be established merely by virtue of the fact that the funds in question had been re-allocated to the four cost centres (referred to in paragraph 17.2 above);

36.2 Mr Waligora had accepted that US had suffered no loss merely as a result of the re-allocation of funds, and that KPMG's quantification was not a quantification of damages;

36.3 the fact that the funds in question had subsequently been expended did not place the loss on the identical basis as the amounts that had been re-allocated. One has, so it was said, to investigate that expenditure in order to quantify the loss;

36.4 one is bound to take the value that US received from the expenditure into account in quantifying damages. In this case, US received value, because the expenditure was legitimate.

37. Turning to the first leg of these submissions, once it is accepted, as we have, that the entire amount of the re-allocated funds were placed beyond the reach of US, it follows that the quantum of US's loss is the aggregate of the amounts that were re-allocated and expended. As pointed out, Waligora demonstrated in great detail how the funds in question were expended. Little or none of that was challenged.

38. The second leg, that Mr Waligora accepted that KPMG's quantification of funds re-allocated did not establish that it had suffered a loss, must be considered in perspective. Whilst Mr Waligora accepted in cross-examination that he and his firm had not been not mandated to quantify damages, whether the results of the exercises that he and his team had performed constituted a quantification of the loss suffered by US, is a legal question. The conclusion from the findings recorded earlier herein is that US was deprived, as a result of Mr Roux's conduct, of the entirety of the funds that he had re-allocated and were subsequently misapplied as set out earlier.

39. The quantum of US's loss is thus the difference between the position in which US would have found itself but for Mr Roux's conduct, and that in which it found itself in consequence thereof. This loss flowed directly, naturally and generally from Mr Roux's conduct and was not too remote to be recoverable as such.

40. The last leg of the argument related to the value that US supposedly received from the expenditure of the funds in question. The arbitrator correctly found that the onus to establish a compensating benefit received by the loss-suffering party rests on the defendant.

41. It was argued on behalf of Mr Roux that as part of US's overall *onus* to establish the quantum of its losses, it ought, at least *prima facie,* have established the net value of the benefit that it had received from the expenditure of the funds in question. However, the decision of the SCA in *Minister van Veiligheid en Sekuriteit v Japmoco BK*[16] does not support this contention. This decision is discussed in the third edition of Visser & Potgieter *Law of Damages,*[17] in which the authors express the view that once a plaintiff proved his damage and quantified his loss, any subsequent reduction in favour of the defendant is a matter that the latter has to prove.

42. In any event, an examination of the question whether US received any net value from any of the ultimate uses to which its funds was put would in our view entail both an objective and a subject test. Thus, whilst it may be so that, viewed purely objectively, some of the ultimate expenditures could have enhanced the reputation of Maties Rugby, the extent of which was not established, US did not subjectively choose to spend its funds in the manner in which they were ultimately used. Such expenditure thus occurred against its will. The arbitrator accordingly correctly found that Mr Roux had not established that the misapplication of US's funds resulted in it having received any net value.

[16] 2002 (5) SA 649 (SCA).
[17] Second edition, p 265, paragraph 10.16.

The expenditure in respect of WPRI

43. During the period 28 July 2008 to 26 March 2010, Mr Roux caused US to pay R4 340 276 to WPRI from cost centre 9740. When Mr Roux left US, a deficit of R1 804 398 remained in the cost centre, which US had to fund from its unrestricted reserves. US alleged that Mr Roux had caused the payments to be made without the knowledge or authority of the Council or its authorised delegate, Mr Lombard. US further alleged that the payments had been made by US without any legal obligation on it to do so, which amounted to a misapplication of US's assets, and that it suffered damages as a result.

44. Mr Roux initially denied all of these allegations, which included a denial that the payments had been made. By later amendment of his plea, Mr Roux pleaded a version regarding the issue of knowledge on the part of US in relation to the payments, but he asserted no version regarding the issue of his authority to have caused the payments to be made. Mr Roux pleaded that a number of senior management members of US and members of its Audit & Risk Committee served as members of the management committee of the WPRI. This included Mr Jannie du Rand, Professor Julian Smith and Professor Van Huyssteen. They were alleged to be *"involved in the discussions and arrangements in respect of that Institute"*.

45. In the course of the arbitration hearing, Mr Roux accepted that Mr Du Rand had not been a representative of US at the relevant time, and that he only later became a member of the Audit & Risk Committee. Professor Van Huyssteen testified that he was unaware of WPRI. Professor Smith did not testify. There was no evidence to the effect that US was aware of the payments that had been made to WPRI.

46. Mr Lombard testified that although he had approved the cost centre, he was unaware of the payments. Mr Lombard was authorised to sign contracts on behalf of US, and he could delegate authority to Mr Roux to sign contracts binding US, but he testified that he had not delegated any authority to Mr Roux to conclude any agreement with WPRI, and that he only became aware thereof during the KPMG investigation.

47. Mr Roux was involved in the preparation of a draft agreement for US to acquire a 50% shareholding in WPRI, but this agreement was never finalised. Had this agreement been finalised, Mr Roux would only have been able to sign it if Mr Lombard delegated authority to him to do so. Even though no written agreement was concluded, Mr Roux nonetheless caused the payments of R4 340 276 to be made to WPRI.[18] Mr Roux did not testify that these payments had been made in accordance with any authorised agreement concluded with WPRI. No legal obligation on the part of US to make these payments was identified by Mr Roux.

48. Mr Roux testified that he had had authority to make the payments, because he was responsible for cost centre 9740. This, he said, derived from US's *"gedesentraliseerde finansiële bestuur"*. This source of authority was not pleaded, nor was it put to Mr Lombard when he testified that Mr Roux had had no authority to conclude any agreement that would bind US to WPRI. Counsel for Mr Roux submitted that the source of authority was unchallenged, but this is not correct. In the course of Mr Roux's cross-examination, counsel for US attempted to determine the source of this authority and asked, for example, whether it was unlimited, and whether it meant that Mr Roux could bind US to contracts for R1 million or R20 million (a question that was never answered). Mr Roux was unable to suggest any limitation to his authority so derived.

[18] The reason why the WPRI claim is limited to R1 804 398 is that the balance of R2 535 878 is claimed by US as part of the main claim against Mr Roux.

49. Mr Lombard's unchallenged evidence was that Mr Roux had no delegated authority to conclude any contract with WPRI, and that when Mr Roux did sign contracts, it was as a consequence of Mr Lombard's knowledge and consent. It would be anomalous if Mr Roux, merely by virtue of being responsible for cost centre 9740, could have had authority to bind US to unlimited amounts by way of oral agreements, or to cause payments of unlimited amounts by US, even in the absence of any agreement, but, at the same time, to lack authority to bind US to a written contract. The more likely position is that Mr Roux had no such unlimited authority.

50. The unlimited authority contended for by Mr Roux was thus not established. Neither was it established that the persons alleged by him to have been aware of arrangements regarding WPRI were aware of either arrangements or payments. In any event, their alleged awareness was not pleaded to have provided authority to Mr Roux, and is irrelevant to the unpleaded source of authority upon which Mr Roux relied in the hearing.

51. The payments of R1 804 398 that Mr Roux caused to be made to WPRI were thus unauthorised. It was submitted on behalf of Mr Roux that there had not been any breach by Mr Roux of his employment contract because verification procedures had been followed internally before the payments were made to WPRI. However, there was no indication that the procedures were intended to, or had the effect of providing authority for the payments when that authority was absent in the first place. In causing the unauthorised payments to be made, Mr Roux was bound by the same contractual obligations already outlined and, in the absence of any authority to have made the payments, such conduct constituted a breach by Mr Roux of his contract with US.

52. Unlike the expenditure which formed the subject matter of the main claim of US against Mr Roux, the claim in relation to WPRI was based on the fact that the payments by US

were unauthorised. In the main claim, the flow of funds into the Rugby Club's cost centres were unauthorised. In the WPRI claim, the focus was on the flow of the funds out of cost centre 9740 having been unauthorised. Nonetheless, in both instances, US's funds were placed beyond its reach,[19] and were misapplied. In both instances, the source of the misapplied funds was US's unrestricted reserves because the shortfall of R1 804 398 had to be made up from unrestricted reserves. For the same reasons that apply to the main claim, US suffered damages in an amount of R1 804 398 in respect of payments caused to be made to WPRI, and for which Mr Roux is liable.

CONCLUSION IN RESPECT OF MR ROUX

53. We conclude that Mr Roux's appeal against the arbitrator's award is to fail.

THE CASE AGAINST MR DE BEER

54. The sole remaining claim against Mr de Beer was claim (b) for payment of an amount of R1 904 511. This claim was for damages alleged to have been suffered by US as a consequence of Mr de Beer's breach of his contractual obligation to act in good faith and honestly, by creating and using fictitious receipt codes to manipulate the US accounting system.

55. The essence of Mr de Beer's conduct, as testified to by Mr Lombard and Mr Waligora, was that Mr de Beer had manipulated student accounts to create a false impression that R1 904 511 had been paid by students (who were either former students or who had never been students of US), whereas no payments were in fact received. Some

[19] We set out later in the case against Mr de Beer why it cannot be assumed that US unrestricted reserves would in any event have been used for Rugby Club expenses, which includes the WPRI payments.

66 affected student accounts were falsely manipulated, leading to write-offs on these accounts and to a falsely created credit which was utilised to pay Rugby Club expenses.

56. All of this took place in the student fees office whilst Mr de Beer held the position of Deputy Director of Student Fees. Based on Mr de Beer's misconduct, his employment was terminated from 31 December 2012.

57. In his plea, Mr de Beer denied that he had used fictitious transaction codes to record fictitious payment receipts. However, the evidence of Mr Lombard and that of Mr Waligora as to the manipulation that had been performed by Mr de Beer was not challenged. Mr de Beer did not testify in his own defence. In heads of argument filed on Mr de Beer's behalf, there was no suggestion that the manipulation performed by him was legitimate; rather the argument advanced was that a *"credit that has been processed and created irregularly does not necessarily give rise to damages".*[20] In addition, Mr de Beer's attorneys had in correspondence admitted that he had manipulated US's accounting system.

58. Ultimately, there was no challenge to US's case that Mr de Beer breached his obligations of good faith and honesty owed to US by manipulating the accounting system. Instead, the focus of the defence was that US had not proved that it had suffered damages because the funds that had arisen out of the manipulation were said to have been spent on *"legitimate payments due by the university for Rugby Club expenses"*.[21]

59. However, similar to Mr Roux's defence, this defence ignores the fact that these funds were never intended to be used for payment of Rugby Club expenses, even if they

[20] Second Appellant's heads of argument, paragraph 24.
[21] Second Appellant's heads of argument, paragraph 22.

may have constituted legitimate expenses. Mr Lombard testified that the Rugby Club did not have a budget of its own and, from a US funding perspective, it fell under Maties Sport. The funding made available to Maties Sport from US's central budget for the period 2002 to 2010 ranged between R3.1 million to R7.9 million per annum.[22] Out of this allocation to Maties Sport, it in turn allocated to the Rugby Club over the same period an amount ranging from R93 000 per annum in 2002 to R141 900 in 2010.[23] Mr Waligora testified that each sporting club could raise funds in the form of gate fees, external sponsorships and membership fees. Financial support from US could be obtained from time to time by way of a formal application process, but that this had not been done by the Rugby Club.[24]

60. Mr Lombard explained that within US, at all levels, the impression was that the Rugby Club was very successful and particularly successful in obtaining sponsorships. He said that it was much appreciated that Messrs Roux and de Beer, being financial people, were involved in the finances of the Rugby Club to ensure that its finances were conducted in a healthy manner.

61. The evidence was thus that US, via Maties Sport, allocated annual funding to the Rugby Club in modest amounts relative to the overall annual expenditure of the Rugby Club which was funded from other sources. There was no evidence that US intended to utilise R1 904 511 of its unrestricted reserves to pay Rugby Club expenses, in circumstances where its annual funding contribution to the Rugby Club had not exceeded R142 000 in the years 2002 to 2010. Mr de Beer's dishonesty lay in creating funds in the accounting system that were not destined for the Rugby Club and then misapplying those funds.

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[22] "D1", vol 24(1), p131.
[23] "D2", Vol 24(2), p137.
[24] Mr Waligora's expert summary report, Vol 25(1), p13.

62. US was thereby deprived of the use of its own funds. In these circumstances, it is artificial for Mr de Beer to contend that the false creation of a credit and illegitimate application of US's funds caused no loss to US.

63. It is also no answer to contend that US showed no loss because the result of the wrongdoing was reflected in 66 student accounts, which were not proved by US to be irrecoverable. Although US pleaded that these accounts were irrecoverable, the central problem remains that US should not have been placed in the position of having to attempt to recover the 66 accounts from persons who were either former students or who had never been students at all to make good the deficit caused by Mr de Beer's manipulation. If Mr de Beer wished to show that notwithstanding his conduct, there was a compensating benefit to US represented by valid and recoverable claims on the 66 accounts, the burden was on him to show this. He did not attempt to do so.

64. Mr Waligora testified that the investigation had proved that the quantum of the manipulation was R1 904 511. Mr Lombard was recalled as a witness, and he dealt specifically with the correspondence exchanged between US and Mr de Beer's attorneys which recorded Mr de Beer's agreement to the quantum of R1 904 511. Mr de Beer did not testify to challenge these admissions and no differing version as to quantum was put to Mr Waligora, Mr Lombard or Ms Swart, all of whom testified about Mr de Beer's manipulation. There was thus no basis to doubt the quantum of damages claimed by US. The quantum was testified to by various witnesses, it was stated to have been agreed by Mr de Beer in correspondence and it was not challenged by him in evidence.

65. US sought an order declaring that any monetary order granted against Mr de Beer fell within the ambit of section 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956 ("the Act"). The basis for the declarator was pleaded to be an oral agreement concluded with Mr

de Beer through his attorneys.[25] US argued that although pension benefits are not generally to settle a debt, its claim for a declarator fell within the exception recorded in section 37D(1)(b)(ii) of the Act, which provides that a registered fund may deduct an amount due by a member to his employer on the date on which he ceases to be a member of the fund in respect of *"damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member",* where the member has in writing admitted liability to the employer.

66. During argument counsel for US agreed that it would not be competent to make an order purporting to bind the trustees of the pension fund while the trustees are not party to the arbitration proceedings. We have found that Mr de Beer's conduct was dishonest, but nothing further needs to be said regarding the declarator.

67. Accordingly, Mr de Beer's appeal against the arbitrator's finding as to his liability for payment of R1 904 511 under claim (b) falls to be dismissed.

CONCLUSION IN RESPECT OF MR DE BEER

68. There remains the question of costs in respect of Mr de Beer. The arbitrator found that by far most of the time consumed in the arbitration before him had been devoted to the case against Mr Roux, and that in relation to Mr de Beer, a substantial portion of US's case against him was abandoned shortly before argument. The arbitrator, however, left the question as to the apportionment of the time spent on the case against Mr Roux and that relating to Mr de Beer to the discretion of the person to whom the taxation of the applicable bills of costs is to be assigned.

69. This approach is problematic. It is unlikely that such a person will be able to make a

[25] Particulars of Claim, paragraph 42.

reliable assessment in respect of such an apportionment.

70. Mr de Beer's counsel submitted supplementary heads of argument on the question of an appropriate costs award to be made in respect of Mr de Beer. He submitted that:

70.1 based on a calculation of the transcript of the record in the arbitration hearing, a very small proportion thereof related to US's claim (b) against Mr de Beer, by far the largest proportion having related to the two claims against him that US abandoned towards the end of the hearing before the arbitrator;

70.2 measured against the size of the entire record in the arbitration, only approximately 1.67% thereof related to US's claim (b) against Mr de Beer;

70.3 had there been a separate adjudication of the case against Mr de Beer, it would not have taken one day in order to achieve the final conclusion thereof;

70.4 US should be directed to pay at least 95% of Mr de Beer's costs, because of the wastage that had occurred consequent upon US's pursuit of the two abandoned claims against him.

71. We do not subscribe to the employment of a mathematical calculation process in order to arrive at an appropriate costs award to be made in relation to Mr de Beer. There are many factors that impact on a calculation of the time and effort expended in pursuing a case in a combined hearing against two separate defendants. There were some overlapping issues in the case before the arbitrator which are incapable of separation with any measure of precision, as between the case against each of the two appellants.

72. It is, however, plain that:

72.1 US's case against Mr de Beer was, ultimately, confined to a relatively small portion thereof, which rendered the time and effort expended upon the pursuit of the other two claims against him having been wasted;

72.2 by far most the time taken in the pursuit of US's claims and the defences thereto related to the claims against Mr Roux.

73. However, aspects of the broad scope of the evidence that US presented in its case against Mr Roux were also, at least to some extent, relevant to its claim (b) against Mr de Beer and impacted thereon. This feature militates against the proposal made on behalf of Mr de Beer that US should be held liable for a substantial portion of Mr de Beer's costs. US was ultimately successful against Mr de Beer in respect of its claim (b).

74. We conclude that Mr de Beer should be held liable for the costs of the US in relation to the case against him prior to the hearing before the arbitrator, and for 5% of US's costs of the arbitration hearing, and 5% of the costs of his appeal.

75. The award that we make is the following:

75.1 Mr Roux's appeal against the arbitrator's award is dismissed with costs;

75.2 Such costs are to include the costs consequent upon the employment of two counsel, and the costs of the Arbitration Appeal Tribunal;

75.3 Mr de Beer's appeal against the arbitrator's award succeeds to the extent that paragraph 21.7.5 of the arbitrator's award is deleted, and substituted by the

following wording:

"21.7.5.1 the first defendant is ordered to pay the plaintiff's costs of suit, such costs to include those costs consequent upon the employment of two counsel;

21.7.5.2 the second defendant is ordered to pay the plaintiff's costs of the case before the hearing, and 5% of the plaintiff's subsequent costs of the arbitration, such costs to include those costs consequent upon the employment of two counsel."

75.4 Mr de Beer is directed to pay 5% of US's costs of opposing his appeal, including the costs consequent upon the employment of two counsel.

75.5 Save for what is said in paragraphs 75.3 and 75.4, Mr de Beer's appeal against US is dismissed.

DATED THIS 7th DAY OF DECEMBER 2021

CM Eloff SC

Retired Justice LTC Harms

M van der Nest SC