IN THE LABOUR COURT OF SOUTH AFRICA
BRAAMFONTEIN

CASE NO:JS1137/2001

In the matter between

ANNANDALE WILLIAM CONLY **Applicant**

and

PASDECH RESOURCES (SA) LTD **Respondent**

JUDGMENT

MAYA J

[1] This is an ordinary contractual dispute in the form of a claim for damages allegedly arising from the unlawful repudiation, alternatively material breach of contract of a contract of employment concluded by the parties during August 1997. In terms of this contract, the respondent, a company listed on the Johannesburg Securities Stock Exchange formerly known as Femco Technology Holdings (Pty) Ltd, employed the applicant as its joint managing director. The claim is in the sum of R827 000,00 comprising of outstanding salary for a period of 13 months, a 13th cheque or bonus equivalent to a month's salary and outstanding leave pay.

[2] One of the material terms of the employment contract was that the

applicant would be paid a monthly salary of R55 000,00 (which he was indeed paid up to the end of June 1999). The nature and duration of the contract were some of the disputed facts in the matter: these include whether or not the applicant was entitled to a 13th cheque and leave pay. On the applicant's version, the contract was verbal and was for a fixed term of three years calculated from 1 August 1997 – the claim for outstanding salary relates to the unexpired portion of the contract period alleged by the applicant. The respondent, on the other hand, averred that the contract was neither verbal nor of fixed duration. The parties were, however, agreed that the applicant was at all relevant times an employee of the respondent for purposes of the Basic Conditions of Employment Act 75 of 1997 which vests this court with the power to adjudicate the claim. Towards the conclusion of the trial, the respondent admitted that the contract was fixed, for a period of three years.

[3] The applicant's cause of action is set out at paragraphs 7, 8, 9 and 10 of his Statement of Case as follows:

'7. On 21 April the Applicant was advised by the Respondent's Mr N. Kumar that he was suspended on full pay and benefits pending an investigation into certain alleged irregularities concerning his employment. The aforementioned suspension was unlawful as there existed no legally valid grounds or reasons therefor.
8. Notwithstanding that the applicant requested same, the Applicant was at no stage advised of the reasons for, or any facts whatsoever as to why his employment was suspended.
9. On or about 28 May 1999 the Applicant received an organogram containing the so-called new structure of Respondent's management. Said organogram reflected that the Applicant was no longer an employee or director of the Respondent.
10. The abovementioned conduct of the Respondent …constituted a material breach, alternatively, repudiation of the Applicant's contract of employment.'

The respondent denied acting unlawfully or repudiating the employment

contract.

[4] The issues which this court was called upon to determine were the following: (a) Did the respondent breach the contract of employment? (b) If it did, was the applicant entitled to cancel the contract? (c) Is the applicant entitled to damages as a result of the breach? and (d) What is the quantum of such damages?

[5] The parties led extensive evidence relating to a complex web of business dealings by the respondent and its subsidiaries and various other companies, some which frequently changed character and bred offshoots, conducted both here and in Europe. To put the parties' relationship in its proper perspective, it is necessary to set out this lengthy testimony in some detail. This includes a host of equally lengthy correspondence exchanged by the applicant and Kumar in which the underlying background to the issues is set out more lucidly, in my view, than in the oral testimony. Two witnesses testified in support of the applicant's case – himself and his longtime friend and business partner, Mr van Zyl (an attorney turned businessman). The sum of Van Zyl's account is this. During April 1997, he held interest in the respondent and a number of its subsidiary companies – he was the managing director and chief executive of the respondent itself, was executive director in the respondent's subsidiary companies, Auto Cable Industries (Pty) Limited (ACI, a manufacturer of car electrical harnesses which also underwent a name change at some stage to become Pasdec Automotive Technologies) and Femco (Pty) Limited (a manufacturer of electrical motors), was a director and shareholder in Femco Mining (Pty) Limited (a

manufacturer of flame-proof mining motors and another subsidiary company of the respondent) and was one of three shareholders in the Vavasor Group, a company which held controlling shares in the respondent. According to him, the applicant was also involved in some of these companies. For example, the applicant, together with a Mr Zammit (van Zyl's co-director in the respondent who had since died at the time of the trial) was a co-shareholder in Vavasor and, consequently, in the respondent. He was a shareholder in Femco Mining and was also a non–executive director in the respondent.

[5] Van Zyl described his involvement in the applicant's appointment by the respondent as follows. During July 1997, he was informed by Zammit and the applicant that a Malaysian company, Genaire Holdings represented by the Mr Kumar mentioned in the Statement of Case, sought to become incumbent shareholder of the respondent. Three requests were then made: Vavasor was asked to retain 10 per cent of its shares (valued at about R5m) in the respondent for a period of 36 months as a show of its confidence in the new shareholder, Genaire; the applicant and Zammit would procure a two per cent share in Femco Mining for the respondent (in addition to its 49 per cent shares in this company) to give it controlling interest in this subsidiary – this entailed that he would relinquish some of his own shares in Femco Mining to facilitate this transaction. He agreed to the proposal on certain conditions, the main on being that the applicant and Zammit (another longtime and trusted friend and business partner) would remain in the respondent's employ as the only executive directors, with management

control powers, for the duration of three years commencing on 1 August 1997 during which he would retain shares in the respondent. Genaire would appoint its directors only on a non-executive basis. He was particularly cautious to safeguard his interests in this manner as he distrusted Kumar, who had previously attempted to blackmail him into renegotiating a transaction in another business setting. Kumar subsequently presented him, in his capacity as the respondent's managing director, with a minority offer from Genaire embodying these conditions and the terms of the executive directors' employment and salary packages. The salary packages included a 13th cheque for each of the executive directors. The terms and conditions of employment were similar to those that he and Zammit already enjoyed as the respondent's directors. He confirmed the terms of the offer with Kumar and, subsequently, with Zammit and the applicant. Thereafter the minority report was published: on 12 September 1997. As far as he knew no written agreement was ever concluded with the applicant. However, he and Zammit, the previous executive directors, had written contracts and had also been furnished with letters of appointment setting out the terms of their employment with the respondent.

[6] After concluding this transaction he took up employment with ACI as its executive chairman. One of the early transactions that he negotiated for ACI involved what he termed 'a management buy-out' of the 50,1 per cent ACI shares held by General Motors Corporation, a US company. General Motors intended to transfer 1,1 per cent of their shares to the respondent. The remaining 49 per cent shares would be transferred for a nominal

consideration to a management company which would be formed. ACI wanted a R40m interest free share equity from General Motors which would be used to restructure and restore the hobbling ACI to a viable position. He represented ACI and the contemplated management company whilst the applicant and Zammit represented the respondent and Kumar, Genaire. It was finally agreed that General Motors would furnish R32m. Genaire agreed to provide the shortfall of R8m. Kumar however required a pledge of the management company's shares to use as security to raise this sum. This proposal deviated from the original agreement and both he and General Motors found it unacceptable. Because of his previous experience with Kumar, whom he considered dishonest, he was not willing to continue his involvement with ACI and the management company if they were under Genaire's control. He thus relinquished his shares in the management company to the respondent and his position as ACI's executive chairman was filled by the applicant. His services were, however, retained from 1 December 1997 for a period of two years on a consultancy basis to complete the General Motors transaction. He later learnt about the suspension of applicant and Zammit by the respondent and an organogram reflecting the restructuring of the respondent's management which indicated to him that the applicant had been removed from such management.

[7] I may just mention in passing, purely by reason of the unprecedented nature of the request, that at the conclusion of Van Zyl's evidence, the applicant's counsel sought a ruling directing that Kumar, the respondent's witness, be called to testify before he called the applicant. The basis for this

application was initially that no facts, grounds or reasons were given to the applicant for his suspension in the pleadings. Kumar therefore had to testify on these grounds or reasons to clarify for the applicant the case that he had to meet, so it was argued. It was then contended that I should make a ruling on the evidentiary burden in terms of the Uniform rule 39(14) in the absence of a similar specific provision in the labour court rules. In my view, the application was entirely baseless and I gave it short shrift and refused it.

[8] The applicant then testified. His evidence confirmed that given by Van Zyl. He stated that he has various business interests; in the manufacture of steel, aluminium and stainless steel products and property development. His involvement with Genaire came about when a contingent of Malaysian business people visited South Africa, presumably to seek business opportunities and investments in the country. He usually drove them in his vehicle to various factories and other trading places. He developed a good relationship with them to the extent that in July 1997, Kumar and Genaire's attorney in the country, Mr Viljoen, offered him and Zammit the positions of joint managing directors in the respondent on the same terms and conditions that applied to Zammit, who was already in the respondent's employ. They accepted the positions. Zammit would manage Femco Mining and he, ACI. Five other foreign directors were appointed to the respondent's board on Genaire's behalf. In his recollection, the only terms of employment which were mentioned specifically, albeit in broad detail, related to a salary in the monthly sum of R55 000,00, insurance on cellular phones and motor vehicles, 13th cheque and a 20 day annual leave. He accepted the terms.

Kumar undertook to prepare an employment agreement which never materialized. He did not insist on it since he was a new appointee and, in any event, believed that it was the duty of the respondent's human resource department to attend to it.

[9] ACI was suffering huge losses when he took over. Femco Mining and even the respondent itself were in a similar position and required a considerable cash injection. Research conducted in July 1997 into the respondent's restructuring determined that a sum of about R15m was required to restore it to profitability. This money would be provided by the new shareholder, Genaire. The first tranche, in the sum of R6m, would be provided before the end of December 1997. Genaire never delivered on its undertaking and repeated reminders to Kumar merely elicited false promises that the money was on the way. Genaire similarly failed to meet other financial obligations including its undertaking to inject R10m into Femco Mining. The applicant referred to several minutes of board meetings held by the respondent's directors over an extended period in which ACI's dire financial situation and its urgent need for financial assistance was raised, without success.

[10] In October 1997, the board approved the purchase by the respondent of Nis Traders (Pty) Ltd, a struggling company owned by Nissan trading in the respondent's line of business, to which he, Kumar and Zammit would be directors. The object of this transaction was to increase ACI's size and source additional work for it. He and Zammit also secured export business

with a European company, Delphi Packard Electric Systems (Delphi, affiliated to General Motors), which would be subcontracted to ACI. The board authorized them to pursue the export business and granted them permission to hold directorships or own shares in such business. It was not possible for the contract to be concluded directly with ACI because Genaire failed to meet certain obligations such as providing the requisite guarantees and cooperating in the due diligence exercise. Delphi thus refused to deal directly with Genaire and the respondent.

[11] By August 1998 ACI was in a critical situation. Not only had Genaire failed to give it money but it also failed to provide the respondent with letters of credit to enable it to procure components for the manufacture of harnesses. It was at risk of exceeding its R40m bank overdraft limit. The situation was so desperate that he was using his personal financial resources to obtain raw materials for ACI. Zammit on the other hand had personally lent Femco Mining about R4m to keep it afloat. On 27 January 1999 they (he and Zammit) sent Genaire a joint letter fully explaining the situation which had deteriorated to a point that suppliers were no longer servicing the ailing companies. They threatened to invoke their fiduciary duty and advise the companies' customers, bank, auditors and creditors of the situation on the following day. In the meantime, the respondent's auditors had caught wind of its insolvent status and drew the attention of the respondent and its directors to their statutory obligations. In response to the letter, Kumar arrived a week later. He did not bring money but merely wrote a letter to the respondent's bank undertaking that Genaire would transfer R16m to the

respondent shortly, another false promise which was not fulfilled. Kumar requested him to accompany him to the respondent's major customers to allay their fears and retain their business on the promise that the respondent would be rescued. Despite the broken promises, he still enjoyed a cordial relationship with Kumar. It however soured when he refused to vouch for his false statement at a creditors' meeting in March 1999 that Genaire had honoured its obligations to the respondent. Kumar became very angry with him. At that meeting Kumar undertook to the creditors that they would be furnished with proposals detailing how they would be paid. Kumar did not however write the letters and he wrote them out of embarrassment.

[12] On 19 April Kumar returned to South Africa. He gave no indication to him that anything was amiss. Over a period of two days he drove Kumar around and had meals with him as usual. Kumar still promised that the situation would be sorted out. He was thus shocked to receive a letter of suspension on 21 April which was dated the 20th, signed by Kumar. The letter read:

'I wish to inform you that an Extraordinary Meeting of the Directors of [the respondent] will be held…on Wednesday, 21 April 1999 at 15h00, at which meeting I will propose that the following Resolutions be passed by the Board with or without modification thereto, namely:

1. "That the services of William Conly Annandale and Guido Zammit as executive employees of [the respondent] and as executive of any of [the respondent's] subsidiaries be and are hereby suspended with immediate effect on full pay and benefits pending an investigation into certain prima facie irregularities concerning their employment with [the respondent] and their duties as executives of any of [the respondent's] subsidiaries."
2. "That Navin Kumar in his capacity as a Director of [the respondent] be and is

> hereby authorized to implement the aforegoing Resolution on behalf of [the respondent] in such manner as he in his absolute discretion deems fit."'

[13] The letter was delivered to him a mere15 minutes before the scheduled board meeting. He called his attorney for advice. On such advice he refused to attend the meeting for lack of proper notice. Kumar nonetheless had a discussion with him and Zammit during which he informed them that 'some issues', which he would not define, needed to be resolved and undertook to do so shortly. On the following day Kumar attempted to convene the board meeting and presented him and Zammit with an attendance sheet. He once more complained that the board meeting was not properly constituted and could only be a discussion meeting. He endorsed the attendance sheet to reflect that sentiment. Kumar nevertheless insisted on having his proposed resolutions formally adopted. He left the meeting at this stage. On the following day he received a letter of suspension, dated 21 April and signed by Kumar, which read:

'I have been instructed by the board to inform you, as I hereby do, that in accordance with a resolution of the Board of even date your services as an executive employee of the [respondent] and your duties as an executive of any of the [respondent's] subsidiaries be and are hereby suspended with immediate effect on full pay and benefits pending an investigation into certain prima facie irregularities concerning your employment with the [respondent] and its subsidiaries.

During the period of your suspension you will not be required to work or perform any executive duties and accordingly we require you to refrain from communicating with any of the [respondent's] customers, suppliers, employees or any business associate. You will, however, be required to hold yourself available to attend meetings at the request of a Board member of [the respondent] subject only to reasonable notice being given to you. I anticipate that the investigations will be concluded during the second half of May 1999 whereafter your employment will either be immediately reinstated or, alternatively, you will receive notice of disciplinary enquiry to be convened.'

[14] The applicant challenged the veracity of purported minutes of a board

meeting of the 21st which were not signed and reflected that he had been present when the resolutions were adopted and the validity of the meeting itself on the basis that it was not properly constituted. He also denied that a resolution to have Kumar chair the meeting had been taken in his presence. He stated that despite the suspension Kumar requested him to continue working, which he did. On 3 May he received an 'inter office memo' from Kumar requesting him to provide the following documents and information:

'1. The contractual agreement between Export Harness Supplies (Pty) Ltd (EHS)[1] and Auto Cable Industries (Pty) Ltd (ACI).
2. The relevant correspondence between EHS and CAI on pricing agreed with both parties.
3. The calculations and payment made on Genfemanco (Pty) Ltd.[2]
4. The owners and directors of Genfemanco (Pty) Ltd.
5. The payment to Belanca (Pty) Ltd and the agreement thereof with the said company.
6. The agreement signed on the purchase of Nistraders (Pty) Ltd.
7. The certification of the auditors of the takeover of the assets and stocks of Nistraders.
8. The statement of accounts for payment made to Armando Cacacae.[3]'

[15] He responded to the memorandum on the following day and provided Kumar with the relevant answers and documentation. The gist of his explanation[4] was this. EHS was established as an intermediary company between Delphi Packard and ACI to procure export business. It was therefore an exclusive agent and marketer for ACI with its business owned by ACI. Cacacae was its sole shareholder. He and Zammit were merely trustees in the company. The respondent's board approved their directorships in it to facilitate the administration work between its office and ACI. The original agreement between EHS and ACI was verbal. He was Genfemanco's sole director.

1A company incorporated initially on 23 October 1998 as Ticiline Ten (Pty) Ltd with the main object to 'engage in general trading'. It was acquired by the applicant and Zammit, who became its directors, on 28 October 1998. Its name was subsequently changed to Export Harness Supplies (Pty) Ltd on 4 November 1998. Its main business and object was also changed to 'manufacturing and export of motor related components'. Zammit resigned as its director on 28 May 1999.

2 Genfemanco Management Company (Pty) Ltd was incorporated on 8 December 1997. Its main object was 'to carry on the business as business management consultants. The applicant acquired it on 3 December 1997. He and Zammit held shares in the company and were its directors.'

3 An Italian national with whom ACI represented by one of its directors, R.K. Schusser, contracted on 23 November 1997 to 'procure and enhance' orders for the supply of Automotive harnesses and other products manufactured by ACI on the payment of a commission.

4 As appears, in part, also in a letter dated 5 May 1999 authored by Kumar on the respondent's behalf addressed to the latter's auditors.

[16] Kumar sent him another memorandum on the 6th requesting more detailed information and documentation relating to the same issues raised in the earlier memo. It read:

'Export Harness Supplies (Pty) Ltd
1. The statutory documents of EHS reflecting the directors, shareholders and the related power of attorney given by Cacacae.
2. The agreement between ACI and EHS reflecting the board approval.
3. The transfer pricing between contracted sum of Delphi and EHS of DEM 33 and EHS and ACI of DEM 22.
4. The management of EHS and the personnel responsible for the company.
5. The purpose of establishing EHS and the relationship with ACI. This information is to obtain total clarity of the relationship of ACI and EHS.
6. The amount owing by EHS and the reason for the delayed payment to ACI.
7. The reconciliation of the account between ACI and EHS as of 30 April 1999.
Nistraders (Pty) Ltd (ACI Nippon (Pty) Ltd (ACI-N)

8. The reason ACI giving 49% shareholding of ACI-N to EHS. This is to seek clarity to the reasoning of the shareholding structure.

9. The takeover of the accounts, stock and fixed assets of the company and the personnel involved in the process. 10. The relevant confirmation of the takeover and the related work.
11. The reason for the advances to ACI-N by ACI of approximately R3.84m.
Genfemanco (Pty) Ltd

12. A certification by the secretary of the directors and the shareholders of the company.

13. The purpose of setting up the said company.
14. The reason the Genfemanco payments are charged to [the respondent].
15. The ownership of the ACI 49% shares and the basis of Genfemanco having the right to own the shares in relation to the Belanca agreement.
16. The amounts received by Genfemanco from ACI and the details thereof.
17. Details of the distribution of the same amount to the management.
ACI Accounts for the year ended 31 December 1998

18. The loss incurred in the second half of the year of 1998 of R15.403.

19. The extraordinary loss incurred in the month of December 1998 of R11.2m in relation to the turnover.
20. The gross margin loss incurred by the company in its manufacturing accounts, which has an average gross margin profit of 40% to 54%.
21. The capital expenditure incurred in the company for computers and equipment and the relevant approval from the board.

22. The payments made to Concom (Pty) Ltd[5]. The nature of the payment and the documents pertaining to it.
23. The confirmation of payments made to Henk Viljoen & Chester [attorneys] and the relevant documents.
24. The retrenchment cost incurred in the first half of the year and the relevant workings of the exercise.

Armando Cacacae

25. The detailed statements of account relating to the payment to Cacacae.

26. Confirmation of payments received by Henk Viljoen & Chester from ACI for Cacacae.
27. The correspondence between Cacacae and the ACI relative to the contract procured as per the agreement.
28. Signed copies of all agreements entered into between ACI and Cacacae.

Representation made by you for and on behalf of ACI and Femco Tech to the customers and suppliers.

29. The representation made by you to the customers of the eventual liquidation of ACI. Please indicate the purpose of the representation and the confirmation that the same has been done to the board of directors of Femco Tech and ACI.

30. The representation that the EHS would enhance the survival of ACI.
31. The representation that ACI has lost a major customer namely Delta and that we are commercially insolvent. This representation was done to the auditors of ACI.
32. That the continued survival of ACI would be through EHS. Please explain the benefit to ACI taking into consideration, which you must have done, the bank borrowings, the cash flow etc of ACI. And also the benefits that EHS would derive from such an exercise.'

[14] On the 7th he wrote Kumar requesting, inter alia, to be furnished with the reasons for his suspension. The letter was never answered. He nonetheless responded to Kumar's memo of the 6th in a letter dated 10 May to which he attached copies of EHS' CM29 and CM42 forms and the contract concluded with Cacacae. Reference was made in respect of some of the questions to answers given in the earlier memorandum. The letter read thus:
'1…Transfer document transfers all issued shares to Cacacae per his requirements. No Power of Attorney was necessary from Cacacae, his verbal instructions are and were adequate.

5 Conkom Ontwikkelings (Edms) Beperk, a company owned by the applicant which he testified owned a building that he used to obtain a bank facility of R500 000,00 to purchase products and pay creditors to ensure that production at ACI continued.

2.The agreement between ACI and EHS was verbal, based on the basic conditions of the Delphi/EHS agreement…Approval for the entire transaction was given on the 26th June 1998 – see Board Resolution 26th June 1998…The matter was discussed in detail prior tp (at Exco) and during the meeting.
3. The transfer pricing you quote is incorrect. The price to ACI is per the documentation already supplied. The price to EHS is higher due to EHS having to pay for inbound freight, outbound freight, packaging, labels and having to finance stock freight cost inbound 2 to 3 months supply in advance of being paid per harness shipped. EHS also pays for sovereign insurance cover and other insurances. Right now EHS is also paying for ACI required wire and terminals in advance …due to ACI's inability to have done so.
4. EHS purely sub-contracts the work to ACI. Management is limited to a production activity with minimum admin. Delphi staff continually monitor quality and the only person besides ACI as a subcontractor is Mr Zammit and myself.
5. From the outset Delphi would not enter into a direct relationship with ACI. In terms of the board resolution Messrs Zammit and Annandale were mandated to set a structure in place to obtain some work from Delphi, indirectly. EHS was established to secure export work that could be sub-contracted to ACI. Each entity is however contractually committed to its obligations.
6. The amount in fact due to ACI can only be ascertained if ACI staff and you deliver to me documentation requested numerous times…
7. The reconciliation as at 30 April 1999 requires the same detail as in 6 above.
8. The board approved the purchase of 51% shares in ACI-Nippon on 20th June 1998. Refer minutes…
9. The board accepted that the external auditors would verify correctly the balance sheet values of such issues that were being taken over. Refer the minutes…
10. …
11. Advances to ACI Nippon were made by management of ACI Brits. Due to the fact that no debtors were taken over, the company required cash flow to continue operations. In terms of board resolution of 26th June 1998…such finance from within the group was approved.
12. I, in the absence of secretary having been appointed …have advised you as to the directors and shareholders of Genfemanco in my inter-office memo of 4th may 1999.
13. Mr N.L. van Zyl, G.J. Zammit and W.C. Annandale had an entitlement to 49% of the shares of ACI prior to conclusion of the Femcotec/General Motors agreement.
You suggested the formation of a company in this regard, upon which the general Motors agreement was amended and the Genfemanco agreement entered into. Refer minutes of 14th October 1999.
14. The reason that the Genfemanco payments are charged to Femco Technology Holdings Limited is simply that the agreement was between Genfemanco and Femcotec.
15. Although the Genfemanco agreement was agreed to by the board, designed by you in principle…it is obvious now that a mistake was made since van Zyl was bought out separately. Accordingly Genfemanco should only have 32,6% of the shares to be sold.

One third entitlement was bought from Belanca. This can easily be rectified by an addendum to the agreement.
16. …
17. The discussion …where you suggested buying our entitlement of ACI shares specifically revolved around management preferably having an interest in the company. Nevertheless Femco bought our entitlement to the shares and any payments in accordance with the agreement belongs to Genfemanco. Genfemanco did however in a spirit of goodwill make ex gratia payments to various staff members totaling some R148 000,00.
18. The loss incurred has not bee fully analyzed…and my suspension limits my access. Contributing factors to the results are:
a) High interest rates.
b) Drop in turnover.
c) Excess labour and staff, not yet retrenched.
Due to your failure to capitalize the company by injecting R15m as was agreed, the full restructuring programme could not be done timeously.
19. I still await an analysis and details from Yunis and the Auditors regarding the extraordinary loss…
20. The gross margin is a product of sales and cost of sales. Cost of sales is being analyzed which may add some light to the issue.
21. On an operational level no proper or functional computer system existed. Mr Schusser, Annandale and Zammit discussed it with the board of ACI and Mr Zammit understood the urgency. Quotes were obtained, full management meetings were held and the necessary computer software and hardware acquired to complete further the system already partly purchased under General Motors Management. Copies of Management meetings were tabled at board meetings.
22. Payments to Conkom were my salary and refunds of amounts paid by Conkom on behalf of ACI.
23. Payments made to Viljoen …all documentation will be available from the accounts department…
24. Retrenchment cost and workings of the exercise will be found with production, wage department and finance. Retrenchment is on LIFO basis according to Labour union rules.
25….
26. Confirmation of these payments can be made by checking paid cheques.
27. …
28. …
29. No representation was made to customers regarding ACI's eventual liquidation…
30. The representation …that EHS would enhance the survival of ACI was to the board of Femcotec and discussed with Mr Schusser…
31. The representation that ACI had lost a major customer to the auditor was not made. The auditor confirmed this to you and his misunderstanding…in front of me…
32. At no stage did I state that the continued survival of ACI would be through EHS. In fact…you have a detailed proposal in writing, you requested it – in this regard. All my proposal did was to attempt in good faith at no gain to EHS to minimize any effect of resourcing on ACI. The prices you currently have with Delta for any such work is known

and it would therefore be hardly possible to benefit in any event…The position is particularly bad at Delta especially since you told them that 2 million Ringgitt was already sent. The same was said to Mercedes, Mr Zammit, you and myself stated this in writing to Standard Bank!!'

[15] He had a meeting with Kumar after this correspondence who promised him that he would be reinstated shortly once certain minor outstanding issues were resolved on his return from Malaysia. Kumar did not return and he remained suspended. He however continued to do work for the respondent that Kumar had requested him to do until late May when he discovered that despite such request to him Kumar had instructed all ACI staff not to communicate with him. When he learnt about the restructured management scheme which appeared to exclude him as an executive board member, he sought legal assistance and subsequently, in a letter dated 28 May 1999, notified the respondent of his 'resignation as director [of the respondent and its subsidiaries] and termination of employment'.

[16] During his cross-examination he said that he had been paid a 13th cheque, which he described as a 'pro rata bonus' in December 1998. He conceded however that this part of his claim was not pleaded as one of his terms of employment. He proffered nothing to prove that he ever received the bonus. Regarding his leave entitlement, he reckoned that he had 27 leave days due to him. He explained that he had taken time off work on two previous occasions (five days to attend an air show in the US in July 1998 and about three days during the Christmas break in December 1998). It turned out that he had taken another week off in March 1998 that he did not mention in his evidence. He stated that he had no exact recollection of the actual leave taken by him and relied on calculations furnished to him by the respondent's personnel officer, Mr Bodenstein. This was after his request to the managing director, Schusser to have his leave days computed. Schusser, he explained, was aware that he had taken leave on previous occasions. He

however conceded that he did not mention those instances nor furnish Schusser with the detail thereof when he requested him to compute his leave entitlement. He subsequently notified Zammit and Kumar in writing that the respondent owed him 27 days leave pay and they confirmed that without demur. He denied that he had resigned as the respondent's managing director, stating that he had merely resigned as director of the various companies listed in his letter of resignation and not as the respondent's employee. However, he could not explain what the words 'termination of employment' contained in the letter which was written by him meant and attributed them to his legal representative. At some stage of his confusing explanation in this regard, he seemed to admit that had he not resigned precipitously (in view of Kumar's undertaking in his letter of suspension to revert to him during the second half of May), he may well have been subjected to a disciplinary enquiry - and reinstated or not.

[17] He was questioned at some length about the circumstances surrounding Kumar's memoranda of 3 and 6 May. He conceded that the bulk of his evidence which related to Genaire's alleged improper conduct towards the respondent was not the basis of his cause of action against the respondent. He stated however that this evidence set out the intolerable conditions under which he was forced to work and the obvious manner in which he was made the scapegoat for the respondent's poor performance. He also denied that Kumar's memoranda clearly related to and indicated the basis of his suspension. He said that Kumar sought the information on the pretext that he had forgotten his briefcase with his own documents in Malaysia. Later

however, when asked to explain a statement in his letter of resignation that he 'had done everything to cooperate with the investigation initiated by Mr Kumar' it became clear from his contradictory answers, as one would reasonably expect, that he was quite aware that Kumar was conducting an investigation related to his suspension. Significantly, he conceded that the organogram which precipitated his resignation was an interim reorganization of ACI's management effected during his suspension and did not show that he was excluded from the respondent's management.

[18] It appeared that not only were some of his responses to Kumar's memoranda factually incorrect but that he deliberately withheld information from the respondent's board. For example, he was referred to his affidavit in other related proceedings involving one of his companies and the respondent. In this statement he stated that the so-called Genfemanco agreement[6], one of the issues raised in the memoranda, was not signed on 12 November 1997 as reflected therein but in March 1998. He backdated it (an act he denied was fraudulent), so he explained, at the request of and assurance by Kumar that this would, amongst other mutual benefits, save them from the embarrassment of the past delays in providing creditors with guarantees. This is why he did not raise this anomaly in his answer to Kumar – the latter was aware of it. It appeared that the agreement referred to Genfemanco (Pty) Ltd when no such company ever existed, another fact which he failed to mention to Kumar. It is only in the other proceedings between the parties mentioned above that an explanation was given, and

6 Significantly, in terms of this agreement Genfemanco Management Company (Pty) Ltd, in which the applicant held 50% shares, would acquire 49% shareholding in ACI.

even there only in amended pleadings, that the agreement 'does not reflect the common intention of the parties…that any reference to Genfemanco (Pty) Limited wherever it appears should have been a reference to Genfemanco Management Company (Pty) Ltd'.

[19] Another instance related to his answer to Kumar's pertinent question seeking to establish the identity of 'the directors, shareholders and the related power of attorney given by Cacacae'. The applicant had represented that Cacacae was the sole shareholder of Export Harness Supplies (Pty) Ltd. As it turned out, no shares were ever transferred to Cacacae and he (the applicant) in fact held the shares in question. His explanation in this regard was that he 'did not think it relevant'. There was then the issue of a company swap that he made involving EHS (the so-called intermediary company between ACI and Delphi) that he also had failed to bring to the respondent's attention. During 1998, his company Elandeo Twenty (Pty) Ltd mutated into Export Harness Supplies (Pty) Ltd and, later, to Export Harness Supplies International (Pty) Ltd, supplier and manufacturer of wiring harnesses to the automotive industry. In October 1998, another EHS was born when Ticiline Ten (Pty) Ltd became Export Harness Supplies (Pty) Ltd, manufacturer and exporter of motor related components. He was the director of both companies. In a convoluted discourse[7], he sought to explain the need for the formation of the later EHS which apparently replaced the original one in the ACI-Delphi deal and would take over ACI's custom with a major customer, Delta Motors Corporation (Delta). His explanation for omitting to disclose

7 The applicant's explanation was that before a contract was concluded with Delphi, the first EHS concluded one with a Swedish motor company which ran into financial difficulties which could potentially prejudice EHS. He then decided to form another EHS for the Delphi deal.

these developments to the respondent's board (which specifically approved the first EHS as the designated intermediary) was that it was irrelevant - all that was important was that 'there is a company Export Harness Supplies'. Interestingly, he was constrained to admit that had ACI gone into liquidation as he prophesied, his undisclosed company would have inherited the lucrative contracts. There were a number of other seeming anomalies that were raised with him, including that in March 1998, he offered employment in EHS to one of ACI's key employees, Mr Turner, and represented to the respondent's key customer, Delta, that the respondent was going into liquidation. At some stage, the 1998 EHS also withheld payments to ACI. There had been an operational shortfall of about R950 000 during December 1998 which was discovered only in May 1999 for which he could not account. He could not deny that these and other related issues gave rise to a need for an investigation and that this was the basis for his suspension. He however denied being told by Kumar he was being suspended because of the respondent's chaotic situation which Kumar needed to investigate. His explanation for his bid to be reinstated after he had resigned if his employment conditions were intolerable as he alleged was that he heard that the respondent's situation had improved in his absence. The applicant's case was closed on this note.

[20] After an unsuccessful application for absolution, the defence called Kumar to testify in support of its case. He was no longer involved with the respondent at the time of the trial. He disputed a considerable portion of the applicant's version of the events. He stated that he suspended the applicant

and Zammit because of the respondent's dire situation and certain information that he received about the two men's stewardship of ACI and Femcotec which hinted irregularities. He needed to investigate certain critical issues concerning the subsidiary companies and the manner in which they were run, all which only the two men had intimate knowledge as their managers. For example, he had information from Turner that the applicant had offered him a lucrative job in EHS on the basis that ACI was going into liquidation and that its business would be taken over by EHS. Turner even showed him his letter of appointment by EHS, albeit after the suspensions. The respondent's board was quite surprised by this development since ACI was still a going concern and EHS was merely meant to be an interface company.

[21] He informed the applicant of the reasons for his suspension. He denied that he sought information from the applicant because he had forgotten his briefcase in Malaysia. His second memo was prompted by the applicant's inadequate response to the first one. The applicant's lack of candour delayed the investigation. Zammit, on the other hand, was reinstated speedily because of his full cooperation with the process. The applicant's resignation preempted a formal disciplinary enquiry which could well have cleared him of wrongdoing and resulted in his reinstatement. He denied the applicant's version of the events at the meeting of 21 May which he said was properly constituted. According to him the applicant was informed of the reasons for his suspension. He did not dispute that the applicant was entitled to leave. He however had no knowledge of the exact number of days comprising such

entitlement. He merely signed the document in which the applicant claimed 27 days' leave to acknowledge and did not verify its correctness. He also did not know if the applicant was entitled to a 13th cheque and had been paid such a bonus at some stage. He did however confirm that the applicant's terms of employment were similar to Zammit's but could not recall the detail thereof. He conceded that there had been delays on Genaire's part in transferring funds to the respondent, some which were attributable to the Malaysian government's imposition of capital control on all outgoing funds. He confirmed travelling around the country with the applicant to meet customers and assuring them that ACI would continue trading and that the majority shareholder, Genaire, would give it financial assistance. He issued the interim management organogram to ensure that all concerned knew to whom to report. The organogram did not seek to exclude the applicant who was suspended only as joint managing director of the respondent and remained a member of ACI's board of directors. He denied barring ACI staff from communicating with the applicant.

[22] Turner then testified. His brief evidence was the following. He is a director and employee of ACI, now known as Pasdech Automotive Technologies. His background is in industrial engineering production and technical design and development of automobile harnesses. During 1999 he was its plant manager and later became general manager. He had overall responsibility of the manufacturing plant encompassing its production, financial, quality and logistics department - ensuring that the company supplied harnesses to its customers and remained financially viable. In

March he accompanied the applicant, as an observer, to a number of meetings held with various directors of ACI's major customer, Delta which ACI supplied with all its harness requirements. At those meetings the applicant expressed concern that ACI was unable to pay its suppliers as a result of its cash flow difficulties and that this, in turn, could affect its ability to continue supplying Delta with harnesses. The applicant then suggested that to ensure continuity of supply in the event that ACI went into liquidation, EHS could take over ACI's assets and goodwill and continue operations within a short period. Delta's directors were extremely concerned as this meant that Delta's production could grind to a halt and were concerned that EHS, as a new concern, may not be able to take over such a big contract. Shortly after these meetings, on 27 March, the applicant made him a written offer of employment (of the same position that he had at ACI) in EHS on the basis that ACI was possibly going into liquidation and that the only alternative was to ensure that its work went to EHS. The applicant also showed him an unsigned copy of a resolution to the effect that EHS take over ACI's work, which he said he was going to place before the board of directors for approval. The commencement date of such employment was left open as the applicant was unable to tell when ACI would be liquidated. It also became common knowledge in the automotive industry that ACI was collapsing such that he received another employment offer from another company. ACI however did not go into liquidation. Instead, it subsequently improved dramatically after the applicant's departure and he remained in its employ. It however lost Delta's business in the ensuing confusion and concerns which arose after the applicant's representations to its directors.

[23] Within two weeks of the applicant's employment offer Kumar came to South Africa. He then expressed to him his deep concerns about the situation with regard to the company, his own position and that of his staff. He told him about the applicant's offer and what he had represented to customers relating to its imminent liquidation and EHS' proposed takeover. Another concern that he had nursed for a while related to pricing. As he understood the situation, EHS was merely a front company for the Delphi contract and was not meant to make any profit from that arrangement. However, the applicant instructed him, despite his disapproval, to invoice goods supplied by ACI to EHS at a lower price and then put a profit margin on that price in the EHS invoice to Delphi for EHS' benefit. His branch in Port Elizabeth had no cash flow problems although he had been informed that the Britz branch was struggling to the extent that the applicant had to personally assist it financially.

[24] This evidence concluded the defence case. An application was then brought on the applicant's behalf for an amendment of his statement of case. I refused the ill-conceived application and gave my reasons therefor at that stage. Nothing more needs to be said on that aspect.

[25] In argument, the applicant's counsel correctly conceded that the issue of the organogram had been 'pleaded incorrectly' but argued that the organogram was nonetheless important in the applicant's decision to resign as it showed that he no longer featured in ACI's management structure.

Indeed, the employment contract was concluded with the respondent, the holding company. It was (correctly) alleged in the pleadings that he was a director of that company and (incorrectly) that he received an organogram setting out the new structure of its management. It was not disputed that the organogram reflected an interim management team established during the period of his suspension which did not exclude him from the board of directors as (incorrectly) alleged in the statement of claim.

[26] Contrary to the applicant's denial that he had resigned from his employment and in line with his pleadings, his counsel acknowledged that the applicant had in fact cancelled the employment contract. Relying on the case of *Council for Scientific and Industrial Research v Fijen* 1996 (2) SA 1 (A),[8] he however submitted that the respondent's conduct in unlawfully suspending the applicant without valid grounds therefor, granted the applicant the right to cancel the employment contract. He argued further that the respondent had no right to suspend the applicant either at common law or in contract (as the employment contract did not incorporate a suspension clause and the respondent's disciplinary code, on which it did not in any event seek to rely, there being none for ACI, merely provided for 'lower

8 There, Harms JA held at 9G – 10A: '[A]n English rule of law …is that in every contract of employment there is an implied term that the employer will not, without reasonable and probable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties. This implied term may be breached without the intention to repudiate the contract. It is sufficient if the effect of the employer's conduct as a whole, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it…It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the 'innocent' party to cancel the agreement...On that basis it appears to me that our law has to be the same as that of English law and also that a reciprocal duty as suggested by counsel rests upon the employee. There are some judgments in the LAC to this effect…It does seem to me that, in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply flow from *naturalia contractus*.'

rank employees').

[27] Regarding the latter submission, it is indeed correct that none of the evidence indicated that the employment contract catered for the applicant's suspension. It is however doubtful that the same can be said for the rest of the submission. As correctly submitted by the applicant's counsel the common law position is that an employer has no automatic right to suspend an employee in the absence of a specific provision in the employment contract or a statutory enactment providing for it. [9] Does this therefore mean that an employer hands are tied even where an employee is suspected/guilty of serious misconduct? The applicant's counsel pointed out that an employer may be entitled to suspend an employee without payment of salary even where the employment contract makes no provision for suspension if the employee is guilty of an alleged negligent conduct causing damage to property, fraud or theft and his misconduct results in financial losses to his employer which are disproportionately greater than his salary.[10] He then argued that if there is such an extensive right to suspend without pay at common law, a right must be inferred allowing an employer, absent an express, appropriate clause in the employment contract, to suspend an employee with pay and fringe benefits in a case of suspected serious misconduct such as the present one. One must then ask the following question if this proposition is accepted - from which source is such right to be inferred?

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9 *Norton v Mosenthal & Co* 1920 EDL 155
10 Joubert, LAWSA Vol 13 Part 1 para 155.

[28] It seems to me, particularly in the light of our equity legislation (which, even though silent on this issue, propounds equity in the workplace and the proper balancing of employer and employee rights)[11] that it may be time to answer the question whether such a right can be derived from the principles of fairness in the affirmative. A suspension implemented in the manner followed in the present case (where the employee was informed of the relevant reasons and was not deprived of his salary and other benefits for the relevant duration) hardly seems to offend such principles.

[28] Further, it must be considered that it is acceptable and common practice for an informal investigation by the employer to determine if there is merit in the charges brought against the employee to precede a disciplinary hearing and, pending such investigation, to suspend the employee.[12] This, in my view, is exactly what happened here. I find no fault with the respondent's conduct in so far as this aspect is concerned.

[29] I have difficulty accepting the applicant's allegation that he was not told why he was being suspended over Kumar's contrary version, patchy as the recollection of the events was at times and despite the applicant's subsequent written request for such reasons to the latter. Significantly, Kumar's evidence that he gave the applicant details of the reasons for his suspension was not explored in cross-examination. I pause to mention here

11 Labour Relations Act 66 of 1995.
12 *Joubert*, supra, para 179. See also *Brassey, Employment and Labour Law* 1 F3:15 where he states that '[w]hen the applicable statute agreement is silent on the issue, it will…normally be proper to imply a right a right to suspend pending a disciplinary hearing if, as is normally the case, such a hearing is obligatory. The source of the implication is in the duty to hear itself. The process of convening and concluding a disciplinary enquiry cannot but take time and in the meantime the employer must have some protection against further harm at the hands of the suspect'.

that I found the applicant an unsatisfactory witness, his testimony not always having been truthful. Some of the more glaring examples are his denial that he was aware that Kumar was conducting an investigation and believed that he sought the information detailed in the May memoranda because he had left his briefcase in Malaysia in the face of his own reference to an investigation in his letter of resignation; his incomprehensible attempt to deny that he had terminated his employment contract on the flimsy excuse that he, an obviously astute and sophisticated businessman acting with the assistance of his legal representative, was confused about the legal effect and implications of resigning as a managing director. Equally disturbing was his nonchalant attitude about swapping the EHS companies and keeping this vital information to himself even though I accept that this cannot bolster the decision to suspend him as Kumar discovered it only after the suspensions. I may mention that other aspects of his evidence which I found improbable are the allegation that Kumar barred the respondent's staff from communicating with him when on his own version he was requested to perform certain tasks from the respondent's premises which clearly involved accessing important documents and talking to certain members of such staff; also part of his account relating to the events of the board meeting of 21 April which must have been properly convened in the light of his failure at any stage between that date and that of his resignation, 28 May (Zammit's apparent participation thereat and his vote in favour of the proceedings in any event puts paid to his complaint).

[30] As to whether the suspension was justified, to my mind, the undisputed

evidence of Turner, who impressed me most favourably as a witness, about the information he relayed to Kumar **before** the suspensions, on its own clearly signified 'prima facie irregularities' and laid sufficient basis for an investigation and the applicant's suspension. This is so even if Kumar was not yet aware of the false representation relating to Cacacae shareholding in EHS, the issue of payments made to the non-existent Genfemanco and the other disquieting aspects of the applicant's conduct in the running of ACI's affairs highlighted in paragraphs 18 and 19 above. An investigation was clearly warranted and, as Kumar pointed out, he needed to have 'unfettered access' to the relevant documents and parties which, up to that stage, only the joint managers of the sinking companies enjoyed.

[31] In determining the question whether the respondent's conduct amounted to a repudiation of the employment contract, regard must be had to the relevant test – whether fairly interpreted such conduct exhibits a deliberate and unequivocal intention no longer to be bound.[13] As previously mentioned, Kumar undertook in the letter of suspension to complete the investigations during the second half of May whereafter the applicant would either be reinstated or subjected to a disciplinary enquiry. It seems to me that the fine detail relating to a myriad of companies sought in the May memoranda would have made it clear to those concerned that the investigation Kumar was conducting would take time to check and verify. The applicant, without waiting for this period to expire elected to resign before the respondent could decide whether to reinstate him or subject him to a disciplinary enquiry. His attempt to be reinstated to his position just a few weeks after his resignation also does not assist his case for the alleged repudiation. The respondent's conduct can by no stretch of the imagination amount to a breach or repudiation of the employment contract. It must follow, therefore, that the applicant was not entitled to cancel his employment contract.

13 *Street v Dublin* 1961 (2) SA 4 (W) at 10B-C.

[32] There was then the claim for a bonus. It was argued for the applicant that in the absence of countervailing evidence that he would not have been entitled to this benefit, I must find that his evidence in this regard was 'prima facie acceptable. This claim is however beset by a fundamental flaw - it was not alleged in the pleadings that it was a term of the employment contract that a 13th cheque was payable and the applicant, well aware that this claim was disputed, did not even proffer evidence that it was ever paid as he belatedly alleged. Further, I remain uncertain of the exact nature of the claimed benefit. I can only assume from the applicant's evidence, or rather lack of evidence in this regard that it was not a performance bonus but rather a service bonus which an employee receives for completing a 12 month cycle of employment. Nevertheless, whatever form it may be, I am firmly of the view that no case has been made out for the payment of this claim in relation to the five months that he remained in the respondent's employ during 1998.

[33] The claim for outstanding leave pay similarly lacked foundation in the statement of claim as it was not alleged that it was a term of the employment contract. Neither was it pleaded that there was an agreement that the applicant was entitled to 27 days of leave pay as he belatedly sought to establish during his cross-examination. There being no basis to accept the allegation that he was entitled to 20 days annual leave, one must then have recourse to the provisions of the Basic Conditions of Employment Act which regulates leave where the parties have not set their own terms as it is impossible to decide from the applicant's evidence what the specific terms,

if any, were. The relevant version in this case would then be the repealed Act of 1983 in view of the fact that the 1997 version which came into effect in December 1998[14] would have become applicable to the applicant from 1 August 1999 when his new annual leave cycle began subsequent to his resignation. Section 12(4) of the 1983 Act entitled an employee to 14 consecutive days' leave of absence for each period of 12 consecutive months for which the employee is employed and obliged an employer upon termination of an employee's employment (on notice in terms of s 14) to pay to him his full remuneration in respect of any leave which accrued to him at the end of the annual cycle but was not granted to him before the date of termination of his employment. The applicant's first annual cycle fell between 1 August 1997 and 31 July 1998 and the second one, which was interrupted, from 1 August 1998 to 31 July 1998. He would not have accumulated the full 14 days leave during the second cycle as he terminated the employment contract two months shy of its end, on 28 May 1998. In the light of the evidence that he took leave, which he could not quantify, on various occasions during the relevant two year period it is impossible to determine how the 27 days leave that he claims, which he could not have accumulated, was computed. I simply do not know how much leave was due, how much was taken and how much was outstanding, if any. The applicant failed to prove this claim as well.

[34] In the result the application is dismissed with costs, such costs to include the expenses of Mr Kumar, a necessary witness.

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14 Schedule 3 s 6(1).

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MML MAYA

ACTING JUDGE OF THE LABOUR COURT

Applicant's counsel: Adv. Jooste

Instr. by: Mark-Anthony Beyl Attorneys

Respondent's counsel: Adv. Kemach

Instr. by: Lindsay, Keller & Partners
Date of Judgment: 30 November 2006