LAZARUS MUCHENJE
versus
SUSAN M MUTANGADURA
and
WINSTON MAKAMURE
and
DR M RANGARIRAI MAVHUNGA
and
DR BEULA CHIRUME
and
DR DOUGLAS MAMVURA
and
NETONE CELLULAR (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 15 July 2020, 5 August 2020 & 15 March 2021

Opposed chamber application

Adv *T Nyamakora*, for the applicant
Adv E *Matinenga*, for the 1st to 4th and 6th respondents

CHINAMORA J:

Introduction:

On 13 July 2020, the applicant filed an urgent chamber application seeking a provisional order couched as follows:

> "TERMS OF FINAL ORDER SOUGHT
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
>
> 1. That the letter of 9 July 2020 drafted by the 2nd respondent purportedly for and on behalf of the 6th respondent addressed to the applicant be and is hereby declared null and void.
> 2. Any respondent who opposes this application be ordered to pay costs, the one paying the others to be absolved.
>
> "INTERIM RELIEF GRANTED

Pending the confirmation of the provisional order, the applicant be and is hereby granted the following relief:

1. That the effect of the letter dated the 9th July 2020 drafted by the 2nd respondent purportedly on behalf of the 6th respondent be and is hereby suspended.
2. The 1st to the 4th and the 6th respondents be and are hereby interdicted from publishing the illegal dismissal of or the termination of the applicant's employment in terms of section 11(2) of the Public Entities Corporate Governance General Regulations SI 168 of 2018 and further interdicted from advertising the position in terms of section 8 of the same statutory instrument".

It is evident that the application asks for a declaratory order in terms of s 14 of the High Court Act [Chapter 7:06] ("the High Court Act") to the effect that the letter dated 9 February 2020 is invalid. The applicant also seeks an interdict restraining all the respondents, except the 5th, from publishing information relating to the dismissal or termination of the applicant's employment, and from advertising his position.

When the matter came before me on 15 July 2020, I deferred the hearing to a later date and issued an interim order which incorporated directions on timelines for filing of pleadings by the parties. The said order was in the following terms:

1. The hearing of this urgent chamber application is hereby postponed to 4 August 2020 at 10.00 am or as soon thereafter as the matter may be heard.
2. Pending the hearing of the matter and its final determination, the following directions are hereby given:
   2.1 The respondents shall file their opposing affidavit no later than 4.00 pm on 16 July 2020.
   2.2 The applicant (if need be) shall file its answering affidavit no later than 4.00 pm on 22 July 2020.
   2.3 The applicant shall file its heads of argument no later than 4.00 pm on 24 July 2020.
   2.4 The respondent shall file their heads of argument no later than 4.00 pm on 29 July 2020.
   2.5 The letter dated 9 July 2020 authored by the 2nd respondent and addressed to the applicant shall not be put into effect.

2.6 No publication shall be made by any of the respondents to the effect that the applicant's employment contract has been terminated.

3. There shall be no order as to costs.

In response to the interim order referred to above, on 21 July 2020, the respondents filed an application for leave to appeal against that order to the Supreme Court. At the same time, their lawyers (Messrs Gill Godlonton & Gerrans) wrote a letter to the Judge President through the Registrar of this court. The complaint contained in said letter was that the judge seized with the matter (myself, hereinafter referred to as "the judge") had irregularly handled the matter, in that he had effectively determined it without affording the applicants the right to be heard. The letter also expressed concern that the judge viewed the respondents in contempt of the interim order by their failure to comply with paragraph 2.5 of the order. Finally, the letter invited the Judge President to look into the matter.

In the wake of the above letter, the parties met the judge for a case management meeting in chambers on 22 July 2020 and agreed that the judge was to remain seized with the matter until its final disposal. The parties and the judge further mapped and agreed on a way forward, namely:

1. The applicant would not report for work until HC 3611/20 was determined and the judgement in that matter was rendered.
2. The parties were to abide by the interim order granted on 15 July 2020, subject to some changes to the dates of filing documents.
3. In addition, the parties would argue for and against the final order sought on the return date.
4. The 1st to the 4th and the 6th respondent undertook not to pursue the application for leave to appeal filed under HC 383/20.

The applicant's case

In his founding affidavit the applicant asserts that he is the chief executive officer ("CEO") and an employee of the 6th respondent. He cites the 1st to 4th and the 6th respondents jointly and severally, while seeking no relief against the 5th respondent, who was cited as an interested party to enable him to be heard if he so wished. The applicant alleges that 1st to 3rd respondents unlawfully and irregularly convened a special board meeting on 20 February 2020, at which they passed a special resolution to suspend him as the CEO of the 6th respondent with

immediate effect. Other senior officials of the 6th respondent were also suspended at this meeting. He contends that the resolution was a nullity because there was no lawfully convened board. On 10 March 2020, the applicant obtained an interim order from this court under HC 1524/20. In those proceedings, the applicant explained why the resolution was a nullity. He submitted that there was no notice of meeting or agenda circulated. In addition, he stated that the meeting was held at a place unknown to him and one of the directors, as well as the acting Chief Finance Officer. He alleged that only four of the remaining five directors attended the meeting, and the 5th respondent was not served with a notice to attend. CHIRAWU-MUGOMBA J granted interim relief interdicting the 1st to 4th and the 6th respondents from pursuing any disciplinary proceedings against the applicant, pending confirmation of the provisional order. The final order sought on the return date was for the resolutions passed on 20 February 2020 to be nullified.

The 1st to 3rd and the 6th respondents after initially noting an appeal against the interim order, later agreed to comply with that order. In consequence, the applicant was reinstated to his position as the CEO by letter from the 6th respondent's board dated 8 July 2020. The letter reads as follows:

> "Dear Sir,
>
> RE: NETONE CELLULAR (PVT) LMITED AND YOURSELF
>
> Reference is made to the above matter.
>
> We confirm that on the 21st of February 2020, you were placed on suspension by NetOne Cellular (Pvt) Limited. On the 2nd of March 2020, you were served with a notification to attend a disciplinary hearing before a disciplinary authority. We further confirm that you subsequently sought and obtained an order from the High Court of Zimbabwe interdicting NetOne Cellular (Pvt) Limited from proceeding with the disciplinary proceedings until your application before the High Court was finalised.
>
> We wish to advise that NetOne Cellular (Pvt) Limited is withdrawing the suspension letter dated 20 February 2020 and the charge letter (notification) that was served on you on the 2nd of March 2020. As a result, the disciplinary proceedings have been set aside and you are, with immediate effect, reinstated to your position without loss of salary and benefits from the date of your suspension. Please take note that you will paid your salary and benefits for the period that you were on suspension.
>
> Yours faithfully
>
> Mr W Makamure
> For and on behalf of NetOne Cellular (Pvt) Limited Board of Directors"

On 9 July 2020, the 1st to 3rd and the 6th respondents field a notice withdrawing their appeal to the Supreme Court. The same day (i.e. 9 July 2020), by letter written by the 2nd respondent, the applicant was dismissed from his position as CEO. The letter is in the following terms:

> "Dear Sir,
>
> RE: TERMINATION OF YOUR EMPLOYMENT CONTRACT ON NOTICE
>
> Reference is made to the above matter.
>
> As you are aware, NetOne Cellular (Pvt) Limited concluded a fixed term contract of employment with you on the 2nd March 2020. Among other things, the contract provided that it would expire on the 31st March 2021. By agreement recorded on 24th July 2018, the fixed term was extended to expire on the 31st March 2023.
>
> I wish to inform you that the company has decided to exercise its right in terms of the Labour Act (Chapter 28:01) and in terms of the common law to terminate your contract of employment on notice. Section 12 (4) of the Labour Act requires each party to give the other party three (3) months' notice to terminate the employment contract, in the event that a party wishes to terminate the contract.
>
> This letter, therefore, serves as notice to terminate your contract with NetOne Cellular (Pvt) Limited on three (3) months' notice. Your notice is with effect from 31st July 2020 and runs up to the 31st October 2020. Your salary and benefits for the three months shall be calculated and paid to you. In this regard, NetOne Celllular (Pvt) Limited elects to immediately pay you your salary and benefits for the entire notice period ending 31st October 2020 without requiring you to attend work. As such, you will not be allowed on the premises without express authority from NetOne Cellular (Pvt) Limited.
>
> Upon receipt of this letter, you will be required to surrender all company property to Mr R Mahaso, Enterprise Risk Manager.
>
> Yours faithfully
>
> Mr W Makamure
> For and on behalf of NetOne Cellular (Pvt) Limited"

The applicant argues that the 2nd respondent is not employed by the 6th respondent and, as such, lacks capacity to write a letter on behalf of the 6th respondent unless expressly authorised by its board of directors. Additionally, the applicant states that the letter is illegal as it disregards the provisions of section 11 of the Public Entities Corporate Governance General Regulations (SI 168 of 2018), ("the Regulations"), which prescribe how a CEO of a public entity is removed from office. He proceeds to submit that the procedure for the dismissal of a CEO of a public entity is the same as that applies when a board member is dismissed. The applicant also asserts that 6th respondent's board ought to have obtained the prior consent of the President. In a

nutshell, the applicant's contention is that he was appointed in terms of a contract which must be read with the Public Entities Corporate Governance Act and its regulations. As such, his argument continues, his removal from office in whatever form is regulated by the procedure set out in that legislation. He maintains that the Labour Act has no application.

The case for the respondents (except 5th respondent)

For convenience, the 1st to 4th and the 6th respondents shall hereinafter be referred to as "the respondents". On their part, the respondents in an affidavit deposed to on their behalf by the 1st respondent gave a background to the filing of the application before me. The affidavit confirms that the 6th respondent exercised its right to terminate the applicant's employment on notice. The respondents deny that the 5th respondent is a member of the 6th respondent's board of directors and, therefore, should not have been cited in these proceedings. In support of this position, they attached a letter dated 6 July 2020 from the Ministry of Information Communication Technology, Postal and Courier Services stating that the 5th respondent "was never appointed to the board of NetOne". They further deny convening an illegal meeting and argue that what they did was above board.

The respondents insist that the 2nd respondent is a board member of the 6th respondent and was authorised by the board's resolution dated 30 June 2020 to write the letter dismissing the applicant. In addition, they contend that the termination of the applicant's contract on notice is different from a dismissal. Hence, they argue that section 11 of the Public Entities Corporate Governance General Regulations deals with dismissal of a CEO of a public entity, whereas section 12 (4) of the Labour Act addresses the issue of termination of an employment contract on notice. The respondents, therefore, contend that the application by the application is founded on the wrong premise. They submit that, if the applicant is aggrieved by the termination of his employment on notice, he ought to file a claim with a labour officer in terms of section 93 of the Labour Act. Finally, the respondents state that the relationship between the applicant and his employer has deteriorated to untenable levels, leaving. the 6th respondent opting to terminate on notice in a no fault situation.

The issues for determination

As I have previously mentioned, the parties agreed to argue for and against the granting of the final order. For ease of reference, the final order seeks the following relief:

3. That the letter of 9 July 2020 drafted by the 2nd respondent purportedly for and on behalf of the 6th respondent addressed to the applicant be and is hereby declared null and void.
4. Any respondent who opposes this application be ordered to pay costs, the one paying the others to be absolved.

On 5 August 2020, I heard argument by the parties, and reserved judgment. I now render my judgment with reasons for my conclusions. It is clear that what I was required to do was to examine whether or not a case had been made out to grant an order nullifying the decision to terminate the employment of the applicant contained in the letter dated 9 July 2020.

The legal arguments by the parties

At the hearing, *Adv Nyamakora*, made four broad submissions in support of the applicant's case, firstly, that the applicant was not an employee within the contemplation of the Labour Act. The second argument was that the Labour Act does not apply to persons whose employment was provided for in the Constitution. Thirdly, counsel contended that the Public Entities Corporate Governance Act, unlike the Labour Act, makes no distinction between dismissal and termination. Fourthly, he submitted that the dismissal of CEOs of public entities is not done in terms of the Labour Act, but as provided for in the Public Entities Corporate Governance Act.

In respect of the Constitution-based argument, it was argued that section 194 of the Constitution contemplates the enactment of legislation that must give effect to good governance, and the Public Entities Corporate Governance Act is such legislation. In particular, the applicant submitted that section 197 of the Constitution provides that an Act of Parliament may limit the terms of office of CEOs or heads of government-controlled entities. Further, it was contended for the applicant that the 6th respondent is a state operated entity envisaged by Chapter 9 of the Constitution. In this regard, it was submitted that section 3 (1) of the Labour Act applies to all employees except those covered by the Constitution. This provision is in the following terms:

> "This Act shall apply to all employers and employees except those whose conditions of employment are otherwise provided for in the Constitution".

In addition, the applicant argued that the provisions of section 2A (3) of the Labour Act do not apply in this matter to give supremacy to the Labour Act over the Public Entities Corporate Governance Act. That section asserts that "this Act shall prevail over any other enactment inconsistent with it".

The applicants proceeded to argue that, in terms of section 16 of the Public Entities Corporate Governance Regulations, the right of the 6th respondent to dismiss is very curtailed. The provision reads as follows:

> (1) Notwithstanding any provision to the contrary in the enabling instrument of the entity concerned, *no board member of a public entity shall be dismissed or required to vacate his or her office* unless –
>
> (a) he or she has been guilty of conduct inconsistent with his or her membership … ,or
> (b) he or she has become disqualified for appointment to the board; or
> (c) where he or she was appointed to the board by virtue of having a particular qualification, he or she has ceased to have that qualification; or
> (d) he or she has failed to comply with his or her conditions of service or with the provisions of his or her performance contract; or
> (e) he or she, whether individually or together with other members of the board, has failed to draw up a strategic plan or to comply with its provisions or to attain any material objective set out in it; or
> (f) he or she has been absent, without just cause and without leave of the board or its chairperson, from three or more consecutive meetings of the board;
>
> nor, in any such case, unless the line Minister has been given at least seven days' written notice of the intended dismissal or removal from office". **[My own emphasis]**

In relation to the dismissal or removal from office of the applicant, section 16 of the Public Entities Corporate Governance Act is relevant because section 11 of the Regulations provides as follows:

> "(1) *No board of a public entity shall dismiss its chief executive officer except on the same grounds, and in accordance with the same procedures, as are applicable to the dismissal of board members*, and section 16 ("Dismissal of board members of public entities") of the Act shall apply, with any necessary changes, in any such case: Provided that the board shall not dismiss its chief executive officer unless, in addition to following these procedures, it has secured the prior endorsement of the President for the dismissal.
> (2) A board that has dismissed its entity's chief executive officer shall without delay cause notice of the dismissal to be published in the Gazette". **[My own emphasis]**

It was submitted that to the extent that section 16 (1) of the principal Act makes use of the terms *"dismissal"* or *"required to vacate office",* there is no difference between "dismissal" and "termination of employment". In this regard, the applicant contended that the effect of dismissal or termination was to require an employee to leave or vacate the office he previously

occupied. Reliance was placed on *Black's Law Dictionary* (8th edition, p1414) which defines "to dismiss" as meaning to release or discharge a person from employment. The applicant submitted that the respondents, by utilising section 12 (4) of the Labour Act to terminate his employment failed to comply with the procedure provided for in the Public Entities Corporate Governance Act and the Regulations. Additionally, he argued that the prior endorsement of the President was not obtained as required by the proviso to section 11 (1) of the Regulations. Accordingly, the applicant sought an order declaring the letter of termination of his employment null and void.

Adv Matinenga for the respondents, argued that the applicant wore two hats, the first one being that of a CEO under which he could claim the protection afforded by section 16 of the principal Act and section 11 of the Regulations. Counsel argued that dismissal referred to in these provisions that of a CEO based on establishment of fault, and no reference was made to termination of his employment on notice. It was submitted that the second hat that the applicant wore was that of an employee of the 6th respondent, and nothing precluded termination of his employment on notice. Thus, the argument continued, the principal Act and regulations do not take away the 6th respondent's right to terminate the applicant's right on notice.

It was further contended that the legislature, did not amend sections 12B and 12 (4) to remove the common law right of an employer to terminate on notice. The respondents relied on a passage from *Nyamande & Anor v Zuva Petroleum (Pvt) Ltd & Anor* 2015 (2) ZLR 194 (S), where the Supreme Court summised:

> "Section 12 (4) of the Act can only have meaning if there is a substantive right, in this case the common law right to terminate employment on notice, to which it pertains. This is especially so when one considers that what section 12 (4) of the Act does is to facilitate the exercise of an existent common law right".

Further reliance was placed on *Casserley v Stribbs* 1916 TPD 310 at 312, which sated that a statute can only alter the common law if it says so expressly. Consequently, it was submitted that the common right to terminate on notice is still the extant position of the law.

The respondents, additionally, argued that the applicant's contract falls within the provisions of section 12 (4a) (c) of the Labour Act. The provision stipulates that, no employer shall terminate a contract of employment on notice unless the employee was engaged for a period of fixed duration or for the performance of some specific service. It was argued that the

applicant was not dismissed, but had his contract terminated on notice. The respondents relied on *Nyamande & Anor v Zuva Petroleum & Anor supra*, where it was stated that section 12B deals with dismissal following misconduct proceedings and that termination on notice does not amount to an unfair labour practice. They proceeded to argue that section 16 of the Public Entities and Corporate Governance Act and section 11 of the Regulations did not apply because the applicant was not dismissed, but had his contract terminated. It was submitted in conclusion that the Labour Act overrides any legislation inconsistent with it, and that the order sought should be dismissed with costs.

Analysis

I begin by examining whether or not the Labour Act enjoys superior status over the public Entities Corporate Governance Act. The Labour Act, in section 3 (1) stipulates that it applies to all employees except those covered by the Constitution. While the applicant argued that he was such an employee, I do not see in sections 194 to 198 of the Constitution anything that directly creates a CEO of public entity as an institution subject to regulation by the Constitution. Rather, those provisions provide a framework for a statute, such as the Public Entities and Corporate Governance Act, to be enacted with provisions that foster good and accountable governance in public or state-controlled entities. In my view, the institutions contemplated by section 3 (1) of the Labour Act are the Judiciary, the Prosecutor General's Office and the Auditor General, to give a few examples. They are not covered by the Labour Act because the Constitution in creating those institutions, also incorporated provisions for the removal from office of the holders of those office.

However, section 2A (3) of the Labour Act is an interesting provision, in that it provides that the Labour Act shall prevail over any other enactment inconsistent with it. The respondents argued that section 2A (3) makes section 16 of the Public Entities Corporate Governance Act subservient to the provisions of the Labour Act, in particular, section 12 (4) relating to termination on notice. The question that requires to be answered is whether there is an inconsistency between the Public Entities Corporate Governance Act and the Labour Act vis-à-vis the issue of termination of the employment of a CEO of a public entity which impels the latter taking supremacy over the former. My view is that the two statues are not inconsistent, but were enacted to deal with distinct areas governing the employment and termination of services of different categories of employees. Indeed, the court finds nothing peculiar about

such a legislative arrangement. The fact that section 3 (1) of the Labour Act excludes certain categories of employees from its purview validates this kind of arrangement. The import of section 2A (3) is that if no inconsistency exists between the Labour Act and another statute, the Labour Act does not prevail over such legislation. Its language is clear and unambiguous. I reiterate that the issue that I am requires to determine as agreed between the parties is whether I should declare the letter of 9 July 2020 drafted by the 2nd (i.e. the dismissal letter) addressed to the applicant null and void. As evident from the arguments of the parties, the basis upon which I can decide on the nullity or otherwise of the letter is the answer to the following question: *Does the Labour Act prevail over the Public Entities Corporate Governance Act?* Let me address the question. In this connection, it is important to look at the purpose of the respective legislation, namely, the Public Entities Corporate Governance Act and the Labour Act. The ability of this court to examine the purpose of legislation to aid statutory interpretation has judicial precedent. In this context, NCOBO J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 89 eloquently stated the position thus:

> "… the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. *Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."* **[My own emphasis]**

In similar language, Prof E A Kellaway in his book *'Principles of Legal Interpretation - Statutes, Contracts and Wills'* 1st ed, after reviewing a number of authorities, appositely observed at page 61:

> "While it is not permissible to speculate as to the purpose of an enactment, the legislative purpose may be sought from the subject matter of the Act, the enacting clauses in the whole enactment, *the state of the law before the enactment was passed and the surrounding circumstances*" See *Hunter v R* 1907 TS 910; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530". **[My own emphasis]**

The preamble of a stature is, in my view, an instructive starting point in ascertaining the intent of the legislature as it provides clues to why parliament promulgated that piece of legislation. In its preamble, the Public Entities and Corporate Governance Act provides as follows:

> "To provide for the governance of public entities in compliance with Chapter 9 of the Constitution; *to provide a uniform mechanism for regulating the conditions of service of members of public entities and their senior employees; and to provide for matters connected wit*h or incidental to the foregoing". **[My own emphasis]**

It is clear from the construction of the preamble that, firstly, this legislation was enacted to deal squarely with "the governance of public entities". The interpretation section of this statute, being section 2 (1) defines a "public entity" as follows:

> "an entity whose operations or activities are substantially controlled by the State or by a person on behalf of the State, whether through ownership of a majority of shares in the entity or otherwise, and includes—
>
> (a) a statutory body; and
> (b) a public commercial entity; and
> (c) an entity established under an agreement for a partnership or joint venture between the State and any other person, which entity declared in terms of subsection (2) to be a public entity; and
> (d) any subsidiary of an entity referred to in paragraph (a), (b) or (c)".

It is common cause that the 6th respondent, NetOne Cellular (Pvt) Limited is a public entity and, therefore, the type of institution that falls for regulation by the Public Entities Corporate Governance Act. The second point I make is that this particular legislation was enacted "*to provide a uniform mechanism for regulating the conditions of service of members of public entities and to provide for matters connected wit*h*".* Undoubtedly, the focus of this statute is on regulating the conditions of service of members of public entities. Thirdly, the preamble betrays that this legislation also deals with the employment and termination of employment of such members. I take the view that the inclusion of the phrase "*to provide for matters connected with*" is not superfluous, but to emphasise that the Public Entities Corporate Governance regulates employment and termination of employment of members of public entities such as CEOs.

I now turn to examine the purpose of the Labour Act. This statute asserts in its preamble that it seeks to do the following:

> "… to declare and define the fundamental rights of employees; to define unfair labour practices; *to regulate conditions of employment and other related matters*; to provide for the control of wages and salaries; to provide for the appointment and functions of workers committees; to provide for the formation, registration and functions of trade unions, employers organizations and employment councils; to regulate the negotiation, scope and enforcement of collective bargaining agreements; to provide for the establishment and functions of the Labour Court; to provide for the prevention of trade disputes, and unfair labour practices; to regulate and control collective action; to regulate and control employment agencies; and to provide for matters connected with or incidental to the foregoing". **[My own emphasis]**

What is obvious from the above preamble is that the aim of the Labour Act is to regulate the rights of employees generally, including their conditions of employment and related matters. It does not single out, for regulatory purposes, any particular class or category of employees. The conclusion I make is that the legislature did this for a deliberate reason. The view I take is that the legislature saw it fit that good governance in public entities be enhanced by enacting a special purpose statute focussing on those institutions. Consequently, the Public Entities Corporate Governance Act was enacted to regulate how CEOs of public entities are employed or removed from employment. It is apparent from section 197 of the Constitution that, through this legislation, parliament intended to guarantee tenure of office of people appointed as CEOs of state-controlled entities. That provision is in the following terms:

> "An Act of Parliament may limit the terms of office of chief executive officers or heads of government-controlled entities and other commercial entities and public enterprises owned and wholly controlled by the State".

Section 198 needs to be read in conjunction with section 316 of the Constitution which provides:

> "An Act of Parliament must provide for the competent and effective operation of statutory bodies and, in particular, must *ensure that their chief executive officers serve for limited periods whose renewal is dependent on the efficient performance of their duties*". **[My own emphasis]**

Undoubtedly, the above provision of the Constitution links the tenure of office of CEOs of public entities to "efficient performance of their duties". It is in the context of sections 197, 198 and 316 of the Constitution that section 16 of the Public Entities Corporate Governance Act and section 11 of the Regulations should be examined. These provisions disclose that the intention of the legislature was to provide security of tenure of employment of CEOs of public entities through a transparent and predictable process of removal from office, which was bolstered by obtaining the consent of the President.

In fact, the Labour Act contemplates the existence of other statutes governing employment and the likelihood of conflict. Hence, section 2A (3) provides that in the event of any inconsistency between the Labour Act and another statute, it shall prevail over that statute to the extent of the inconsistency. It was argued for the respondents that the Labour Act and the Corporate Governance Act are inconsistent within the contemplation of section 2A (3) of the Labour Act. The respondents submitted that the inconsistency lies in that section 12 (4) of

the Labour Act allows an employer to terminate on notice, and that such a termination is not a dismissal, whereas the Public Entities Corporate Governance Act (in section 16) provides for a fault-based dismissal. The contention continued that the applicant's employment was validly terminated in terms of the Labour Act and should not be declared null and void.

I do not agree that that there is anything in section 2A (3) of the Labour Act which precludes the application of section 16 of the Public Entities and Corporate Governance Act, as read with section 11 of the Regulations, to the termination of the applicant's employment. My view is that there is no difference between "termination of employment" and "dismissal from employment", which founds an inconsistency within the meaning of section 2A of the Labour Act. . I come to this conclusion having looked at *Black's Law Dictionary*, (6th ed. 1990) p. 463, col. 2), which defines *"discharge"* in the employment context to mean *"to dismiss from employment"* or *"to terminate the employment of a person"*. In this regard, it is instructive that this definition was the same one adopted in the United States case of *Romano v. Rockwell International Inc.* (1996) 14 Cal.4th 479 at 493.), where the view was expressed that, in employment law the ordinary meaning of the term 'discharge' is to terminate employment. It is clear from ordinary dictionary meaning and the view taken in *Romano v Rockwell International In supra* that the material consideration is not the terminology employed, but whether the employer's action brings the employee's contract to an end. It seems to me that, the giving of notice to terminate in terms of section 12 (4) of the Labour Act does not act to make this statute override the Public Entities Corporate Governance Act. In one case, the contract is brought to an end after the lapse of a notice period, while in the other the employment is terminated once the process set out in the Public Entities Corporate Governance Act is concluded. To me it is a distinction without a difference and, certainly, one that does not demonstrate inconsistency between the two statutes.

As regards the application of common law, my view is that the legislature has in its wisdom decided to regulate the employment and removal of office of CEOs of public entities via a specific statute which sets out procedures to be followed. In this respect, it is trite that a common law remedy does not render nugatory a statutory provision. (See *Commercial Farmers Union and 9 others vs The Minister of Lands and rural Resettlement & Ors* SC 31-10). To me, the issue is not whether or not the 2015 amendment to the Labour Act abolished the common law right of termination on notice. Rather, the question to be asked is: What is the justification for preferring the common law in circumstances where the legislature has seen the prudence of

creating a special regime to regulate a specific category of employees? In light of the demonstrable rationale for the enactment of the Public Entities Corporate Governance Act, no basis is apparent for the reliance on the common law right of dismissal.

Disposition

As I have come to the conclusion that there is no inconsistency between the Labour Act and the Public Entities Corporate Governance Act within the contemplation of section 2A (3) of the Labour Act, the provisions of section 12 (4) should not have been utilised to bring an end to the applicant's employment.

In the result, I make the following order:

1. That the letter of 9 July 2020 drafted by the 2nd respondent written for and on behalf of the 6th respondent addressed to the applicant be and is hereby declared null and void.
2. The 1st to 4th and 6th respondents shall pay costs of this application, the one paying the others to be absolved.

Titan Law Chambers, applicant's legal practitioners
Gill, Godlonton & Gerrans, 1st to 4th and 6th respondents' legal practitioners