THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 960/2016

In the matter between:

THE CHEMICAL INDUSTRIES NATIONAL PROVIDENT FUND **APPELLANT**

and

TRISTAR INVESTMENTS (PTY) LTD **RESPONDENT**

Neutral citation: *The Chemical Industries National Provident Fund v Tristar Investments* (960/2016) [2017] ZASCA 184 (6 December 2017)

Coram: Cachalia, Bosielo, Tshiqi and Mathopo JJA and Makgoka AJA

Heard: 20 November 2017

Delivered: 6 December 2017

Summary: Validity of an investment consulting agreement – whether the signatories who signed the agreement on behalf of the appellant had authority – whether the agreement was ultra vires the rules of the appellant.

Calculation of income for the unexpired period of an unlawfully terminated agreement- such task inherently speculative – court obliged to make an award if there is credible evidence.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Tsoka J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Makgoka AJA (Cachalia, Bosielo, Tshiqi and Mathopo JJA concurring):

[1] This appeal concerns the validity of an investment consulting agreement (the agreement) concluded between the appellant, Chemical Industries National Provident Fund (the Fund) and the respondent, Tristar Investments (Pty) Ltd (Tristar). The Fund is a large pension fund whose members are employees in the chemical industry in South Africa. It is managed by a Board of Trustees.

[2] Tristar is an investment consulting company, whose business is to advise trustees on the management of their assets. The Fund is governed by a set of rules, in terms of which its management is carried out by 24 trustees, half of whom are appointed by the employers of the members and the other half by employee members.

[3] Until the end of 2007 the Fund was administered by an entity known as NBC (Pty) Ltd (NBC). The Fund's investment consulting services were provided by an NBC-affiliated company. On 19 December 2007 the Fund and Tristar concluded the impugned agreement in terms of which Tristar would provide investment consulting services to the Fund for three years with effect from 1 January 2008.

[4] Pursuant to the agreement, Tristar performed services on behalf of the Fund for over three months, for which it was paid a sum of R2 722 207.44. On 17 April 2008, the Fund resolved to withdraw Tristar's appointment, contending that the agreement was invalid because the signatories on behalf of the Fund did not have the authority to conclude it. It also contended that the agreement was ultra vires the rules of the Fund. Tristar viewed the Fund's stance as a repudiation of the agreement, which it accepted.

[5] This set in motion litigation in the Gauteng Local Division of the High Court, Johannesburg (the high court). The litigation culminated in a trial in which the Fund, as the plaintiff, sought an order declaring the agreement void, for the reasons mentioned earlier. The Fund also claimed repayment of the sum paid to Tristar in performance of the agreement.[1] Tristar denied the Fund's allegations, and counter-claimed for the accrued income for the unexpired period of the agreement, as well as for damages arising from the Fund's cancellation of the agreement.

[6] The trial court declared that the agreement was valid, and was thus unlawfully terminated by the Fund. It accordingly dismissed the Fund's claim

[1] During the closing argument in the high court, counsel for the Fund conceded that no case had been made out in respect of this claim, and accordingly abandoned the claim.

and upheld Tristar's counter-claim in the amount of R20 139 810.96,[2] but dismissed its damages claim. The high court subsequently granted both the Fund and Tristar leave, respectively, to appeal and cross-appeal its order.

[7] The background facts are straight-forward, and largely common cause. They can be stated as follows. During February 2007 the trustees considered to diversifying the Fund's investment consulting services. This task was entrusted to a sub-committee headed by the principal officer of the Fund, Mr Tsolo, and Ms MacIntosh, the chairperson of the board of trustees.

[8] On 16 and 17August 2007, Tristar and two other prospective consultants made presentations to the sub-committee, after having being invited to do so. Tristar emerged as the preferred bidder. However, the final decision regarding its appointment was deferred until its fees structure had been clarified. On 19 October 2007 the sub-committee met with Tristar where its fees structure was discussed, to the satisfaction of the sub-committee. The sub-committee resolved to recommend the appointment of Tristar to the trustees at their meeting in November 2007. In anticipation of its appointment, Tristar furnished the sub-committee with a draft investment consultancy agreement for perusal by the Fund's attorneys, Routledge Modise Attorneys. The attorneys suggested certain amendments to the agreement, including a reduction of Tristar's fees.

[9] The trustees met on 15 and 16 November 2007, when Tristar's appointment was approved. The decision, to which I shall fully revert, was recorded in the minutes of the meeting as follows:

[2] Initially the high court awarded an amount of R15 186 166.96, but subsequently amended this in terms of rule 42 of the Uniform Rules of Court, at the instance of Tristar.

'After further discussions the agreement was reached on finalising the appointment of Tristar as the Independent Investment Consultant to the Fund despite strong objections having been raised by certain Trustees and these were noted.'

[10] On 28 November 2007, the Fund sent a letter to NBC terminating its services as investment advisor to the Fund, and requesting it to make arrangements to hand over its investment consulting duties to Tristar.

[11] On 11 December 2007,[3] five trustees wrote a letter to the principal officer of the Fund, objecting to the manner in which the appointment of Tristar was conducted, particularly because the decision was taken without a formal vote.

[12] On 14 December 2007 Mr Tsolo and Ms MacIntosh signed the agreement on behalf of the Fund. On the same day, the sub-committee circulated the finalized agreement to all the trustees, as contemplated in the November meeting. On 19 December 2007 the agreement was signed on behalf of Tristar.

[13] In the wake of the letter of 11 December 2007 referred to above, the trustees held a special board meeting on 5 February 2008, when some trustees voiced their objection to Tristar's appointment. However, after some debate, the trustees agreed that the appointment of Tristar would stand despite the objection. On 17 April 2008 the trustees took a decision by a vote of more than two-thirds, to cancel the appointment of Tristar.

[14] So much for the factual background. There are three issues in the appeal. The first is whether the Fund's representatives who signed the agreement, were authorised to do so. If this issue is decided in Tristar's favour, the Fund's alternative attack is that the agreement was ultra vires the rules of the Fund. The

[3] The actual letter is dated 26 November 2007, but the covering letter is dated 11 December 2007.

third and final issue concerns Tristar's counter-claim for the accrued income. I consider these, in turn.

[15] With regard to the authority issue, the Fund predicates its argument on rule 13.6.8 of its rules. It provides that all decisions of the trustees shall require the support of at least two-thirds of each of the employer and member trustees. It is common cause that no voting took place when the decision to appoint Tristar was taken. It was submitted on behalf of the Fund that in the absence of a vote, it was not possible to establish whether the requisite two-thirds of the trustees had been met. Accordingly, it was argued, there has not been compliance with the rule. In this regard, reliance was placed on *Numsa v Cosatu*.[4] There, the court found that the absence of voting on a resolution to suspend the General Secretary of COSATU rendered the decision irregular and unlawful.

[16] *Numsa v Cosatu* is distinguishable from the present case in one material respect. Cosatu's constitution expressly prescribed voting by members of the central executive committee over a motion for the suspension of the General Secretary. There is no such obligation in rule 13.6.8. All that is required is that resolutions must be carried by a two-third's majority.

[17] The rule does not stipulate how the existence of the threshold is to be ascertained. Tristar contends that in the absence of a stipulated method, it is permissible for the Board to employ any method to determine the requisite level of support for a particular decision. In this regard, Tristar relies on the practice usually followed by the Fund when passing resolutions.

[4] *National Union of Metalworkers of South Africa and others v Congress of South Africa and others* (32567/13) [2014] ZAGPJHC 59 (4 April 2014).

[18] It is not disputed that historically, decisions of trustees have been adopted consensually, without a formal vote. Thus, even though some trustees might speak against a resolution and have reservations about it, if ultimately they are prepared to 'live with it', so to speak, then it is carried. The appointment of Tristar was no different. It appears from the minutes of the meeting that there were indeed strong sentiments against the decision by some trustees. Ultimately, however, after exhaustive debate, a decision was reached to appoint Tristar.

[19] It is therefore apparent that the Board was able to establish the requisite two-thirds threshold satisfactorily without a formal vote. In this regard, it is instructive that all the decisions of the trustees, except one, were adopted in this manner. The only exception was the one taken on 17 April 2008, reversing Tristar's appointment. But, as is apparent from the evidence, that decision was self-serving, and only taken by vote for the sole purpose of removing Tristar and reinstating NBC. Rather than bolstering the Fund's argument for a formal vote, that decision fortifies Tristar's assertion that the November 2017 decision, like others before, was taken by consensus, and that this was the method employed by the trustees to determine whether the two-thirds threshold had been reached. It is worth noting that both the decision to appoint NBC, and later to reinstate it in August 2008, were not taken by a formal vote. The Fund's insistence on a formal vote, in the circumstances, is without merit.

[20] It is clear from the factual background leading to the decision to appoint Tristar that it was a carefully considered and managed process: A decision was taken to diversify consulting services; potential service providers were identified; prospective consultants, including Tristar made presentations; Tristar was identified as a preferred bidder; Tristar's fees were clarified (and reduced), with the involvement of the Fund's attorneys; Tristar was appointed in

November 2007 and the agreement was signed on behalf the Fund on 14 December 2007 by Tristar on 19 December 2007.

[21] Viewed in light of these events, the inescapable conclusion is that the Fund's representatives had the authority to sign the agreement on its behalf. It follows that the Fund's assertions to the contrary lack merit. Given this conclusion, I do not deem it necessary to consider the two further disputes regarding the issue of authority, namely whether the appointment of Tristar was subsequently ratified, and whether issue estoppel operated against the Fund. The trial court found in favour of Tristar on both issues.

[22] I turn briefly to the Fund's alternative attack, that the agreement was ultra vires the rules of the Fund. It is based on rule 13.7.5, which provides:

'The Trustees may appoint administrators and consultants on such terms as they may determine and may withdraw any such appointment at any time; provided that a consultant shall not rank as officer of the Fund.'

[23] The Fund's argument is that because the rule allows the Fund to withdraw an appointment at any time, an agreement which purports to run for a fixed term such as a three-year term provided for the impugned agreement, is ultra vires and invalid.

[24] I have some doubt that a rule which permits a fund to terminate a contract contrary to its terms is enforceable against a third party such as Tristar as this would mean that it permits the fund to breach or repudiate any agreement. But it is not necessary to decide this question as I do not think that this is a sensible or business-like interpretation of the rule. In my view the rule simply gives the Fund the power to lawfully terminate a contract, whatever its duration. The rule does not give it the power to terminate a fixed-term contract contrary to its terms

as this would necessarily imply that all contracts concluded by the Fund are invalid unless they had summary termination clauses. This would make the conduct of business by the Fund with service providers unworkable and result in an absurd and unworkable interpretation of the rules.

[25] It follows that the first two issues, namely whether the Fund's representatives were authorised to sign the agreement, and whether the agreement was ultra vires the rules of the Fund must be decided in favour of Tristar, as the high court correctly found.

[26] What remains to be considered is Tristar's counter-claim for the accrued income. In terms of the agreement, the Fund undertook to pay Tristar a basic annual fee of 0.2 per cent per annum for the gross returns of the Fund. The fee was payable in monthly instalments on the last day of each month following the commencement of the agreement. The claim involves a computation of fees that Tristar would have earned over the applicable period, and of the saved costs for the Fund. Thus, the payment of a basic fee was contingent upon Tristar saving the Fund transaction and other costs over an eighteen-month period. The method for calculating the savings was this: establish the costs through the assistance of an advisor and the custodian bank at the beginning of the eighteen-month period, and perform the same exercise eighteen months later, in order to establish the savings.

[27] The Fund contends that the basic fee was not proved because Tristar did not demonstrate the cost savings promised in the agreement. However, it does not lie in the Fund's mouth to make this assertion. It terminated the agreement well before the eighteen-month period contemplated in the agreement. Tristar was consequently unable to give the Fund the benefit of its advice over that

period, and the actual cost saving could not be computed. The result is that the evidence in this regard was bound to be speculative.

[28] Tristar relied on the evidence of Mr Alex Burn, its Chief Executive Officer, and Mr Brian Abrahams, an independent chartered accountant. Mr Burn testified about a presentation he made at the trustees' meeting on 28 February 2008 at which he reported that Tristar had had meetings with the Fund's custodian bank (Standard Bank) and had managed to reduce the fees charged by the custodian to the Fund. He was emphatic that, given its past performances, Tristar would have been able to achieve a reduction in fees from certain asset managers. According to him, there had never been a situation where Tristar was unable to achieve this.

[29] With regard to the cost savings Tristar actually brought about by April 2008, Mr Burn explained that Tristar had negotiated lower custodian, mandate, and script lending costs on behalf of the Fund. According to him, the fact that Tristar had achieved a cost saving in respect of the custodian's costs was an indication that Tristar had commenced the process of achieving cost savings for the Fund.

[30] Mr Abrahams testified that the lost revenue would be based on the estimated value of the assets which would be determined, among others, by the market returns and by the investment consulting advice rendered by Tristar over the period of the agreement. In his opinion, the key factors would be the unique characteristics, including the investment assets and objectives of the Fund itself, rather than those of other funds subject to Tristar's investment consulting advice over the period of the agreement. He postulated the basic annual fee using the actual market value of the Fund's assets over the period of the agreement.

[31] Counsel for the Fund criticised the evidence presented on behalf of Tristar. According to counsel, the only basis on which returns would have been achieved through Tristar's advice was to examine the actual results achieved by Tristar's other clients, using the same advice over the period of the agreement. Because this information was not provided, it was impossible to determine the claim properly. To my mind, this criticism is not warranted. As explained by Mr Abrahams, the key factors would be the unique characteristics, including the investment assets and objectives of the Fund itself, rather than those of other funds subject to Tristar's investment consulting advice over the period of the agreement.

[32] Because of the inherently speculative nature of the evidence, the court could only do its best to assess whether the requisite cost saving was likely to have been achieved had Tristar's appointment not been terminated. Indeed, the trial court adopted 'a robust approach' in the computation of Tristar's accrued income.

[33] What is more, the fact that the evidence is open to criticism is no reason for the court not to make an award. In *Southern Insurance Association Limited v Bailey NO* 1984 (1) SA 98 (A) at 113F-114E Nicholas JA observed that determining an appropriate award in circumstances such as the present manifestly involves guesswork to a greater or lesser extent. But, the learned judge remarked, 'the Court cannot for this reason adopt a *non possumus* attitude and make no award.' The learned judge then referred to the dictum in *Hersman v Shapiro & Co* 1926 TPD 367 at 379 where Stratford J said:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damages have been suffered, the Court is bound to award damages.'

[34] Given all these considerations, I am of the view that there is no basis for this court to interfere with the award made by the high court in respect of Tristar's accrued income.

[35] In the result the following order is made:

The appeal is dismissed with costs, including the costs of two counsel where so employed.

T M Makgoka

Acting Judge of Appeal

APPEARANCES

For the Appellant:	A Redding SC
Instructed by:	Webber Wentzel, Sandton
	Honey Attorneys Inc, Bloemfontein
For the Respondent:	A Franklin SC
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