

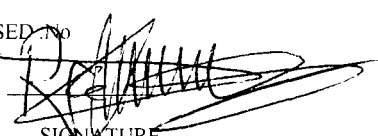
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

15/3/2017
CASE NO: 13216/16

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE:	No
(2) OF INTEREST TO OTHERS JUDGES:	Yes
(3) REVISED:	No
15/3/2017	
DATE	SIGNATURE

In the matter between:

SENTLETSE DIAKANYO

APPLICANT.

and

NEDBANK LIMITED

RESPONDENT .

JUDGMENT

Coram: RE Monama, J.

Introduction.

- [1] During 18 December 2001, the parties created an employment relationship. The applicant was appointed as an Executive Head of Risk, Compliance and the South African Reserve Bank Liaison in the Group Finance Clusters

- [2] The position of the applicant entitled him to receive certain the incentives. The incentive were in the form of the share and options . They were allocated in terms of their the share schemes.

- [3] During 2008 he was granted Option Shares and Restricted Shares. This grant was made under the scheme known as the Nedbank Eyethu Black Executive Trust (“the Trust Deed”). In or during 2011 and 2012 was granted further incentive shares under the Nedbank Group (2005) Share Option Matched Share and Restricted Share Scheme (“the 2005 Scheme”).

- [4] The Eyethu Trust Deed and the 2005 Schemes are governed by their respective rules. These rules govern various aspects of the relationship such as vesting of the allocations and the consequences of the dismissals prior to the vesting. The applicant’s entitlement in respect of the

Restricted Shares were scheduled to vest during 8 and 9 March 2014 and 8 and 9 March 2015. At the time of the dismissal the relevant Restricted Shares had not vested as yet. These are the shares that form the subject matter of this application. The allocation vested in tranches and the applicant claims the 2014 and 2015 tranches.

The material background

[5] During 25 February 2014 the applicant was dismissed from his employment. The dismissal followed a disciplinary hearing process. The dismissal dispute was referred to the Commission for Conciliation Mediation and Arbitration (“the CCMA”) in terms of the provisions of the Labour Relation Act. The applicant alleged that the dismissal was unfair.

[6] The Commissioner at the CCMA found in his favour. It was found that the dismissal was substantially unfair. The Commissioner found that in the circumstances of this case, there was a break-down of the trust relationship between the parties. Accordingly, it was held that it would be inappropriate to order the respondent to reinstate the applicant. The

Commissioner ordered the respondent to pay a monetary compensation.

The applicant received the compensation in terms of the ruling.

- [7] On 19 February 2016 the applicant launched these proceedings. He seeks an order in the following terms:

“that the respondent is ordered to reinstate
the **invested shares** to the applicant.”

There notice of motion contains an is an ancillary prayer for cost in the event of non-opposition by respondent.

The grounds for the reinstatement

- [8] The applicant relies on the outcome of the order of the Commissioner of at Commission for Conciliation Mediation and Arbitration that the dismissal was substantially unfair.

The issue.

- [9] The issue for the determination as I understand it, is whether the verdict of the CCMA renders dismissal of the applicant or certain consequences a

nullity. In other words whether the dismissal should be interpreted to mean that notwithstanding the acceptance of the compensation the applicant is nonetheless still entitled to certain incentives which admittedly had not vested at the time of his termination of employment. In short the issue is whether the termination was by non fault or by fault termination. The Trust Deed Agreement contains a provision that:

“- Options may be exercised by the beneficiary at anytime during the exercise period.”

Consequently, the exercise period can only follow the vesting.

The provisions in terms of the agreements.

[10] As stated above, there are two sets of rules which govern the subject matter at hand. The 2005 Scheme is governed by the rules attached as annexure to the application. The 2008 Eyethu Trust arrangements are governed by and subjected to the rules attached to the record. The dismissal procedure is in annexure CR2 to the application¹. Paragraph 26 thereof provides:

“-TERMINATION OF EMPLOYMENT

If a Participant is granted a Restricted Award, and before the Vesting Date, the Participant is no longer employed by any member of the Group by reason of a:

1 No Fault Termination: Death...

¹ See page 96 of the record.

2 No Fault Termination Other, then the Vesting Date in respect of his/her Restricted Award shall be unaffected and remain the first day following the third anniversary of the Restricted Award Date:

26.3 Fault Termination, then the Participant shall forfeit all rights to such Restricted Shares to the trust.”

[11] The Trust Deed allocations are governed by the rules contained in the Deed of Trust attached to the record. It provides for Options Share in clause 12.4.1 and states that:

“-If a beneficiary is granted an Option, and before the Vesting Date the employment of such Beneficiary terminates:

- 1 by reason of a No Fault Termination, such Option shall be deemed to vest in the beneficiary on the Termination Date and shall be capable of being exercised until the last day of the 1 (twelve) month period following the Termination Date, failing which it shall lapse and shall cease to have any further force or effect, provided the RemCom may determine in its sole discretion (which discretion shall be exercised by not later than the Termination Date) that the Option shall lapse automatically on the termination Date; and
- 2 by reason for a Fault Termination, shall lapse automatically on the day which is 30 (thirty) days immediately following the Termination Date and shall cease to have any further force or effect, provided that RemCom may determine in its sole discretion (which discretion shall be exercised by not later than the Termination Date) that the Option shall lapse automatically on the Termination Date.”

[12] The Restricted Shares which are the subject matter of this application are governed by the provisions of clause 13 which provides that:

“-If a Beneficiary is granted a Restricted Share, and before the Vesting Date the employment of such Beneficiary terminates:

- 1 by reason of a Fault Termination, the Beneficiary shall forfeit all rights to such Restricted Share(excluding any Vested Portion) and shall be deemed to have ceded all its rights, title and interest in and to such Restricted Shares (excluding any Vested Portion); or
- 2 by reason of a no Fault Termination, the Beneficiary shall, at the discretion of RemCom be regarded as remaining in the employ of the Group and the Restricted Shares may be released to him in terms of clause 13.1.”

The rules attached to the record².

[13] As stated above the two schemes are somewhat different from one another but have certain common features. The prominent same features relate the certain critical terms. These phrases are the **non fault termination of employment , non fault termination of employment : others, discretionary non fault termination of employment, fault**

² See pages 103-140 of the record.

termination of employment and discretionary fault termination. The discretionary fault or non fault termination of employment occurs when is classified as such by the board and / or remuneration committee of the respondent.

- [14] The fault termination is the termination which follows a disciplinary hearing for the misdemeanour or infraction of the employment code of the respondent. The two no fault phrases refer to non fault such as in death , no fault others refer to the retrenchments, retirements and disabilities as defined or so classified.

The consequences of the ruling.

- [15] The commissioner ruled that the dismissal of the applicant was substantively unfair. He order compensation payment to the applicant . However the Commissioner ruled against reinstatement and held the trust relationship between the parties has broken down. The applicant accepted the award. The acceptance of the award has consequences. One such consequence is to confirm the dismissal. It is correct that the commissioner found the dismissal to be unfair. The commissioner has a

discretion to address the situation. The remedies are contained in Section 193 of the Labour Relations Act. He ordered compensation. He advanced cogent reason why he cannot order the reinstatement. This decision cannot be faltered. Any termination of employment contrary to the provisions of the Labour Relations Act remains dismissal. The Constitutional Court the majority judgment held that:

“.. the absence of a provision in the LRA for a right not to be dismissed unlawfully is an indication that the LRA does not contemplate an invalid dismissal as a consequence of a dismissal effected in a breach of a provision of the LRA.”³

[16] The contention of the applicant is that the ruling of unfair dismissal amounts to the no fault termination. This contention is disputed by the respondent. I find the interpretation of the applicant to be misplaced.

[17] The parties derive their rights and obligations from the documents constituting the 2005 Scheme and the Eyethu Trust Deed Scheme. Therefore, the consequence of the termination of the employment relationship must be determined in terms thereof. This matter therefore involves the interpretation of the terms or phrases termination of employment referred to in paragraph 13 above. The correct approach is

³ See *Steenkamp v Edcon Limited* 2016 (3) SA 251 CC at page 286 G-H.

settled.⁴ The process is subjective and not objective. In Natal Joint Municipality Pension Fund⁵ it was held that:

The primary rule of interpretation is stated in Natal Joint Municipal Pension Fund v Endumeni Municipality as follows

“The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words used. In a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision of provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to and guard against, the temptation to substitute what they regard as reasonable sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable’ point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”(emphasis added)

Accordingly, the court when seized with such an assignment must look at all the facts and determine what the document means.

⁴ See Natal Joint Municipality Pension Fund v Endumeni Municipality 2012 (4) SA 593 SCA and Bothma Batho Transport(Edm) Bpk v S Botha en Seun Transport 2014 (3) SA 494 SCA and Novartis v Maphil Trading 2016 (1) SA 518 at 506 B-H and the authorities referred to therein.

⁵ Page 603F-G to 604 A-D.

[18] The parties created these documents to govern their affairs. The contract documents have clearly itemed and categorised what constitute a no fault termination. In the context of the 2005 scheme the no fault termination means termination of employment by death, by reason of retrenchment, permanent disability or a fault termination and in respect the Eyethu Trust Deed the no fault termination means termination of the employment by reason of retrenchment, permanent disability, permanent incapacity or retirement. On the facts the only interpretation to be given to the nature of of the termination is the fault termination. The fault is the insubordination.

[19] The applicant's dismissal falls outside the agreed circumstances of no fault termination. Accordingly, the dismissal of the applicant terminated the relationship. The termination occurred before the vesting of the last two tranches of the Restricted Shares. Therefore there were no shares that vested and as a result there are no shares to be reinstated.

[17] During the oral submissions the applicant primarily argued that the decision not reinstate the shares was taken by wrong person.⁶ This submission is misplaced because such case was not pleaded. It is always helpful to note the primary functions of the affidavits. The general rule is that a party must or fall by the founding affidavit. The applicant was expected to make his case in the founding affidavit. In the application proceedings these affidavits constitute the evidence and the pleading.⁷ The point was not made out in the pleadings.

[20] As stated above the affidavits constitute an important piece of evidence. There should be drafted with care in order to include all information necessary to sustain the claim. The founding affidavit is lacking in information. Be that as it may, the essence of the claim is based on finding of the commissioner that the dismissal was unfair because the respondent follow a fair procedure.

[21] The applicant did not sufficiently articulate the kind of shares that he was entitled to have reinstated. In fact the applicant's case is made out by the respondent in the answering affidavit wherein the respondent

⁶ This is reference to annexure CR5 on page 141 of the record.

⁷ *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999(2) SA 279 (T)

meticulously give the background, the details of the incentive scheme in which the applicant participated. It also deals with the issues of the disciplinary hearing and the award.

[22] Notwithstanding the meticulous exposition referred to above the respondent persisted that the unfair dismissal cannot amount to no fault employment termination. This aspect has already been dealt with above. The submissions is well made and has merit and I agree.

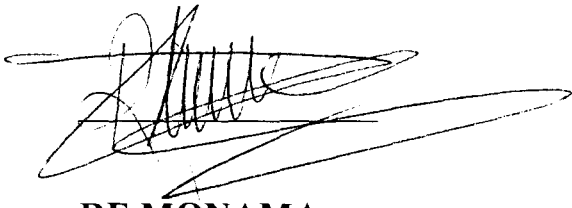
Conclusion

[23] In the circumstance the applicant stand to be dismissed. Counsel for the respondent requested the costs of two counsel. He submitted that the respondent regarded this matter to have some importance. I cannot dispute the view of the respondents. As far as the costs are concerned this matter is not complex and certainly does not justify, the participation of two counsel junior. I am satisfied that the service of senior counsel alone was sufficient.

Order.

In the circumstances the following order is made: namely

- a. The application for the reinstatement of shares is dismissed.
- b. The applicant is ordered to pay the costs of senior counsel only.



RE MONAMA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

Appearances:

For the Applicant: Adv E Masumbuka .

Instructed by: AK Nkome Attorneys, Pretoria.

For the Respondent: Adv. A Cockrell SC ,

Adv Z Ngwenya.

Instructed by: Cliff Dekker Hofmeyer Inc, Johannesburg,
Friedman Hart Solomon and Nicholson Pretoria.

Date of judgment: 15 March 2017.