

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

26/2/15

CASE NO: 87403/14

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
26/02/2015	<i>E.M. bushe</i>
DATE	SIGNATURE

In the matter between:

**BAFOKENG RASIMONE MANAGEMENT
SERVICES (PTY) LTD**

APPLICANT

and

PAUL VAN WYK

RESPONDENT

J U D G M E N T

HEARD ON: 16 FEBRUARY 2015

JUDGMENT ON: 26 FEBRUARY 2015

KUBUSHI, J

[1] The applicant instituted action against the respondent for payment in the amount of R 406 981. 89 together with interest thereon at the rate of 9% *per annum a tempore morae* to date of payment. The applicant's claim is based on a Retention Bonus Agreement ("the agreement") in terms of which the applicant agreed to pay the respondent retention bonus equal to 100% of the respondent's annual remuneration package. The agreement commenced on 1 June 2012 for a period of three years with termination date of 1 July 2015.

[2] The retention bonus was paid in three tranches as follows:

- a. the 1st tranche of 50% immediately upon acceptance of the applicant's offer, taking cognizance of payroll run date closures, which provided for 16.66% paid upfront in lieu of years 2013 (16.66%), 2014 (16.66%) and 2015 (16.66%);
- b. the 2nd tranche of 25% exactly 12 months after payment of the 1st tranche, which provided for years 2014 (12.5%) and 2015 (12.5%);
- c. the 3rd tranche of 25% exactly 12 months after payment of the 2nd tranche, which provided for 25% paid upfront in lieu of 2015.

[3] The applicant was, in terms of paragraph 7 of the agreement, entitled to the termination of the agreement for any reason provided for in the Labour Relations Act, 66 of 1995 as amended from time to time. On such termination, the respondent would be liable to repay the applicant a *pro rata* amount of the gross payment made, calculated from the last day of the respondent's employment in lieu of any period paid for and not yet served.

[4] The applicant, after a disciplinary enquiry which found the respondent to have committed misconduct, terminated the respondent's employment. The respondent

appealed the termination and was unsuccessful in such appeal. He as a result, referred the dismissal to the CCMA seeking re-instatement. The CCMA matter is still pending and is to proceed during March 2015.

[5] At the time of the termination of the respondent's employment, the applicant had paid the respondent 100% retention bonus as envisaged in the agreement. The respondent having not provided his services for the entire period of the agreement was therefore liable to refund the applicant the *pro rata* share of the period not yet served which amounted to the amount claimed, hence the claim in this instance.

[6] The respondent is opposing the application and has filed an affidavit in which he sets out his defence to the claim. The defence is premised on three points, namely:

- (i) the prematurity of the summons;
- (ii) the incorrect calculation of the amount claimed. The respondent's counsel abandoned this point on behalf of the respondent.
- (iii) the contention that the agreement has not been terminated.

[7] In counter argument, the applicant's counsel contends that the respondent's points do not constitute a defence, let alone a *bona fide* defence to the applicant's claim and should be rejected.

[8] In a summary judgment application, where the question of whether the respondent has a *bona fide* defence arises, the court does not attempt to decide the issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. The respondent is also not required to persuade the court of the correctness of the facts stated by him or her or where the facts are disputed, that there is a preponderance of probabilities in his or her favour.¹

[9] However, it has been held that a court hearing a summary judgment application may dispose of the matter if it finds that the issues raised in defence of a summary judgment are not arguable.² This in my view is such a matter. The points raised by the respondent in his defence are not arguable and do not constitute a defence as will appear more clearly from my reasoning hereunder.

THE SUMMONS IS PREMATURE

[10] The contention by the respondent's counsel is that the applicant instituted a contractual claim based on the agreement which was terminated as a result of the termination of the respondent's employment due to misconduct. The respondent denies any misconduct on his part and has referred the matter to the CCMA. An arbitration held under the auspices of the CCMA constitutes a hearing *de novo* and since the CCMA has not pronounced on the referral the applicant is not entitled to claim, so she argued.

[11] It is now settled law that regardless of what happened at the disciplinary enquiry at the workplace, an arbitration proceeding at the CCMA is a *de novo* hearing. In other

¹Sew Nair v Chandler 2007 (1) SA 44 (T) at 47B-C and Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 at 426A-E.

²Once Nought Three Craighall Park (Pty) Ltd v Jayber (Pty) Ltd 1994 (4) SA 320 (W) at 323A-B.

words, it is not a re-hearing or re-presentation of the employer's disciplinary procedure. It is a new hearing, in which decisions are made by the Commission based on evidence presented at the arbitration hearing and not on evidence presented at the employer's internal disciplinary hearing.³

[12] It has also been held that, a decision which I am in alignment with, the *status quo* of an employment relationship cannot be preserved pending finalisation of CCMA proceedings or any further proceedings flowing from dissatisfaction with the results of such proceedings.⁴

[13] My view is that counsel has misconstrued the meaning of “*de novo* hearing” in the CCMA. It does not mean that the outcome of the disciplinary proceedings is disregarded once the matter is referred to the CCMA. The dismissal, as in this instance, remains in force and effect until overturned by the CCMA and until such an outcome is reached by the CCMA the respondent's misconduct remains evidence that was tendered at the disciplinary enquiry.

[14] Furthermore, the terms of the agreement do not make the respondent's liability to pay back the *pro rata* amount for the period not served conditional upon any ensuing dispute or litigation between the parties. On that premise, the applicant's claim cannot be said to be premature and the dispute pending in the CCMA is not a *bona fide* defence as required in terms of uniform rule 32.

³ See SA Municipal Workers Union on behalf of Petersen v City of Cape Town & Others (2009) 30 ILJ 1347 (LC).

⁴ See Nchabeleng v University of Venda & Others (2003) 24 ILJ 585 (LC) at para 12.

TERMINATION OF THE AGREEMENT

[15] The contention by the respondent is that the applicant's submission that the agreement terminated due to the fact that the respondent's employment in terms of his employment contract was terminated, cannot be sustained. The respondent disputes that the applicant cancelled the agreement as provided in clause 7 as the agreement does not make provision for automatic cancellation on termination of the respondent's employment. According to the respondent, to proceed with the claim the applicant must show that it was entitled to cancel.

[16] The terms of the agreement relevant to this issue are the following:

"7. TERMINATION OF EMPLOYMENT BY EITHER PARTY

7.1 The company shall during the currency of this Agreement have the right to terminate the Employee for any reason provided for by the Labour Relations Act, 66 of 1995 as amended from time to time.

7.2 ...

7.3 It is expressly agreed between the parties that should this agreement be terminated by either party as contemplated in clause 7.1 or 7.2 during the duration of this agreement the Employee will repay the company a pro rata amount of the gross payment made, calculated from the last day of employment by the Employee in lieu of any period paid for and not yet served, as per clause 6 above.

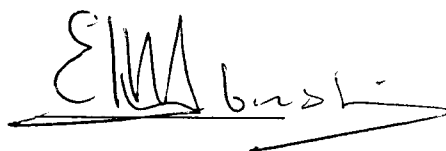
7.4 ..."

[17] These terms are very explicit and require no interpretation. The agreement can only be terminated as envisaged in clause 7 as stated above. It terminates automatically. There is no additional procedure stipulated which the applicant should have followed before termination could occur. Once the employment agreement is terminated due to

the grounds stated in clause 7.1 or 7.2 the agreement is also terminated. The respondent's employment was terminated due to misconduct, and clause 7.1 is applicable and the agreement is therefore terminated.

[18] I find, therefore, that the applicant has made out a case for a summary judgment and should be granted the relief it seeks.

[19] Consequently, the summary judgment application is granted with costs.

A handwritten signature in black ink, appearing to read 'E. M. Kubushi', with a long horizontal stroke extending to the right.

E. M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearances:

On behalf of the applicant:

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Instructed by:

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On behalf of the respondent:

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