REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: CA 19/13

In the matter between:

BONFIGIOLI SOUTH AFRICA (PTY) LTD **Appellant**

and

MICHAEL WAYNE PANAINO **Respondent**

Heard: **04 September 2014**

Delivered: **23 October 2014**

Summary: Restraint of trade agreement and retention bonus- parties entering into a retention bonus and restraint of trade agreements – meaning and purpose of restraint of trade and retention bonus distinguished- restraint of trade agreement preventing employee to compete with his/her ex-employer after termination of employment - retention bonus rewarding employee for staying in the employment of the employer. Interpretation of a deeming clause for the purpose of the termination of employment. - Employee resigning from employment- Labour Court finding that the deeming clause defining exclusively the termination of employment- Appeal - Deeming clause expanding the meaning of termination of employment to make it difficult for the employee to get the retention bonus- Restraint of trade starting after the

termination of employment. Appeal upheld. Labour Court's judgment upheld- with costs- Appellant's prayers in the notice of motion granted.

Coram: Musi JA et Murphy AJA et Setiloane AJA

JUDGMENT

MUSI JA

[1] This appeal, which is with the leave of this Court, raises the question whether the respondent was bound by the obligations created in a restraint of trade agreement.

[2] The appellant approached the Labour Court with an urgent application for an order in the following terms:

> '1. Condoning the applicant's non-compliance with the rules relating to forms and service provided for in the rules of this Honourable Court and dispensing with this matter in such manner and in accordance with such procedure as seems appropriate in terms of Rule 8 and treating this matter as one of urgency.
>
> 2. Interdicting and restraining the respondent for a period of twelve (12) months, from 05 June 2013 to 04 June 2014, from directly or indirectly competing with the applicant's business or becoming involved in any way in the activities of a business which is in competition with the business of the applicant.
>
> 3. Interdicting and restraining the respondent for a period of twelve (12) months, from 05 June 2013 to 04 June 2014, from directly or indirectly being interested, engaged or concerned in, whether as principal, agent, partner, representative, shareholder, trustee, beneficiary, director, employee, consultant, advisor, officer or member of or holding any other capacity in relation to any person, syndicate, partnership, joint venture, trust, corporation or company whether for his direct or indirect benefit and whether for reward or

not, or in any other like capacity in any business carried on within the Republic of South Africa which is in competition with or similar to the business of the applicant.

4. Interdicting and restraining the respondent for a period of twelve (12) months, from 05 June 2013 to 04 June 2014, from making use of any trade connections of the applicant in respect of any business which is competitive or similar to the business of the applicant within the Republic of South Africa.

5. Interdicting and restraining the respondent from utilizing or directly or indirectly disclosing or making available any of the applicant's intellectual property, trade secrets or confidential information.

6. Interdicting and restraining the respondent for a period of twelve (12) months, from 05 June 2013 to 04 June 2014, from canvassing, enticing, employing, appointing or procuring the employment or appointment of any person who is and/or was an employee, consultant, officer or agent in respect of the business of the applicant in respect of any business which is competitive or similar to the business of the applicant within the Republic of South Africa.

7. Ordering the respondent to pay the costs of this application.

8. Granting the applicant further and/or alternative relief.'

The Labour Court (Basson, J) dismissed the application with costs. This appeal is against that order.

[3] The Bonfiglioli Group was established in 1956 in Italy. It manufactures high quality industrial gearboxes and geared motors for use in the industrial, mining and agricultural sectors.

[4] On 01 April 1991, Bonfiglioli Power Transmission (Pty) Ltd (BPT) was incorporated in South Africa. It was the sole supplier of Bonfiglioli products in Sub-Saharan Africa.

[5] The respondent was employed by BPT with effect from 01 April 1991 as an internal sales engineer at its Johannesburg offices. During 1999, the respondent was transferred to Cape Town to establish a sales office. After doing so, he was promoted to the position of branch manager of the Cape Town branch. The respondent's responsibilities included marketing, sales and management. As such, he had direct access to the appellant's confidential and sensitive information. The sensitive information included the South African pricelist for all products supplied by the appellant, the costing of products, customer databases - containing information and records relating to the appellant's customers nationally - and sales reports.

[6] On 14 April 2000, the respondent and BPT concluded an executive retention and restraint agreement. In terms of this agreement, BPT would invest R300.000.00 in unit trust over three years in its name for the benefit of the respondent. The accumulated value of the investment would become the exclusive property of the respondent on 01 January 2004 provided he was still in BPT's employ on that date.

[7] On 12 April 2004, the parties entered into another executive retention and restraint agreement because they were of the view that they complied with the terms of the 2000 agreement. The 2004 agreement was similar to the 2000 agreement except for the fact that BPT was to invest R340.000.00 over three years which would accrue to the respondent if he was still in BPT's employ on 01 January 2009. On 12 April 2006, the 2004 agreement was extended for one year to January 2010. BPT invested an additional R160 000.00 for the respondent's benefit, which would accrue to him on 01 January 2010, if he was still in the appellant's employ. It is common cause that all the money invested by BPT for the respondent's benefit was paid out to him. The relevant parts of the agreement read as follows:

> 'WHEREAS Bonfiglioli has, with effect from 1st January 2004 retained the services of the Executive for an unspecified period of time, upon the terms

and conditions as contained in a separate contract of employment;

AND WHEREAS Bonfiglioli desires to retain the services of the Executive for at least (five) 5 years from the date above;

AND WHEREAS Bonfiglioli desires to restrain the Executive from entering into unfair competition with it upon the future termination of his services;

AND WHEREAS Bonfiglioli desires to create, an incentive for the Executive to agree to the above retention and restraint, an executive retention payment;

NOW THEREFORE the parties agree as follows:

RETENTION SCHEME

1. Bonfiglioli will, upon acceptance of this agreement by the Executive by signature hereof, allocate to a special provision account / deposit with a unit trust fund to be selected by the Executive a total amount of R340 000-00 (Three Hundred Forty Thousand Rand) ("The capital amount"), to be invested in three equal tranches of R113, 333-33 (One Hundred Thirteen Thousand Three Hundred Thirty Three Rand and Thirty Cents) on the date of signing this document and the two ensuing anniversary dates;

2. The investment in terms of 1 above will be made in the name of Bonfiglioli, who shall have all the legal rights, title and interest in the amount(s) so deposited until the entitlement of the Executive to such amount(s) or parts thereof become unconditional in terms of this agreement...

7. Subject to the conditions as contained in this agreement, the Executive will become entitled to the accumulated value of the unit trust investment on January 1, 2009 at which time the unit trust investment shall be transferred in ownership to him.

CONTINUED SERVICE WITH BONFLIGLIOLI POWER TRANSMISIONS (PTY) LTD

10. It is an express condition for payment of the amounts in terms of this

agreement that the Executive remains in the employ of Bonfiglioli and has not terminated if, at any date prior to January 1, 2009.

11. For the purposes of this agreement the employment of the Executive will be deemed to have been terminated if, at any date prior to January 1, 2009;

11.1 The Executive has tendered his/her resignation.

11.2 The Executive is subjected to a disciplinary enquiry or hearing in which he/she is charged with or suspected of committing fraud, theft or any other offence involving dishonesty, and he/she is subsequently found guilty and dismissed.

12. It is also an expressed condition for payment of the amounts in terms of this agreement that performance targets are met.'

[8] On 10 January 2008, BPT sold its business as a going concern to the appellant. When the appellant acquired the business, it obtained by way of assignment all right, title and interest in all agreements between BPT and third parties including all employment contracts between BPT and its employees.

[9] On 31 May 2013, after approximately 22 years' service, the respondent tendered his resignation, giving one month's notice. On 05 June 2013, the respondent met with Mr Robert Rohman, the Managing Director of the appellant. During this meeting, the respondent was informed that he will not be required to work during the notice period.

[10] On 12 June 2013, the respondent sent an e-mail to some of the appellant's clients informing them that he has resigned and offered to assist them with any issues or concerns. He gave them his new contact details.

[11] The respondent registered a company called Motovario South Africa (Pty) Ltd during July 2013 of which he is the sole director. It is common cause that Motovario is an international competitor of the Bonfiglioli Group.

[12] The respondent did not deny that he registered Motovario in order to compete with the appellant.

[13] The appellant approached the court *a quo* on 05 August 2014, on an urgent basis, in order to enforce the restraint agreement. The respondent raised three grounds in order to displace the appellant's case. Firstly, the respondent contended that the restraint of trade agreement was for a definitive period and had elapsed by the effluxion of time. Secondly, he contended that the appellant had no right to enforce the agreement because it was not a party to the agreement and thirdly that the application is premature because the respondent has referred a constructive dismissal dispute to the CCMA and the outcome of that process will have a major bearing on the enforceability of the restraint agreement.

[14] The court *a quo* found that the retention and restraint agreement elapsed on 01 January 2010 and therefore the respondent was not bound by the agreement when he resigned on 31 May 2013. It consequently dismissed the application with costs.

[15] Mr Leslie, on behalf of the appellant, submitted that the court *a quo* erred in interpreting the agreement in the manner that it did.

[16] The court *a quo* erred in particular, so he argued, in finding that clause 11 serves to exhaustively define "termination of employment" when in fact it was a deeming provision that merely adds to the meaning of the term. He submitted that the court *a quo* erred in failing to appreciate that the agreement contained two distinct parts i.e. the retention bonus part and the restraint part. He further submitted that the court *a quo* should have found that the restraint part was triggered on the date of termination and not before then.

[17] Mr Rautenbach, on behalf of the respondent, argued that clause 11 is applicable to the entire agreement and that the date of termination of the

agreement is relevant for both the retention and the restraint clauses. According to him, the maturity date for the retention bonus and the date on which the entire contract lapses coincided.

[18] In *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[1] it was said that:

> '[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.* 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 or 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

[1] 2012 (4) SA 593 SCA at para 18.

> 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.'

[19] The court *a quo* found that clause 11 of the contact is the only provision which ascribed a meaning to the phrase "termination of employment". It further found that the definition of the phrase was for purposes of the whole agreement – i.e. including the restraint of trade part of the agreement.

[20] Clause 11 mentions two scenarios which do not amount to termination of employment and deem those scenarios for the purposes of the agreement between the parties to be "termination of employment". Was it the intention of the parties that clause 11 shall define the phrase "termination of employment" exhaustively in their contract?

[21] In *N.G.J Trading Stores (Pty) Ltd v Guerreiro,*[2] it was said (quoting *Pinkey v Race Classification Board and Another* 1966 (2) SA 73 at p 77) that:

> 'Generally speaking when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be and that, notwithstanding it is not that particular thing, nevertheless... it is to be deemed as that thing.'

[22] A deeming provision creates a fiction. That which is deemed to be what it is not is only so deemed for the purposes of a specific contract or statute. In this contract, clause 11 deems the phrase termination of employment to mean what it says it means for the purposes of the entire contract and not only for the purposes of retention bonus or clause 10. In order to determine whether the phrase was intended to define the phrase termination of employment exhaustively we must ascertain the context in and the purpose for which the fiction was resorted to in order to give full effect to the intention of the parties. A convenient starting point is to ascertain the purpose of a restraint of trade

[2] 1974 (4) SA 738 (A) at 744.

agreement on the one hand and a retention bonus on the other.

[23] A contract in restraint of trade is one that prevents an employee from exercising his or her trade, profession or calling, or engaging in the same business venture as the employer for a specified period, and within a specified area after leaving employment.[3] Van Der Merwe *et al* explain it thus:

> 'Employers often restrain employees in their service contracts to the extent that an employee who leaves the employ undertakes not to compete with his former employer, either independently or in the employ of another.'[4]

[24] The restraint agreement is therefore geared at protecting the employer's proprietary interest after the employee has left the employer's employment. In *Reeves and Another v Marfield Insurance Brokers CC and Another,*[5] the object of a restraint of trade term was described as follows:

> 'The legitimate object of a restraint is to protect the employer's goodwill and customer connections (or trade secrets) and the restraint accordingly remains effective for a specified period (which must be reasonable) after the employment relationship has come to an end. The need for the protection exists therefore independently of the manner in which the contract of employment is terminated and even if this occurs in consequence of a breach by the employer.'[6]

[25] A retention bonus, as the phrase suggests, is paid in order to retain the services of an employee for a specified period. Payment of the retention bonus is contingent upon the employee entering into an agreement with the employer to complete a specific period of service with the employer. The bonus can be paid after the expiration of the period, during the period or at the beginning of the period, depending on the agreement between the parties.

[3] See Basson *et al Essential Labour Law* 4th edition (Labour Law Publication 2005) at page 46.
[4] Van Der Merwe *et al Contract: General Principles* 4th edition (Juta 2012) at page 183 to 184
[5] 1996 (3) SA 766 (A).
[6] at 772F-G.

The purpose of a retention bonus is *inter alia* to avoid instability caused by employees, especially senior employees, who would constantly search for greener pastures; to retain institutional memory and to promote a seamless continuity of operations.

[26] The restraint of trade agreement is therefore to prevent the employee to compete with his/her ex-employer after the employment relationship has come to an end whereas the retention bonus is to reward the employee for staying in the employment of the employer. There is generally no need for an employer to enter into a restraint of trade agreement with an employee whilst the employer-employee relationship is still intact. This is so because at common law, the employee owes the employer a duty of good faith. In *Ganes and Another v Telecom Namibia Ltd,*[7] it was said that the duty of good faith entails that an employee is obliged not to work against the interests of his/her employer and not to place himself/herself in a position where his/her interests conflicted with those of the employer. In *Council for Scientific & Industrial Research v Fijen,*[8] it was stated that:

> '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 entitled the 'innocent party' to cancel the agreement.'[9]

[27] The tendering of a resignation, with one month's notice, as the employment contract stipulated, would not have terminated the employment relationship until the notice period had run. Likewise being charged with an offence involving dishonesty, within a specific period, would not have amounted to termination of employment. The termination would only take effect when the employee is dismissed for the act of dishonesty.

[7] (2004) 25 ILJ 995 (SCA) at 1003; para 25.

[8] (1996) 17 ILJ 18 (A).

[9] at 26D-E.

[28] These instances were included in order to expand the meaning of termination of employment to make it difficult for the respondent to get the retention bonus. Therefore, if the two scenarios are also deemed to be termination of employment then the respondent would not be entitled to the bonus, if any of them happened before 1 January 2010, notwithstanding the fact that the contract of employment was still extant as at 01 January 2010.

[29] In *R v Verrette,*[10] the Canadian Supreme Court, per Beez J said the following about a deeming provision:

> 'A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is. A deeming provision artificially imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used; it plays a function of enlargement analogous to the word "includes" in certain definitions; however "includes" would be logically inappropriate and would sound unreal because of the fictional aspect of the provision.' [11]

[30] I agree. It is clear that the parties wanted clause 11 to enlarge the meaning of termination of employment. The phrase termination of employment retained its ordinary meaning but in addition thereto it also had the meaning ascribed to it in clause 11 of the agreement. This interpretation is in sync with the context and does not lead to an absurdity. Clause 11 supplemented the meaning of termination.

[31] The preamble of the agreement make plain that the agreement served three purposes –viz:

i) to retain the services of the respondent for at least five more years,

[10] [1978] 2 SCR 838.
[11] at 847.

ii) to restrain the respondent from entering into unfair competition with the appellant upon the future termination of his services and

iii) to create an incentive for the respondent to agree to the retention and restrain obligations in the form of an executive retention payment.

[32] The retention bonus was paid to retain the respondent's services for the period mentioned in the agreement and later extended by one year. It also served as payment for him agreeing to enter into the restraint agreement, which would be triggered at the termination of the employment relationship. The purpose of the restraint agreement – like most if not all such agreements – was to protect the appellant's proprietary interest against unfair competition by the respondent following termination of his employment. Clause 18 and 19 of the agreement read as follows:

> '18 The executive hereby undertakes to be restrained from entering into competition, whether directly or indirectly, with Bonfiglioli upon termination of his/her employment with Bonfiglioli.
>
> "19 The executive will be restrained from acting for a period of 12 (twelve) months after termination of his/her employment in the territory.'

[33] It is clear that the restraint part of the agreement was triggered when the respondent's employment was terminated in 2013.

[34] The respondent's argument, which found favour with the court *a quo,* is untenable and leads to an absurdity. I deal briefly with the respondent's argument.

[35] The respondent argued that the restraint of trade part of the agreement begun and ended whilst the respondent was still in the appellant's employment. The respondent's argument was predicated on the premise that clause 11 exhaustively defined the term "termination of employment" for the purpose of

the entire agreement. Accordingly, the respondent's employment could only be terminated if termination occurred prior to 01 January 2010 and it had to occur as a result of the respondent tendering his resignation (before 01 January 2010) or the respondent being subjected to a disciplinary enquiring or hearing (before 01 January 2010) whereat he/she is charged with or suspected of having committed an offence involving dishonesty and he being subsequently (after 01 January 2010) found guilty and dismissed.

[36] If the respondent's argument is accepted, the fiction created by clause 11 would lead to an absurdity. In my view, when a contract or statute states that something shall be deemed to be that which it is not, the court is entitled and bound to ascertain for what purpose the fiction was created and endeavour to give full effect to the fiction in order to carry it to its logical conclusion.

[37] In *East End Dwellings v Finsbury Borough Council,*[12] Lord Asquith said the following:

> 'If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flown from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs, it does not say that having done so; you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.' [13]

[38] The argument advanced by the respondent in relation to the deeming clause is unconvincing because it causes the mind to boggle when it comes to the consequences of the agreement. If the respondent's interpretation is accepted, it would mean that the appellant wanted to protect its interest during the time that the respondent was still in its employment, whereas the need for

[12] [1952] AC 109 (HL).
[13] at 132-133

protection arose only after the termination of employment. The contract would, on the respondent's interpretation, yield not only an insensible but also an unbusinesslike result.

[39] The respondent argued that because he resigned after 01 January 2010, the restraint provisions were not applicable because the entire agreement had lapsed. The respondent submitted that this must be so because after the first contract was fulfilled the parties entered into another contract. At first glance this argument makes sense. However it is clear that the parties were under a misapprehension as to the true nature of the agreement. They were not alive to the fact that the restraint part of the agreement would only kick-in after termination and that the entitlement to the bonus kicked in on the date specified in the contract. Based on this misunderstanding of their contract, they entered into the second contract which was effectively a novation of the first contract.

[40] In my view, there is no ambiguity in the agreement. The deeming clause supplemented and did not supplant the meaning of termination of employment. The deeming provision was inserted to expand the meaning of termination of employment to make it impossible for the respondent to get the retention bonus if he tendered his resignation or committed misconduct in the form of dishonest conduct before 1 January 2010, the date on which the bonus was due. The phrase termination of employment should be given its ordinary grammatical meaning in all other respects in the contract. That being the case, I find that the respondent's employment was terminated on 5 June 2013 after he tendered his resignation on 31 May 2013. The 12 month restraint period, only commenced on 05 June 2013 when the appellant waived the notice period.

[41] It was not in dispute that the restraint agreement was valid and that the period was reasonable. It was also not in dispute that the respondent registered

Motovaria in order to compete with the appellant.

[42] The parties were *ad idem* that the matter is not moot, because the appellant intends instituting a claim for damages against the respondent. A judgment in the appellant's favour would therefore obviate a plea of *res judicata* or issue estoppel in those proceedings. This judgment therefore has practical value. The order of the court *a quo* ought to be set aside.

[43] I therefore make the following order.

a. The appeal is upheld with costs.

b. The order of the Labour Court is set aside and replaced with the following:

c. Prayers 1 to 7 of the notice of motion are granted.

C J Musi JA

Murphy AJA and Setiloane AJA concurred.

APPEARANCES:

FOR THE APPELLANT: Mr Leslie

Instructed by Cowan Harper Attorneys (Sandton)

FOR THE RESPONDENT: Mr Rantenbach

Instructed by Chafeker & Shabodien Inc (Cape Town)