REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

CASE NO: P 137/12

In the matter between:

PASCAL MUSHAIKE AND 8 OTHERS **Applicants**

and

INDEPENDENT COMMUNICATIONS AUTHORTIY

OF SOUTH AFRICA **Respondent**

Heard: **5 and 6 September 2013**

Delivered: **12 December 2014**

Summary: The applicants are required to establish their entitlement to the Performance bonus for their claim to the bonus to succeed.

JUDGMENT

LALLIE J

Introduction

[1] The applicants are employed by the respondent in Port Elizabeth and occupy different positions. Their claim is that pursuant to concluding verbal performance management contracts with the respondent, the respondent refused to pay them their performance bonuses. The respondent's defence was that the performance management contracts ("contracts") were invalid as the respondent is a public entity and not competent to enter into verbal contracts, alternatively, if the contracts ("contracts") were valid, the applicants did not qualify for the performance bonus ("the bonus"). In addition it was

submitted that the contracts were not binding as the individual who purported to enter into those contracts with the applicants lacked the necessary authority to act on behalf of the respondent.

[2] Mr Moletsane ("Moletsane") testified on behalf of the applicants that during the 2010-2011 financial year which coincided with the 2010-2011 performance cycle and ran from 1 April 2010 to 31 March 2011, they reported to Mr Goliath ("Goliath") who was their Regional Manager. The respondent paid the performance bonus to its employees since 2006 in terms of a performance management policy. The practice was that employees would fill their key performance areas (KPAs) in their contracts. At the end of the year the regional manager would appraise their performance and forward the appraisals to the human resources department which would pay their bonuses at the end of March. In 2008 and 2009 bonuses were not paid at the end of the financial (at the end of March) but two months later. In 2010 to 2011 there were labour problems which led to some employees signing their contracts late. The appraisals made by Goliath were changed at head office, conduct which the applicants appealed against. The result was that their original appraisals were reinstated.

[3] The applicants' key performance areas consist of targets they are required to meet. As there are different units at the Port Elizabeth regional office, each unit has its own targets. During appraisal, the applicants presented a portfolio of evidence to Goliath as proof that they had reached their targets. Owing to labour disputes a number of contracts were signed in June 2011 long after the 31 October 2010 deadline. In the past signing performance management contracts late was of no consequence. Employees would be paid their bonuses if they met their targets. Although there was a prescribed manner of conducting appraisals for the 2010-2011 performance cycle, it was not followed in Port Elizabeth because the senior managers, Dr Ramsey ("Ramsey") and Goliath did not see eye to eye as a result no employee received a performance bonus at the Port Elizabeth office for that financial-year and the explanation the respondent proffered was that the employees signed their contracts late. Both Moletsane and Goliath testified that the applicants' counterparts in other provinces who signed theirs even later

received their bonuses. An assertion which did not stand the test of cross-examination as the documents they sought to rely on did not reflect the dates on which their counter parts signed their contracts.

[4] Goliath conceded that there were problems at the respondent which resulted in the late signing of the contracts by employees in 2011. Some problems were caused by the manner in which the respondent dealt with the issue of performance management as in some instances they were instructed, as Regional Managers, to deal with the issue in terms of other documents over and above the performance management policy. He encountered problems of inconsistency in evaluating performance as standards differed from province to province. He sought guidance from Ramsey and when the problems were not resolved he escalated his concerns to the Human Resources Department and the CEO who made an insignificant attempt to assist. He reached a decision with his staff to sign the contracts for the sake of progress. The only flaw was that the performance management contracts, save Walmarans's were submitted late. He denied failure to comply with the policy when conducting appraisals as it was not an issue. Goliath submitted that there was a year when the appraisals were disregarded and each employee received a Christmas bonus.

[5] Ramsey, the respondent's only witness denied that the applicants could be entitled to the bonus without signing their contracts timeously and in terms of the respondent's policy. Verbal contracts were invalid and in breach of the respondent's policy. The process of paying performance bonuses started with the signing of the performance management contract by an employee and his or her supervisor and Regional Manager. In March of the year preceding the payment of the bonus, the mid-year review was used to motivate the business plan. The end of the year assessment ended with a moderation and payment of the performance bonus.

[6] Ramsey testified that he notified all the Regional Managers including Goliath to motivate employees to sign their contracts for the 2010-2011 performance cycle but he was ignored. He explained that the policy that governed payment of the bonus required the periods prescribed for reviews to be adhered to in order to facilitate payment to deserving employees before the end of the

financial year. The respondent has to comply with the Public Finance Management Act which requires the respondent to make payments it has budgeted for. As the applicants' contracts were not submitted on time, they were not budgeted for.

[7] Ramsey testified that the issue of the payment of the bonus was done according to the book in the 2009-2010 financial year and employees including the applicants were paid their bonus. He denied that the amounts the applicants are claiming are due to them as no contracts were sent to him, the human resources department or the finance department. He signed no assessments in October 2010 and at the end of March 2011. There was no agreement as to what the applicants were doing. The applicants were informed of the consequences of not signing their contracts on time. He found their self assessments unreasonable. He denied ever being informed that Goliath had problems with the performance management contracts as he was even involved in setting targets for employees.

[8] The applicants had to establish their entitlement to the performance bonus for the 2010-2011 performance cycle. The fourth and fifth applicants withdrew their claims. Goliath and Wolmarans conceded that they were not entitled to the bonus. It was argued on behalf of the applicants that there was a dispute with regard to the contents of the contracts. The applicants and the respondent presented by Goliath should have agreed on the contents of the contract for the 2010-2011 performance cycle. The applicants attributed the delay in signing their contracts to problems which were escalated to Ramsey, the HR Department and the CEO. Ramsey denied the existence of problems and testified that the applicants revolted. The applicants relied on a letter in which their trade union, CWU, raised problems pertaining to the payment of the bonus and advised the applicants against signing the 2010/2011 performance contracts as CWU had not been consulted. The applicants argued that Ramsey was untruthful in denying knowledge of the problems as he promptly reported their refusal to sign the contracts and attached the letter from the CWU. He further referred to the union's approach of refusing to sign the contracts as ill-founded. It was also argued on behalf of the applicants that despite the respondent's failure to solve their problems they signed their

contracts. They were evaluated by Goliath who decided that they qualified for the bonus in the amounts they are claiming.

[9] It was argued on behalf of the respondent that the applicants' contracts were invalid. Firstly, because there was no meeting of the minds between the parties. The applicants were required to sign the contracts by September failing which they would forfeit their eligibility for the bonus. When they missed the deadline the offer expired. Goliath had no authority to enter into the contracts on behalf of the respondent.

[10] A conclusion that the applicants disqualified themselves from receiving the bonus by their failure to sign the contracts on time can properly be taken after all the circumstances surrounding the delay have been considered. It is common cause that at the commencement of the 2010-2011 performance cycle the respondent had a performance management policy in place which, *inter alia*, governed the payment of the performance bonus. The respondent denied that the late signing of the contracts was due to conflict between the applicants' trade union and itself. A letter dated 16 September 2010, written by Ms Mopeli ("Mopeli") who was the acting CEO supports the applicants' version. Its salient provisions are that although it was towards the end of the second quarter of the financial year, 45% of the employees had not met the requirements of the performance management process. She acknowledged the challenges experienced with the effective implementation of the management system including the inability to start implementing new performance contracts. The process had to be managed on the basis of the 2003 policy until the revised policy had been approved save for deviating from four formal evaluations per cycle as it was not practical. Employees had to be made aware that performance management is a condition of employment. Both divisions had to submit their staff performance contracts by midday 20 September 2010 with signed IDPs. All employees who chose not to co-operate with the process were required to give their reasons in writing. All employees were required to participate in the half yearly review process during October 2010 and divisions had to submit their evaluation reports to HR by 31 October 2010 to qualify for compliance with the process. Paragraph seven of the letter is instructive and reads:

'Due to challenges of attempting to resolve the disputes on the PMS process from staff and management in the regions, the process has to be undertaken on a direct interactive basis. The regions should be isolated from the measures proposed and contracting deadline for the regions be extended to 31 October 2010 and be taken simultaneously with the half yearly review. However, all the different phases of the process must be effected to the compliant. HR must support and monitor the activities.'

Most applicants signed their contracts in June 2011.

[11] In addition to proving the existence of problems between management and employees with regard to the signing of the contracts for the 2010-2011 performance cycle, the letter also serves to clarify to the respondent's employees, including the applicants, the importance of having the contract signed and the consequences of failure to sign them. The letter therefore, amended the requirement that the contracts had to be signed before 31 March 2010. Having been fore-warned, the applicants could not seek to rely on the past practice that late signing of contracts was of no consequence. Similarly, the respondent could not rely on strict compliance with the policy with regard to the date on which the contracts should have been signed.

[12] It was submitted on behalf of the applicants that Goliath and Ramsey did not see eye to eye, a situation which contributed to their inability to fulfil the requirements which would have made them eligible to the bonus. On 28 March 2011, the CEO addressed the following letter to senior managers:

'PERFORMANCE APPRAISAL PROCESS FOR 2010/2011

The performance management cycle for 2010/2011 is coming to an end; it is therefore imperative to outline a process that will enable adequate preparation and timeouts finalisation of the performance appraisal process.

The divisional heads with the assistance of human resources shall convene performance appraisal meetings to ensure objective and consistent application of performance ratings and also to resolve disputes that might arise in the respective divisions. All employees shall be assessed on a five point performance rating scale; employees

> appointed in the last quarter of the financial cycle shall be assessed in the following financial year.
>
> Unresolved disputes shall be referred to the CEO for consideration and final decision. The CEO shall sign off all divisional performance ratings schedules for presentation to the remuneration committee (REMCO). REMCO shall recommend to Council the appropriate performance rewards.'

Attached to the letter is a schedule stating the dates on which steps in the evaluation system should be taken as well as the persons responsible for taking the steps. Goliath testified that the respondent failed to comply with its own policies.

[13] The letter of 28 March required Ramsey and Goliath as the divisional heads to convene performance appraisal meetings and refer unresolved disputes to the CEO. They did not, instead they were entrenched in their differences. In the process they missed the opportunity of dealing with the problems surrounding the applicants' contracts. Goliath entered into performance management contracts with the applicants between May and July 2011, appraised their performance and decided that performance bonuses were due to them. Ramsey attempted to moderate the appraisals. It is common cause that the respondent's policy has delegated that function to the moderation committee. As the general manager, his function was to make submissions to the CEO who in turn was charged with the responsibility of dealing with unresolved disputes and taking the final decision. Ramsey alleged that the CEO had delegated his power of final decision making to him. He could not produce the delegation and the policy is silent on the delegation of the CEO's function of taking the final decision. By usurping the CEO's power contrary to the policy, Ramsey abdicated his performance management responsibilities to the detriment of the applicants.

[14] Goliath's evidence that the respondent's efforts to solve the applicants' problem was minimal was proved correct by Ramsey's attitude and lack of understanding of the extent of his authority in the performance management process. His evidence that he signed the contracts late was not refuted. He was the regional manager and had the authority to enter into performance

management contracts on behalf of the respondent. The fact that he exercised his authority late does not diminish his authority which was linked to his position at the respondent. The only evidence led on behalf of the applicants pertaining to the signing of their contracts was that they were signed late. The allegation that they had entered into verbal contracts was not substantiated.

[15] It is common cause that in terms of the respondent's policy payment of the performance bonus forms part of the performance management system which begins with the signing of the performance contract between an employee and the respondent, represented, for purposes of the present matter, by Goliath in his capacity as the regional manager. The contracts should have been endorsed by Ramsey in his capacity as general manager. The applicants conceded that their contracts were signed late. In the contracts the applicants and Goliath were required to have agreed on outputs and development plan objectives, measurements and assessment of outputs, interpretation of assessment criteria and approaches to two review sessions. Assessments had to be based on facts and not conceptions and had to be recorded. The applicants failed to establish that they entered into contracts which complied with the policy. The decision to pay the applicants the performance bonus had to be based on two assessments. It is common cause that Goliath assessed the applicants once. Management contributed to the applicants' inability to fulfil the requirements of being eligible for the performance bonus. The applicants have to take responsibility for their contribution to their problem. When there were problems between the CWU and the respondent about the performance contracts, the acting CEO made the respondent's position to all its employees very clear. She invited all employees who chose not to co-operate with the process to state their reasons in writing. The applicants did not seize the opportunity and lost the advantage of bringing their problems to the CEO's attention. All the pre-requisites for the payment of the bonus were clarified in the letter but the applicants did not comply. They were left with no basis for their claim to the performance bonus. As the applicants have not established their entitlement to the bonus their claim cannot succeed.

[16] I have considered the arguments on costs. It will not be fair to make a costs order against the applicants in view of the respondent's contribution to the applicant's inability to fulfil the requirements for the performance bonus.

[17] In the premises the following order is made:

17.1 applicants' claim is dismissed.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCE

For the Applicant:	Advocate Grobler
Instructed by:	Van De Walt Attorneys
For the Respondents:	Mr Motsoeneng In person