REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 763/15

In the matter between:

MARINIQUE DE WET Applicant

and

WORLD LUXURY HOTEL AWARDS (PTY) LTD Respondent

Heard: 29 -30 August 2016

Delivered: 1 September 2016

Summary: Interpretation of contract – contractual claim for severance payment where employee resigned – entitled to payment in terms of contract.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Marinique de Wet, resigned. Yet she says she is entitled to severance pay. That claim arises from her contract of employment. In order to decide whether the contract caters for this unusual claim, it needs to be interpreted.

[2] The employee also claims outstanding leave pay. That claim is largely uncontested, except for a period of 41 days during her notice period. She has conceded that she is not entitled to payment for that period and she only claims the balance.

[3] Both claims come before this Court by way of referral in terms of rule 6 and a contractual claim in terms of s 77(3) of the Basic Conditions of Employment Act.[1]

[4] The applicant also claimed short payment of R16 350 on her salry for October 2014 to February 2015; and an amount of R10 200 due to an incorrect calculation on her payslips for the period October to December 2014. The respondent has conceded those claims.

Background facts

[5] The applicant, Ms de Wet, was appointed as manager of World Luxury Hotel Awards (WLHA) on 4 September 2006. At that stage, she was paid by a legal entity known as Gatsby International Hotels (Pty) Ltd. The business of an awards company for luxury hotels was still an embryonic one. She built it up together with the owner, Mr Brandon Lourens. Apart from her monthly salary, a cell phone allowance and a petrol allowance, Lourens offered her a monthly incentive based on the monthly turnover of WLHA. Lourens asked his brother to draft an employment contract in those terms. Lourens and De Wet signed the contract on 22 September 2006.

[6] Seven years later, after World Luxury Hotel Awards (Pty) Ltd had been registered, Lourens and De Wet signed a new contract of employment with that legal entity. This time, De Wet asked her brother to draft the

[1] Act 75 of 1997 (the BCEA).

contract. She and Lourens signed it on 1 March 2013. Both of them testified that he had "paged through it" before he initialled each page and signed it in full; he disputed that he had read it properly. *Caveat emptor*, as he would later realise – he said in his evidence before this Court that he had signed it "to his detriment". (Only De Wet and Lourens testified).

[7] Like the previous contract, the 2013 contract with WLHA also contained a clause 3.2 in terms of which De Wet would be paid a commission of 10% of the firm's monthly turnover. The business grew exponentially – she put its value in 2015 at R13-14 million; Lourens put it at R8 Million. For that, she was rewarded handsomely. Apart from the substantial commission based on turnover, she received a monthly basic salary of R30 000; a telephone allowance of R1 500; and car allowance of R8 000.

[8] The employment contract contains an unusual clause with regard to severance pay. More about that later.

[9] In February 2014 De Wet and Lourens renegotiated certain terms of the contract. Her basic salary was raised to R31 770; the phone allowance increased with R1500; and the car allowance was raised to R17 000. She asked for shares in the company; Lourens refused. He agreed to pay her a quarterly incentive based on sales income.

[10] Later in the same year, De Wet and Lourens had a disagreement about payments due to SARS. She went on maternity leave and returned in October 2014. She testified that "things were not the same" upon her return. She resigned on 1 January 2015. She had to give two months' notice in terms of her contract of employment. Given that she had more than two months' leave outstanding, they agreed that she could stay at home during her notice period.

[11] WLHA calculated the amounts due to De Wet for salary, bonus and commission payments as R219 138, 24. It sent her a letter on 24 February 2015 asking her to confirm that that amount would be "in full and final settlement of all claims". She did not sign it. The company eventually paid that amount into her bank account on 27 February 2015 without her acknowledging that it was in full and final settlement. (The company eventually acknowledged that it had used the wrong basis for calculation

of her basic salary and telephone allowance, following correspondence and her requests for payslips between 27 February and 9 March 2015).

[12] On 9 March 2015 De Wet wrote to the company's financial advisor, Riaan Ebersohn, in these terms:[2]

> "Hallo Riaan
>
> …
>
> Wat my skeidingspakket betref het ek ook regsadvies gekry en verskeie prokureurs het vir my gesê dat dit betaal moet word, so laat weet asb voor of op Woensdag wat julle posisie in verband hiermee is sodat ons dit so gou as moontlik kan uitsorteer."

[13] The claim for severance pay was based on the contract of employment. The respondent refused to pay it. Lourens responded on 12 March 2015:

> "I refer to your recent letters sent to Riaan Ebersohn requesting a severance payment.
>
> I must first express my surprise at the claim even being made. You know as well as I do that it was never agreed that any severance was to be paid to you on resignation. In fact the circumstances in which severance payments were to be made was never discussed. At the time that I signed your contract of employment I did not read it. It was drafted by an attorney representing you and I trusted that you not include any out of the ordinary terms therein. I'm advised that a clause providing for severance payment on resignation is indeed very much out of the ordinary and I should have been alerted to this if that is what you were thinking of getting at the time. Be that as it may, the fact is that the clause does not provide for such a payment on resignation."

[14] The applicant's attorneys wrote to Lourens on 20 March 2015 reiterating her claim and quantifying it as R 1 375 845, 23 based on an average monthly salary of R179 849, 05. They said:

> "We have been instructed that the agreed payment mechanism as set out under the heading 'severance' was specifically done as an alternative to the receipt of shares in the company as was promised to our client during the early stages of the business.

[2] Only the second paragraph is relevant to her claim in this Court.

> We specifically disagree with your opinion that the 'severance clause' does not make provision for resignation and to this end your attention is once again directed to the wording in paragraph 12.1. We take note of the legal advice that you have received in this regard, but believe that it is not correct."

[15] The applicant's attorneys also claimed outstanding leave pay on her behalf. The respondent's then attorneys refuted both claims. After an initial and mistaken referral to the CCMA, she referred a claim to this Court.

[16] In April 2015 the applicant started doing business in competition with the respondent under the name of "Haute Grandeur Global Hotel Awards", a company she had registered in November 2014. She is not bound by a restraint of trade agreement.

Leave pay

[17] The applicant initially claimed outstanding leave pay for a period of 102.5 days. She accepted the calculation on her payslips that she had taken seven days' leave. At the beginning of the trial she also abandoned her claim for the 41 days' leave taken during her notice period. She claimed the balance of 61.5 days' leave, quantified as R518 715, 63.[3]

[18] In its response to the statement of claim, the respondent did not take issue with the calculation of leave pay; nor did it dispute that the applicant was entitled to leave pay other than during her notice period. In response to her claim for leave pay during the period September 2009 to February 2015, the respondent merely pleaded that she did not work out her notice period; that she was permitted to take leave for that period of two months instead; that her leave "was accordingly taken in accordance with the agreement between employer and employee"; and that, "in the circumstances no leave payments are due to the applicant by the respondent".

[19] The applicant has, as noted above, abandoned the claim for leave pay during her notice period. The rest of her claim for leave pay is

[3] This amount is based on an average monthly income of R179 849, 05, comprising basic salary, allowances, commission and bonus payments.

uncontested. The respondent must therefore pay her the balance of R 518 715, 63.

Severance pay: the contract

[20] The main bone of contention is the claim for severance pay. It hardly needs to be stated that a claim for severance pay for an employee who resigned of her own accord is highly unusual. But then, so is the clause in the contract; it even provides for severance payment where the employer dismisses the employee for misconduct, other than gross dishonesty. It reads:[4]

> "**12. SEVERANCE**
>
> 12.1 In the event that the employee's employment is terminated for any reason other than that of gross dishonesty, the employee shall be entitled to the payment of the severance package on the terms as set out below.
>
> 12.2 Where the firm is sold to a party other than the employee, the employee shall be entitled to a payment of a lump sum (a x b) calculated at 15% of her last month's salary within the firm's employ (a) multiplied by the period 1 September 2006 to the date of severance (b).
>
> 12.3 Where the employee's employ within the firm is terminated, the employee shall be entitled to a payment of a lump sum (a x b) calculated at 7.5% of her last month's salary within the firm's employ (a) multiplied by the period 1 September 2006 to the date of severance (b).

[21] Two other clauses are also relevant to the dispute. Firstly, although neither "remuneration" nor "salary" is defined, remuneration is discussed under the following headings:

> "**3. REMUNERATION**
>
> 3.1 It is agreed that the employee's remuneration calculated on the terms set out hereunder [*sic*].
>
> 3.2 The employees agreed gross salaried remuneration: **R30 000, 00 per month.**
>
> 3.2 [*sic*] The employee's commission will be calculated as follows:

[4] Bold as in original.

10% of the firm's monthly turnover.

3.3 The employee shall be entitled to the following fringe benefits:

R1 500 telephone allowance;

R 8 000 car allowance.

3.4 The remuneration package, inclusive of salary and benefits, as described above shall be subject to an annual increase and/or renegotiation at a minimum rate equivalent linked to the inflation rate as per the annual adjustment in the Consumer Price Index. Such increase shall become effective upon the anniversary of the effective date hereof."

"**5. TERMINATION OF EMPLOYMENT**

Either the employee or firm will be entitled to terminate employment on written notice to the other party as follows:

5.1 Either party is required to provide two calendar months written notice."

[22] The contract also contains a standard non-variation clause; and a stipulation that it contains the entire agreement between the parties.

Principles of interpretation

[23] The principles for the interpretation of contracts are well known and were recently summarised by the SCA in *Natal Joint Municipal Pension Fund v Emdumeni Municipality*[5]:

> "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 S*chool. 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

[5] 2012 (4) SA 593 (SCA) para [18] (footnotes omitted).

> 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."

Evaluation

[24] Against the background of these principles, the Court has to decide two issues:

24.1 Is the applicant entitled to severance pay even though she resigned?

24.2 If so, what is the basis for calculation: remuneration or basic salary?

Entitlement to severance pay

[25] In order to decide whether the applicant is entitled to severance pay in terms of clause 12 of the contract, the starting point is the language of the clause itself.

[26] It hardly bears repetition that the clause is an unusual one; but, as Mr Lourens conceded in his testimony, he is bound by the contract as it stands; "it is what it is", whether he took the trouble of reading it properly before he signed it and initialled each page or not.

[27] The clause is unusual because it does not provide for severance pay only if the contract of employment is terminated for operational requirements.

Neither does it provide for "no fault" dismissals only, contrary to what Mr *O'Dowd* initially proposed. Indeed, it is quite clear that, even if the employer had to dismiss an employee for misconduct, other than gross dishonesty, she would still be entitled to severance pay – it provides for payment in the case of termination for any reason other than gross dishonesty. That is a highly unusual scenario. It also distinguishes the facts of this case from that of this Court in *Rogers v Exactocraft (Pty) Ltd*[6], to which Mr *O'Dowd* referred in his argument. In that case, this Court adopted a purposive approach to interpreting the intention of the legislature in relation to severance pay in the context of s 84 of the BCEA. The Court also noted:[7]

> "The purpose of severance pay has been the subject of some debate. A comprehensive study[8] showed that the origin of mandated severance pay can be traced to three main events: the creation of labour codes; the first events of large scale industrial restructuring starting at the end of the 19th century and pressures of the interwar high unemployment episode; and the expansion of the welfare state after WWII. Despite these common origins, the review of existing severance pay programs showed that countries use widely differentiated designs, or at least parameter values. The paper also examined the economic rationale for severance pay and found partial support for all three hypotheses it advanced: that severance pay serves as a social benefit payment, a human resource management tool, and a job protection mechanism.
>
> In another article, the author[9] considered South African case law (none of which specifically dealt with the application of s 84 in the circumstances of this case) and came to the conclusion that s 41(4) of the BCEA rewards the employer for offering or securing alternative employment for the employee. It promotes sustained employment by giving employers an incentive to procure alternative employment for employees facing dismissal for operational requirements. Absent such an offer, the employer has to pay

[6] (2015) 34 *ILJ* 277 (LC).

[7] At paragraphs [26] – [27].

[8] Robert Holzmann, Yann Pouget, Milan Vodopivec and Michael Weber: *Severance Pay Programs around the World: History, Rationale, Status, and Reforms* (IZA DP No. 5731, May 2011).

[9] DW de Villiers, "The Entitlement to Severance Pay Revisited" (2010) 22 *SA Merc LJ* 114-126.

> severance pay – whether it is to "tide the employee over" until he or she finds another job, as some commentators would have it, or to reward the employee for long service, does not really matter."

[28] In *Exactocraft,* the question was whether the employee was entitled to severance pay in terms of ss 41 and 84 of the BCEA when he retired and was then contracted to work for the company again, after which he was retrenched. But in this case, the applicant's claim is founded in contract. It is clear from the contract itself that she would be entitled to severance pay even if she were to be dismissed for misconduct other than gross dishonesty. But is she entitled to it where she resigned?

[29] Mr *O'Dowd* argued that the clause is only intended to deal with termination at the behest of the employer, i.e. dismissal. But that is not what it says. Perhaps, in future, the parties will be alive to the dangers of drafting in the passive voice. But because they chose to enter into an agreement that the applicant's representative had drafted in the passive voice, this dispute was referred to this Court.

[30] Clause 12.1 states – in peremptory terms – that the employee "shall be entitled" to severance pay "in the event that the employee's employment is terminated <u>for any reason</u>[10] other than that of gross dishonesty." Clearly, she would be entitled to severance pay if the employer dismissed her for any reason other than gross dishonesty. That is a termination at the instance of the employer. But resignation is termination of the contract at the instance of the employee.[11] The language of the clause itself, therefore, does not restrict it to termination by the employer.

[31] The parties made a contract. And as Mr Lourens accepted, they must live with it. As the LAC stated in *Young v Lifegro Assurance Ltd*[12], to which Mr *O'Dowd* referred:

> "It is for the parties to the contract of employment to agree on the terms and conditions which will govern their relationship including the rights and obligations which will flow from the termination of the agreement."

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[10] My underlining.

[11] Cf Thompson & Benjamin *South African Labour Law* (Service no 65, 2015) AA1-417.

[12] (1991) 12 *ILJ* 1256 (LAC) at 1265 G-H.

[32] Turning to context, the context of the contract of employment as a whole must be taken into account. And in clause 5, under the heading – in bold capital letters – "**TERMINATION OF EMPLOYMENT**", the parties reiterate the trite principle that either the employee or the employer is entitled to terminate employment on written notice to the other party. Read together with clauses 12.1 and 12.3, that would suggest that, unusually, an employee terminates her employment is also entitled to severance pay.

[33] With regard to the purpose and background of the contract, it is also significant that two different scenarios are envisaged in clause 12.2 and 12.3. If the firm is sold to a party other than the employee, she is entitled to a lump sum calculated at 15% of her last month's salary multiplied by the period 1 September 2006 to the date of termination. But, in terms of clause 12.3, in all other circumstances where her "employ within the firm is terminated", she gets only half that as severance. In that context, it is difficult to see why an employee who resigns – and thus terminates the contract of employment without any fault on her part – would not be entitled to the same, lesser, payment as an employee who is dismissed for misconduct other than gross dishonesty.

[34] Lastly, then, the apparent purpose to which the clause is directed and the material known to those responsible for its production must be considered. Ms de Wet – the person responsible for its production – was clear in her evidence as to its purpose. Lourens refused to give her shares. She did not have a provident fund. She therefore calculated the amount of severance pay using the analogy of the industry norm for payments to provident funds, i.e. 7.5% of salary by the employee and 7.5% by the employer.

[35] As the Court stated in *Exactocraft*[13]:

> "As explained in the article by Holzmann and others, severance pay is both a form of compensation for a no-fault termination of the contract of employment as well as recognition of the employee's 'investment' in the employer's enterprise. This is captured in an early case which, in justifying

[13] Above para [32].

> severance pay, said the employee had 'sacrificed his best employment years in building, or contributing to, the business of the company'.

[36] In this case, Ms de Wet also testified that the severance clause was included to recognise her years of service to the company. More specifically, she built it up from a mere concept to a business with a value of between R8 million (on Lourens's version) and R13 million (on her version).

[37] Taking all these factors into account, I must conclude that, unusual as it is, the contract does provide for a peremptory severance payment to Ms de Wet, even in circumstances where she resigned.

[38] The remaining question then is on what basis that payment must be calculated.

Basis of calculation

[39] The formula on which the severance pay is calculated uses the employee's "last month's salary" as a basis. Mr *De Kock* argued that "salary" included her basic salary; telephone and car allowances; as well as average bonus and commission payments.

[40] Once again, the Court must take into account the principles of interpretation summarised in *Natal Joint Municipal Pension Fund.*[14]

[41] The plain language of clause 12.3 refers to "salary". And although that is not specifically defined, it must be read in the context of clause 3. That clause draws a fairly clear distinction between "remuneration" and "salary". Remuneration includes "gross salaried remuneration"; commission and fringe benefits. And it refers to a "remuneration package, inclusive of salary and benefits". In that context, it appears to me that the draft of the document intended "salary" to refer only to the basic salary, excluding benefits, commission and bonuses. At the time of her resignation, the employee's last month's salary was R 31 770, 00.

[14] Above.

[42] The use of the word “salary” in clause 12.3 also stands in contrast to clause 8.4 which provides that the employee is entitled to “payment of her full remuneration package” during maternity leave.

[43] It is so, as Mr *De Kock* pointed out, that the employee’s payslip reflects a net salary (“*netto salaris*”) of R219 138, 24 per month; but that net amount comprises a breakdown of various categories, including “salary” of (the wrongly reflected amount of) R30 000; cell phone allowance; travel allowance; commission and bonus.

[44] I conclude, taking into account the language of clause 12.3 read in the context of the contract as a whole, that there is a clear distinction between “remuneration and “salary”; and that the clause uses “last month’s salary”, i.e. the lesser amount, as a basis for calculation.

[45] The amount due to the employee, using the formula in clause 12.3, is therefore:

7,5% x R 31 770 (a) x 102 months (b) = R 243 040, 50.

Conclusion

[46] The applicant is entitled to leave pay amounting to R 518 715, 63 and to severance pay amounting to R 243 040, 50. The respondent also conceded her claim for short payments.

[47] Both parties asked for costs to follow the result. I see no reason in law or fairness to disagree.

Order

[48] I therefore make the following order:

48.1 The applicant is entitled to outstanding leave pay (except for her notice period) and to severance pay calculated on the basis of her salary as set out in clause 12.3 of her contract of employment.

48.2 The respondent must pay the applicant the following amounts by 30 September 2016, together with interest calculated at 9% per year, due from the date of this judgement to date of payment:

48.2.1 R518 715, 63 for outstanding leave pay;

48.2.2 R243 040, 50 for severance pay;

48.2.3 R26 550, 00 for short payment of her salary and in respect of an incorrect calculation on her payslips.

48.3 The respondent must pay the applicant's costs, including the costs of counsel.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Coen de Kock
Instructed by Carelse Khan attorneys.

RESPONDENT: Sean O'Dowd of Bagraims attorneys.