IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 241/11

In the matter between:

SOLIDARITY	**First Applicant**
F E WORTMANN	**Second Applicant**
J P C APPELCRYN	**Third Applicant**
J VAN TONDER	**Fourth Applicant**
and	
DENEL (SOC) LTD	**Respondent**

Heard: **11-12 May 2015; and 20; 21-22 January 2016**

Delivered: **24 March 2017**

JUDGMENT

TLHOTLHALEMAJE J

Introduction and background

[1] The applicants approached the Court in terms of the provisions of section 77(3) of the Basic Conditions of Employment Act[1] (the BCEA), to claim payment of monies from the respondent (termed variable pay) together with interest thereon from 24 July 2008. The claim is opposed by the respondent.

[2] The individual applicants' claim is essentially that a portion of their remuneration package was considered variable pay in accordance with letters sent to them on various dates that had adjusted their remuneration packages, which pay was due to them if certain pre-requisites were met.

[3] The letters were received individually, but to a large extent were identical, save for figures that apply to each individual applicant. The letter in respect of the second applicant (Wortmann) records the following:

> "1. It is my pleasure to inform you that your Total Remuneration Package (TRP) has been adjusted with effect from 1 April 2007.
>
> 2. In line with our drive to ensure a performance driven culture within Denel, your Total Remuneration Package has been revised i<u>nclusive</u> of a performance based incentive.
>
> 3. Your new Total Base Remuneration Package (TBRP) will increase to from R628 517.70 to R699 540.20 (see details in Appendix A). Your new total Remuneration Package (TRP) will be R769.494.22 (Total Package) per annum.
>
> 4. The above <u>Total Package</u> includes, a 6% increase on your current Total Base Remuneration Package (TBRP), plus an additional salary adjustment which is a company effort to bring your salary close to the market. Also included is a variable pay (incentive) of 10% of your TBRP (R69.954.02 p.a)
>
> 5. Variable Pay (Incentive)

[1] Act 75 of 1997. Section 77(3) provides:

> "The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."

5.1. This refers to a portion of your remuneration that is on top of your new Total base Remuneration Package (TBRP) of R69.954.02

5.2. This variable pay although included in calculating your Total Package of R769.494.22, is only payable to you at the end of the Financial year, after the approval of financial results of our Company by the Denel Board of Directors and in the event of reaching set objectives.

5.3. The variable pay portion (VP) is at risk, meaning that it is payable subject to the achievements of DSL's objectives as contracted between our CEO and the Denel Group CEO. Also it is subject to you achieving your own individual contracted objectives in accordance with our Company's performance Management system.

5.4. Please note that your variable pay percentage of 10%, is based on your current position and level of responsibility, should this change for any reason during the financial year, your variable pay percentage will be prorated accordingly.

6. Thank you for your contribution over the past year, and best of luck with your efforts to achieve your own objectives as well as DSL's 2007/8 objectives."

[4] The respondent's version was that the claims to variable pay were subject to the provisions of its Incentive Scheme Policy number 53,[2] and that the individual applicants were not entitled to any payment on the basis that they had not met all the conditions set out in the policy.

[5] The background to the individual applicants' claim is as follows:

3.1 The respondent, Denel Land Systems (Pty) LTD, a division of Denel (PTY) Ltd is a private company, with the state as its sole shareholder. It develops and manufactures defence systems, aviation and other commercial products.

3.2 The first applicant, Solidarity is a registered trade union registered in terms of the relevant legislation. The second applicant, Fried Echard Wortmann (Wortmann) is an erstwhile employee of the respondent. He

[2] Effective from 2007.

was employed as a System Engineer based at the International Golden Group. The third respondent, Jasper Cornelius Appelcryn (Appelcryn) was employed as a Fitter by the respondent until his resignation. The fourth application, Jacobus van Tonder (van Tonder) was employed as Configuration Element Manager.

3.3 As mentioned above, on 12 April 2007, the second applicant, Wortmann, was advised in writing of an adjustment in his remuneration package to R769 494.22. The adjusted package included a variable pay in the amount of the amount of R69 954.02, which he claims is entitled to plus interest thereon. He resigned from his position on 01 May 2008, with his last working day being on 31 May 2008.

3.4 The third applicant, Appelcryn, received a similar letter on 16 April 2007, adjusting his remuneration package to R220 645.00. He claims that his variable pay was in the amount of R22 064.50, which he is entitled to plus interest thereon. He resigned from his position on 5 June 2008, with his last working day being on 30 June 2008;

3.5 The fourth applicant, Van Tonder, also received a letter on 11 December 2007, adjusting his remuneration package to R150 150.50, with a variable pay of R15 015.05. He resigned from his position on 1 March 2008, with his last working day being on 31 March 2008. He also seeks the amount of variable pay and interest thereon from 24 July 2008, until the date of final payment.

[6] The variable pay was due and payable under the following conditions, which the individual applicants contend they had met:

a) At the end of the year;

b) After the approval of the Financial Results of the respondent by its Board;

c) If the individual applicants achieved their own individual objectives in accordance with the Respondent’s Performance Management System.

[7] It was common cause that previously, the respondent had in place, *Incentive Scheme Policy number 53*, which was introduced in 2003. On 18 September 2007, the respondent's Board approved a new Policy 53 whose implementation was backdated to 1 April 2007. According to the respondent, its EXCO had approved the new incentive scheme in principle on 16 October 2006, and the previous scheme under the old Policy 53 was withdrawn. The variable pay was due and payable with effect from 25 July 2008 with the Board having approved payments a few days earlier.

[8] The objectives of the 2007 Policy 53 version were as follows:

> "1.1 To drive behaviour supportive of Denel's strategic intent and objectives.
>
> 1.2 To drive business objectives to ensure Denel turnaround.
>
> 1.3 To measure, assess and reward individual excellence in performance.
>
> 1.4 To enable attraction and retention of competent, performance driven employees.
>
> 1.5 To create a performance driven culture and reward performance.
>
> 1.6 To establish a commercial mindset and improve Human Capital returns.
>
> 1.7 To implement market related remuneration, incentive and reward principles.
>
> 1.8 To achieve the objectives of this policy, it is a requirement that all employees contribute to the achievement of their respective entities and that the individual performance be taken into account for all participants of the incentive scheme as defined within this policy through performance management within Denel."[3]

[9] The 2007 Policy, in accordance with its objectives, introduced the concept of Variable pay (VP) and a Performance Management System (PMS). The relevant clauses for consideration in respect of the claim before the Court, which the respondent heavily relied upon for its contention that the applicant's claim is without merit are as follows:

[3] Page 42 of the trial bundle of documents.

“***4. INCENTIVE SCHEME GUIDELINES AND PARTICIPATION:***

4.1 The application of this incentive scheme will depend on the various tasks and levels of contributions made by individuals and or teams within a participating entity.

4.2 ……

4.3 ……

4.4 ……

4.5 All persons no longer in the employ of the company at the bonus pay out time will not be entitled to incentive bonuses.

7. PAYMENT OF BONUSES:

Payment of the bonus (where applicable) will take place as soon as the annual financial statements have been audited and approved by the Denel Pty) (Ltd) Board and formal measurement against contracted entity targets have been completed. The maximum bonus that will be payable for the different categories will be based on a percentage of total base remuneration package (TBRB) as indicated in the attached Annexure ‘A’ subject to individual performance management assessment rating.

. . .

9. TERMINATION OF EMPLOYMENT BEFORE PAYMENT OF INCENTIVE BONUS

Termination of employment for any reason other than retirement, retrenchment, disability or death results in cancellation of participation in the scheme and will result in the forfeiture of any potential bonus payment for the current year. Participants must be in the employ of the entity or Denel to qualify for an incentive bonus unless otherwise agreed in writing. When a participant retires, is declared permanently disabled, dies in the service or retrenched, a pro rata bonus payment will be made, if due.”

[10] The policy related to the Performance Management System, Policy 36, is intrinsically linked to Policy 53 of 2007. It is common cause that Policy 36 was also not finalised as at 1 April 2007, but that it was applied to employees once finalised during the course of 2007 in the same manner as the 2007 Policy 53 was, including retrospective application from 1 April 2007.

[11] The individual applicants contended that they had accepted the respondent’s adjustment in the remuneration packages together with the preceding conditions. They further contended that they had complied with the conditions

and performance related changes implemented in accordance with Policy 36 when it was implemented during the course of 2007 and that despite demand, the respondent neglected and/or refused to make any payments.

[12] The respondent on the other hand contended that the individual applicants had resigned in March, May, and June 2008 respectively, prior to its Board approving payment of the variable pay, and had left its employ as at the date of actual payment being 25 July 2008. According to the respondent, since it was common cause that its financial year ended on 31 March, and the variable pay was paid on 25 July 2008 after it was approved by the Board a few days earlier, the individual applicants therefore did not qualify for benefits in view of the various clauses in Policy 2007.

[13] Central to the respondent's contention is that the applicants were at all material times subject to the Incentive Scheme Policy Number 53 effective from 1 April 2007, and that they had not met the conditions set out in the Policy. According to the respondent, the applicants sought to selectively rely upon partial or incomplete compliance with certain conditions, and have in the process, deliberately disregarded the fact that they had not met the policy conditions of being employed at the time of the incentive bonus pay-out.

Issues for consideration

[14] The Court is called upon to consider:

1. the validity of the respondent's 2007 Incentive Scheme Policy Number 53;
2. whether it was applicable to the individual applicants and if so;
3. whether the conditions for receipt of a bonus were met by the individual applicants, more particularly as detailed in their performance contracts;
4. whether the condition that the recipients be employed at the time of bonus payment was met by each individual applicant; and if the Policy conditions were not met; and

5. whether the individual applicants have any alternative basis for the claim other than pleaded.

[15] The applicants disputed being aware of the 2007 version of the policy. Central to the dispute was whether the policy was sufficiently accessible and communicated to all employees. The individual applicants alleged that Policy 53 was never communicated to them whilst they were in employ of the respondent, and was therefore not valid. The applicants relied on their performance contracts, and contended that there was no policy implied or otherwise, that was part of the performance contracts. They further contend that in the alternative of the policy being valid, it was not applicable to the claim of incentive bonus.

Policy 53: Were the applicants aware of it?

[16] It must be stated from the outset that I find difficulty with the applicants' contentions that they were not aware of Policy 53 of 2007, or that it was not communicated to them. This after their belated concessions that this policy was indeed published on 23 October 2008 at a site where Worthmann was based, and was readily available at Configuration and the HR departments.

[17] The respondent's Senior Manager: ICT and Configuration Manager, Leoni Londt (Londt), had testified that since 2002, the respondent has had an intranet with a real-time link to DCO Head office policies, for all employees to access, and had regularly updated information on the intranet and advising employees of how to access the Denel Site from the DLS Intranet under the Denel Policies Link.

[18] It was not contested that all employees had access to the intranet, and those that did not, like artisans, could request any document or policy from their foremen or from Content Management. Londt had in the performance of her functions regularly sent e-mails to employees informing them of updated policies available on the DLS Reports menu in the General Group, advising them on how to access these policies, and that should they require any

assistance, the ICT helpdesk was to be contacted. Van Tonder was appointed by Londt in the Configuration Department (between 2002 and 2007), and had regularly sent out e-mails to other employees informing users as far back as September 2002 that the Denel Policies and Procedures were available on the intranet.

[19] Hugo Ivy (Ivy), who was previously employed as the Human Resources Director based at the Corporate Office (Denel Corporate Office), had further testified that the concept of variable pay was introduced in the new scheme in 2006/2007 which was approved by the Board. Before then, the new policy was discussed with organised labour in various meetings. Those meetings were attended by representatives from Solidarity, the first applicant. Van Tonder conceded that he had attended feed-back meetings called by Solidarity. Inexplicably, he could not recall whether variable pay or performance management systems were issues discussed amongst many others in those meetings. Be that as it may, I am prepared to accept that new policy was discussed with organised labour at various forums, executive teams, HR teams, and advertised through road shows.

[20] According to the respondent, after the final approval by the Board, the policy was then implemented retrospectively from April 2007 to coincide with the start of the financial year. The decision to implement the new policy with effect from April 2007 was discussed in the labour forum meetings at which Solidarity was also present, and as far Ivy could recall, labour did not raise any objections to the implementation, other than raising the concern that the performance management system should be fair and objective.

[21] It is common cause that the policy was available on the respondent's intra-web along with all other policies of the respondent. I accept that as at April 2007 the document was not available in draft or final format. However, it was common cause that Solidarity had meetings with members at the respondent's premises where important information was provided to employees. Solidarity also sent out news flashes to its members with updates on the policy.

[22] Two meetings[4] were held with the Denel Labour Forum where the incentive scheme was addressed. In the second meeting the forum was advised that the scheme would be implemented mid-year (mid 2007) and further that in terms of the scheme employees would need to be employed at the time of the pay outs of the bonuses being paid[5]. The last engagement on the issue of the policy with the unions was on 12 march 2007.

[23] The implementation of the two policies according to Ivy, also followed upon consultations with the labour forum on 9 February 2007, and again, this position was not challenged by the unions. Once these policies were approved, they were then placed on the respondent's intranet for accessing by all employees. E-mails were also sent to employees informing them of the availability of the new policies. Thus, if employees wished to challenge the policy, they could have approached the HR Department, or if no resolution was found, to have referred the dispute to the CCMA or the bargaining council.

[24] Thulani Mahlanzi, the respondent's Executive HR Manager had also confirmed that meetings were held at the level of RTCC (Corporate Office) in the presence of the group CEO, the divisional CEOs and representatives from labour. In his capacity, he had presided over such meetings, including where performance management systems were discussed. Those discussions also covered issues surrounding an update on the incentive scheme and the policy.

[25] In the light of the above factors, it is my view that it is indeed disingenuous on the part of Solidarity or the individual applicants to contend that they could possibly not have been aware of the new policy, especially in circumstances where Solidarity had regularly updated its members though their own bulletins distributed on the intranet.

---

[4] Which took place on 3 November 2006 and 12 March 2007.

[5] As recorded in the minutes of the meeting.

Validity of the Incentive Scheme Policy Number 53 of 2007 and whether it was applicable to the individual applicants

[26] Having established that the applicants were definitely aware of Policy 53 of 2007, the next issue for determination is whether that policy was valid. It appears that the applicants' contentions are premised on their view that incentive bonuses prior to the financial year 2007/2008 were regulated by Policy 2003, which they accept, had formed part and parcel of their conditions of employment. The introduction of the varied or changed policy in 2007 however affected their terms and conditions of employment, and their argument was that it was not done lawfully. It was further argued that the 2007 Policy could not therefore be read to form part of the contracts between the parties, more particularly in view of the adjustment letters pertaining to their remuneration.

[27] Prior to dealing with the arguments raised on behalf of the applicants, a few observations need to made about how the parties had presented their respective cases in these proceedings. Too much time and effort was spent on technicalities pertaining to the differences between the 2003 and 2007 policies; the issue whether there were consultations or negotiations surrounding the policies, and whether these in essence constituted a change to the terms and conditions of employment. Ultimately however, the issue remains whether policy 2007 was applicable to the individual applicants as at the time they left the employ of the respondent for the purposes of a determination whether they are entitled to their claim or not.

[28] Having assessed the evidence and the arguments presented in regards to whether policy 2007 was valid or not, it needs to be stated that there are various hurdles faced by the applicants in this case, which in my view, makes their arguments unsustainable in both law and logic. My conclusions in this regard are fortified by the following factors:

28.1 The applicants were prepared to accept that Policy 2003 formed part and parcel of their terms and conditions of employment. In the same vein, they had strenuously emphasised that the remuneration adjustment letters equally formed part and parcel of their terms and conditions of their employment. In respect of both documents, I did not understand the applicants' case to be that these were unlawful as they were not a subject of negotiation;

28.2 The 2007 Policy and its adoption by the respondent's Board as illustrated above involved a process of consultations, road shows and dissemination of information in that regard on all fronts. This included engagements with labour, engagements at EXCO, the Board and all stakeholders in the process leading to adoption of the policy, which it was envisaged that it would be implemented with effect from April 2007;

28.3 I am prepared to accept that the adoption and implementation of Policy 2007 merely followed a process of consultation with all the stake-holders. It was not disputed that when the new CEO took over as attested to by Ivy, ways and means had to be looked at as to how to rescue the respondent from its then parlous state, including how to incentivize the employees. I have no reason to doubt that under the circumstances, management had to exercise its prerogative and to implement policies that would enable it to attain its objectives in turning the business around;

28.4 To a large extent, the individual applicants, and in particular, Van Tonder, conceded that it was within management's prerogative to implement policies. It therefore follows that the process in that regard can only be deemed to have been consultative, and in my view, there was no need for the respondent to engage in negotiations over the policy;

28.5 To the extent that the process leading up to the adoption and implementation of Policy 2007 was merely consultative, if Solidarity was aggrieved about that process or its ultimate result, various options were available to it at the time, including calling upon the employer to restore the *status quo* in terms of the provisions of section 64(4) of the LRA, failing which it could have called out a strike. Solidarity could also have sought an interdict from this Court;[6]

28.6 It therefore did not assist the applicants' case for Wortmann in his evidence to simply contend that he and the Union had strenuously contested the applicability of the policy internally. Under cross-examination, he had conceded that if Solidarity was unhappy with the validity of the policy it could have approached this Court. The fact that Wortmann had challenged the policy post the termination of his employment as evinced by his letter to the CEO of 16 July 2008[7] does not take his case further insofar as it can be alleged that the policy was challenged;

28.7 Ultimately, the applicants did not refer a dispute to show their displeasure with the new policy, and on the respondent's uncontested version, the policy remained valid and applicable until it was again amended in 2013. Furthermore, respondent's evidence that the policy was implemented in similar circumstances to other affected employees remained uncontested;

28.8 The applicants' attempt at raising the issue of the validity of the policy within the context of a statement of claim in terms of the provisions of section 77 of the BCEA is equally problematic. This is particularly so when it is contended that the amendments and/or variations of their conditions of employment should have been negotiated and agreed to. The facts of *Mazista Tiles (Pty) Ltd v National Union of Mineworkers and Others*[8] as relied upon on behalf of the applicants are clearly distinguishable from the facts in *casu,* in that the dispute referred for

---

[6] *Independent Commercial Hospitality and Allied Workers Union and Others v Commission for Conciliation, Mediation and Arbitration and Others* [2015] 9 BLLR 958 (LC) at para 23-25.

[7] Page 176 of the Respondent's Bundle.

[8] 2004 (25) ILJ 2156 (LAC). (*Mazista*)

determination in *Mazista* pertained to a retrenchment dismissal, and was referred for determination in terms of the provisions of the then section 187(1)(c) of the LRA;[9]

28.9 Equally so with *Abrahams v Drake & Scull Facilities Management (SA) Pty Ltd*,[10] which the applicants sought to rely upon, the dispute in that case concerned a single individual who had initially referred a dispute pertaining to unilateral changes to terms and conditions of employment to the CCMA. The dispute remained unresolved at the CCMA, and being a single individual, the applicant therein had approached the Court initially on an urgent basis which matter was struck off the roll on account of lack of urgency, and was subsequently referred for oral evidence before Steenkamp J;

28.10 Even if it were to be accepted on the proposition in *Abrahams* that this Court has jurisdiction to determine whether there was in fact a unilateral variation of the individual applicants' terms and conditions of employment, the fact remains that procedural requirements under section 64(4) of the LRA obliged the applicants to have first referred such a dispute to the CCMA as was the case in both *Abrahams* and *Mazista.* To this end, the applicants cannot be allowed to circumvent those provisions through direct access to this Court via the provisions of section 77 of the BCEA;

28.11 In the light of the above factors, since the applicants were prepared to accept that Policy 2003 and their remuneration adjustment letters varied their terms and conditions of employment, Policy 2007 equally

---

[9] Which provided that:

> "1. A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5, or, if the reason for the dismissal is-
>
> (a) ………..
>
> (b) ………..
>
> (c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and the employee."

[10] (2012) 33 ILJ 1093 (LC); [2012] 5 BLLR 434 (LC). (*Abrahams*)

had the same effect, and is therefore deemed to have been valid. The fact that the policy was not a subject of negotiations cannot be lead to the conclusion that it was unlawful or invalid. The respondent, as it had done in the past, had exercised its prerogative in adopting and implementing that policy, which for all intents and purposes, was applicable to all its employees, including the individual applicants.

[29] Central to this dispute however is whether Policy 2007 was applicable to the applicants *at the time* that they left the respondent's employ in the financial year 2007/2008. Thus, if it is found that the policy was not applicable to their contracts of employment for the year 2007/2008 at the time that they left the respondent's employ, they would be entitled to the relief that they seek. This is premised on the fact that their letters of adjustment would then be the sole determining factor in deciding whether they are entitled to variable payments or not.

[30] A determination of the above issue will further dispose of the question or arguments raised by the applicants in the alternative, to the effect that even if it were to be found that the Policy 2007 was valid, the issue for consideration was whether the individual applicants were still entitled to the incentive portion of the TBRT, notwithstanding the terms and conditions of that Policy. In this regard, it was contended that clauses 4.5 and 9 of Policy 2007 never formed part of their respective bonus incentive conditions contained in their remuneration adjustment letters.

[31] The starting point is that it cannot be correct that the remuneration adjustment letters should be read in isolation, particularly in view of the conclusion reached that Policy 2007 was valid and applicable to all employees. It was not in dispute that Policy 2007, in accordance with its objectives, introduced the concept of Variable pay (VP) and a Performance Management System (PMS), and accordingly Performance Management System (Policy 36) was intrinsically linked to Policy 53 of 2007. Policy 36 was adopted and implemented in the same manner as the 2007 Policy 53 was, including retrospective application from 1 April 2007. The payment of variable pay

therefore could not have been considered, approved or made in isolation, without regard to the provisions of Policy 36.

[32] The contention that clauses 4.5 and 9 of Policy 2007 in any event never formed part of their respective bonus incentive conditions contained in their remuneration adjustment letters amounts to splitting of hairs. As correctly pointed out on behalf of the respondent, the applicants seek to approbate and reprobate, and to nick-pick from these policies and letters as to what should and should not apply to them.

[33] Of further importance in this case is the timeline between adoption and implementation of the Policy 2007, the timing of individual applicants' resignation, and the specific conditions in the adjustment letters. It was conceded by the respondent that as at the end of March or 1 April 2007, the Policy 2007 document had not been circulated, nor approved by the Board. According to Mahlinza, only the principles in regard to the policy had been approved by the Board at that time.

[34] A circular was sent to all staff on 16 July 2008 by the General Manager, Wolhunter, advising them *inter alia* that the Board had approved the incentive bonus for the year up to 31 March 2008 on 15 July 2008. It was further indicated in that circular that not all employees qualified for bonuses applicable to the year up to 31 March 2008 in view of the Provisions of Policy 53 of 2007.

[35] The individual applicants resigned and left the respondent's employ on 31 May; 30 June; and 31 March 2008 respectively, and it was not in dispute that the respondent's financial year for the purposes of any payments was from 1 April 2007 to 31 March 2008. Thus, any variable pay due to employees would have been paid on 25 July 2007.

[36] On 18 September 2007, the respondent's EXCO approved the incentive scheme 'in principle', withdrew the 2003 policy, and then replaced it with policy 53 of 2007. The new policy was to be implemented with effect from

1 April 2007, and there is nothing to gainsay the respondent's contentions that even though the policy is dated 13 June 2007, it was legally effective from 1 April 2007 to coincide with its financial year.

[37] The implication from the above is that even if the individual applicants had met other conditions applicable for the purposes of the variable pay, clause 4.5 of Policy 53 of 2007 excluded "*all persons no longer in the employ of the company at bonus payout time*". Furthermore, paragraph 5.2 of the adjustment letters specifically stated that the variable pay was due at the end of the financial year, and after the approval of the financial results by the Board. Thus, as at 24 July 2008 when payments were made, all the individual applicants were no longer in the employ of the respondent and therefore, in accordance with clause 4.5 of the policy, they could not have benefitted.

[38] Significant with Wortmann's evidence was that after he had handed in his resignation, he spoke to his line manager and the CEO who had asked him whether anything could be done to persuade him to stay. His contention however was that he had a lucrative offer waiting for him in the UAE, and that his resignation had nothing to do with his salary. It was common cause that he left at the end of May 2008 when the payments were due on 24 July 2008. According to him, had he stayed a further two months in order to benefit from the scheme, he would have lost out on the offer in the UAE. From these contentions alone, it should be inferred that Wortmann was indeed aware of the proviso in the policy that he stood to forfeit the bonus should pay-out time come when he had left. He nevertheless made his choice to leave.

[39] Clause 9 of the policy is even more emphatic as it excluded employees who had terminated their services on any reason other than retirement, retrenchment, disability or death. An additional proviso to clause 9 was that exceptions could be made unless there was an agreement in writing. No such exceptions were made in this case.

[40] It cannot be doubted that the above clauses 4.5 and 9 of policy 2007 are in sync with the objectives of that policy, which are to *inter alia*, measure, assess

and reward individual excellence in performance; to enable ***attraction and retention*** of competent, performance driven employees. It would not make sense to have these benefits in place only not to achieve the intended objectives.

[41] In the light of the evidence led, and the submissions made on behalf of the parties, I am satisfied that the applicants were fully aware of the provisions of policy 53 of 2007 as at the time that they resigned from the employment of the respondent. I am further satisfied that this policy 53 of 2007 was valid and binding on them, and that despite having met some of the conditions applicable in regard to benefitting from the incentive bonuses, the provisions of clauses 4.5 and 9 of that Policy, read together with specific conditions outlined in the adjustment letters precluded them from benefitting. The fact that the individual applicants met some of those conditions did not imply that payments were automatically due and payable. All conditions of payment had to be met.

[42] In regards to the issue of costs, the respondent tendered wasted costs following the adjournment of proceedings on 21 September 2016. Wasted costs in respect of proceedings on 22 September 2016 were reserved. Even though the reason for the adjournment was for the applicants to consider whether an official from Solidarity should be called upon to testify or not, and ultimately did not do so, there is no reason in law or fairness why any party should be liable for those costs. In respect of the costs of main claim, I am also of the view that a costs order is not warranted.

Order

[43] Accordingly, the following order is made:

1. The applicants' claim as brought in terms of the provisions of section 77(3) of the Basic Conditions of employment is dismissed.
2. There is no order as to costs.

E Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES

On behalf of the Applicants:	Adv Corné Goosen
Instructed by:	Serfontein, Viljoen & Swart Attorneys
On behalf of the Respondent:	Mr Jeremy Crawford of Crawford and Associates