THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no JS845/2014

In the matter between:

COURTNEY THORP **Plaintiff**

and

NATIONAL HOMEBUILDERS REGISTRATION COUNCIL **Defendant**

Trial: 17-19 October 2016; 7 November 2016

Judgment delivered: 6 April 2017

Summary: Claim in contract for payment of performance bonus and 'golden handshake'. On the facts - bonus payment discretionary, and cannot form basis of claim in contract, plaintiff failed to prove agreement in terms of which he would be paid a lump sum at termination of fixed term contract in the event of non-renewal.

JUDGMENT

VAN NIEKERK J

[1] The plaintiff was initially employed by the defendant on 1 February 2003 as an executive director in terms of a five-year fixed term contract, to expire on 31 January 2008. The termination date of that contract was later extended to 31 July 2008. On 28 July 2008, the parties concluded a further five-year fixed term contract, to expire on 31 July 2013. The present dispute concerns a subsequent contract concluded on 30 June 2010, in terms of which the prior contract was superseded by a five-year contract deemed to have commenced on 1 January 2009, to terminate on 31 December 2013. (The contract reads 31 December 2014, but the parties accept that this is a typographical error and that nothing turns on it.) In terms of the contract, the defendant advised the plaintiff that his services would no longer be required after 31 December 2013.

[2] The present dispute concerns a term of the contract that terminated on 31 December 2013. The plaintiff seeks to enforce a clause to the effect that in the event of the contract not being renewed, the defendant would pay the plaintiff a sum equivalent to two years remuneration, some R 4.1 million. The plaintiff also claims some R150 000 as the balance of a payment owing to him in terms of the defendant's bonus scheme, and a further amount in respect of outstanding leave pay. The latter claim was settled by the parties during the trial. The defendant denies that it is obliged to pay the plaintiff any further amounts in respect of the bonus scheme, and denies that it ever agreed to a term of his contract entitling the plaintiff to a gratuity should his contract not be renewed.

[3] I deal first with the claim for the outstanding portion of the performance bonus. It is not in dispute that the defendant operates a performance bonus scheme. The applicable policy provides for a performance management system based on the approved strategic corporate plan, key performance indicators, monitoring

mechanisms and performance measurement activities. The policy expressly provides that the final decision to pay performance incentives is at the discretion of the defendant's council. The methodology of determining performance rewards is dependent on the performance of the organisation as a whole, and on individual performance. It provides for a core incentive pool, calculated as the percentage by which business has exceeded target multiplied by the budgeted incentive pool.

[4] On 29 November 2013, the defendant's remuneration committee resolved to recommend to council for approval a 7% performance bonus pool (i.e. 7% of the salary bill) for deserving employees with excellent performance in terms of the performance reviews conducted. It is not in dispute that the plaintiff scored a 3.8 on his scorecard, which in terms of the applicable definitions meant that he exceeded targets.

[5] On 17 March 2014, the defendant's remuneration committee resolved that it should recommend to council for approval a 3.5% performance bonus for the 2012/2013 financial year for the plaintiff and another executive employee. It is also not in dispute that the defendant's council resolved on 30 April 2014 that a 3% incentive bonus payment be made to the two executives for the 2012/2013 financial year. Pursuant to this resolution, the plaintiff was paid an amount of R 34 280.65 on 2 June 2014. In effect, the plaintiff claims the difference between this amount and what he would have earned that his participation extended to the 7% performance bonus pool recommended by the remuneration committee, or at least, the 3.5% recommended by the remuneration committee in March 2014 (i.e. the 0.5% difference).

[6] It is not necessary for me to decide whether the terms of the defendant's performance bonus scheme or the resolutions adopted by its remuneration committee or council entitle the plaintiff to the performance bonus that he claims. The plaintiff's claim is clearly one brought in terms of contract (see paragraph 5

of the statement of case) and that being so, it is incumbent on him to establish a contractual right to payment of the bonus. The plaintiff did not dispute that the terms of the performance bonus scheme are such that any right to a bonus is subject ultimately to the discretion of the defendant's council. The evidence is clear - the council exercised a discretion and it resolved to pay the plaintiff the bonus that he has been paid. That is not to say that the actions of the defendant's council may not have been arbitrary or unfair in one sense or another, but that is not a claim that is justiciable by this court. The plaintiff has elected to sue in contract, and he has no contractual right to the bonus. For that reason, his claim must fail.

[7] Turning next to the plaintiff's claim for the equivalent of two years' remuneration, the evidence discloses the following. As I have mentioned, the plaintiff was initially employed as chief executive: finance and supply chain for a fixed term of five years, to terminate on 31 January 2008. On 14 January 2008, the plaintiff was advised by the defendant's then chief executive officer that his contract of employment had been extended by six months, to expire on 31 July 2008. On 24 July 2008, the defendant's chief executive officer addressed a letter to the applicant are advising him that he had been appointed as executive director: finance on a further five-year fixed term contract, from 1 August 2008 to 31 July 2013.

[8] During the course of 2010, after the then chief executive officer had left the defendant's employer, discussions took place between the plaintiff and the acting chief executive officer, Mr S Mashinini. The plaintiff's evidence was that Mashinini requested him to remain in the defendant's employ for a further 18 months, i.e. until December 2014. The purpose of this proposal, according to the plaintiff, was that Mashinini was aware that he was 'in the market' for alternative employment and given the plaintiff's qualifications, skill and experience, Mashinini wished to bring a degree of stability to the defendant. The plaintiff was amenable to a discussion on these terms and Mashinini forwarded to him a copy

of his existing contract on the basis that it would serve as a working draft for the revision. An attached note by Mashinini reads as follows:

> Please peruse the proposed contract and suggest changes for negotiation and finalisation of this contract as discussed.
> Thanx
> Sipho

[9] The plaintiff testified that he effected handwritten amendments to the document provided to him. One of the amendments reflects an insertion to the effect that the defendant would 'incentivise' the plaintiff by paying him the equivalent of one years' remuneration, on a cost to company basis, should the contract not be renewed.

[10] The plaintiff testified that he made a copy of the document and left it with Mashinini, assuming that Mashinini would consider the document and finalise its terms. The plaintiff testified that he indeed received a document for his signature, delivered in hardcopy by a member of the human resources department. The document provided for a fixed period of employment of five years, deemed to have commenced on 1 January 2009 to terminate on 31 December 2014. (As I have mentioned, it was not in dispute that the contract or to have reflected the termination date of 31 December 2013, and that the reference to 2014 was a typographical error.) In clause 19 (c) of the document, the following is stated:

> (c) The NHBRC recognises the fact that the term of employment is for five (5) years and will incentivise Mr Thorp for the fixed term contract with a two-year total cost to company payment in the event that the fixed term contract is not renewed.

[11] The plaintiff's testimony was that he regarded this term, which effectively provided for a payment of double the amount that he had proposed in the event that the contract was not renewed, as a 'gift'. The plaintiff testified that he

initialled all of the pages and signed the document in the space provided. He signed the document first – when he received the hard copy of the document, it was a clean copy with no manual adjustments, deletions or the like, nor had any representative of the defendant signed or initialled the document. He did not dispute that none of his previous contracts had contained a clause of this nature, or that the defendant's policies made no provision for gratuities in the event that a fixed term contract was not renewed. He was also aware that to the extent that the defendant is a statutory organisation, the terms and conditions of the employment of its employees are subject to regulation and in particular, the approval of council. The plaintiff's attitude was that it was for the chief executive officer to ensure that the approval and authorisation of the defendant's remuneration committee and council was obtained for the terms of his contract. In other words, while he knew that the defendant's policy did not make provision for the payment of gratuities in the event of the non-renewal of a fixed term contract, it was not his concern.

[12] The circumstances in which the plaintiff's contract of employment terminated, by the effluxion of time, are not in dispute. The plaintiff testified that on 29 November 2013 the termination of his contract with effect from 31 December 2013 was confirmed by way of a letter from the chief executive officer, without him having been given any prior indication that there was any prospect of the contract being renewed, or any invitation to him to reapply for his position.

[13] In the copy of the contract furnished to the court, clause 19 (c) has been deleted by a manual striking through of the clause. The deletion is initialled by Mashinini, as is every page but for the last page, which contains the full signatures of both parties. The explanation for the deletion was provided by the defendant's witnesses. The defendants erstwhile executive director: corporate services, Ms Laurie Less, testified that a draft agreement that did not include clause 19 (c) was emailed to the plaintiff for him to peruse and sign. She testified that the plaintiff inserted clause 19(c), and then initialled and signed the document. When

the document was brought to her by the human resources manager, Mr Anton Wolmarans, they 'had a laugh' and advised Mashinini that the clause was inappropriate since it was not in keeping with the defendant's policies which made no provision for gratuities or 'golden handshakes' and that when presented with the two originals of the document, One for the plaintiff, the other for the defendant) Mashinini deleted clause 19 (c), initialled the deletion and signed the document. When the plaintiff was thereafter asked to countersign the document by initialling the deletion, he refused to do so. Less was an impressive witness, which cannot be said for Wolmarans. He seemed simply unable to provide evidence as to facts rather than his own views, opinions and interpretation of facts and indeed, proffered more than one version of the facts.

[14] There is obviously a material dispute of fact in relation to the circumstances in which clause 19 (c) came to be inserted into the draft document and deleted. However, it is not necessary for me to make any decision as to which is the more probable since in my view the plaintiff has failed, on his own version, to discharge the onus of proving the existence of a binding contractual term that entitles him to the sum claimed. To succeed in his claim, it is incumbent on the plaintiff to prove an offer, and a clear, unambiguous and unequivocal acceptance of that offer by the offeree.

[15] The plaintiff's evidence regarding his discussion with Mashinini regarding a revised contract of employment did not extend to a payment of 24 months' remuneration in the event of a non-renewal of the contract. At best for the plaintiff, there was a discussion over the prospect of a payment equivalent to 12 months' remuneration in those circumstances. The plaintiff did not dispute that the copy of his existing contract, accompanied by Mashinini's handwritten note, comprised no more than an invitation to the plaintiff to make proposals for the revised contract. Specifically, the plaintiff was requested to 'suggest changes for negotiation' using his existing contract of employment as a base document.

[16] In other words, the plaintiff was invited to make proposals on new terms and conditions of employment on which agreement might be reached. It is not disputed that the plaintiff made such proposals, including the proposal of a 12-month payment to him should the contract not be renewed. The plaintiff testified that he did not know what happened to the document after it was left with Mashinini - his assumption was that Mashinini would have the draft typed and peruse it.

[17] On his version, the plaintiff then received a clean, hard copy of the document from the human resources department. That document was not an offer of employment on the terms that it reflected – it was not signed by the CEO as were offers of employment made in the normal course. The document did not reflect any oral agreement reached between him and Mashinini. In other words, the document was not an offer made by the defendant *animo contrahendi*. At best for the plaintiff, on his version, the document amounted to a typed version of the proposal that he had been invited to make and which he submitted, with the exception only of the quantum reflected in clause 19 (c). He initialled and signed the document, thus making an offer, in writing, to the defendant, to contract on the terms contained in the document. The plaintiff made no enquiry thereafter as to whether his offer had been accepted. On his version, the plaintiff did not even request a copy of the document as signed by the defendant. Indeed, the plaintiff appears to have remained in a state of self-imposed ignorance until the dispute over the terms of his contract some three years later. On the plaintiff's version therefore, he was unaware of any acceptance by the defendant of his proposal regarding the payment of a gratuity on the non-renewal of his contract, nor was any acceptance of such a proposal later communicated to him. In short, there was never any agreement between the parties on any contractual term that the plaintiff would be paid a gratuity should his contract not be renewed. It does not assist the plaintiff that he believes, as he appears to do, that clause 19 (c) remains valid and enforceable because he did not countersign the deletion. On the plaintiff's version, the deletion of clause 19 (c) by Mashinini (which the

plaintiff does not seriously dispute) indicates no more than Mashinini's rejection, in graphic terms, of his proposal. The plaintiff's claim to the equivalent of 24 months' remuneration must therefore fail.

[18] Finally, in relation to costs, the court has a broad discretion in terms of s162 to make orders for costs according to the requirements of the law and fairness. In the present instance, it should be recalled that the plaintiff was successful in at least one of the elements of his claim, that of leave pay. As I indicated above, that issue was resolved only during the course of the trial. While that claim does not amount to a significant portion of the whole of the plaintiff's claim, he was nevertheless obliged to approach the court to recover what was ultimately his due. Further, this court does not conventionally make costs orders in circumstances where genuinely aggrieved individuals seek redress against their employers. I will give the plaintiff the benefit of the doubt in so far as his *bona fides* are concerned. In those circumstances, it seems to me that the interests of the law and fairness would be best served by each party bearing its own costs.

I make the following order:

1. The plaintiff's claim is dismissed.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the plaintiff: Adv M Lennox, instructed by Eversheds Attorneys

For the defendant: Adv X Matyolo, instructed by mkhabela Huntley Adekeye Inc