IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not Reportable

Case No: J1446/13

In the matter between:

EDMOND MALOKA Applicant

and

WORKERSLIFE DIRECT (PTY) LTD Respondent

Heard: 9, 10 February 2017 and 6 March 2017

Date of Delivered: 25 August 2017

Summary: Action for specific performance arising out of a clause in an employment contract providing for the payment of commission after termination of employment. Despite the respondent admitting the authenticity of the contract in question on the pleadings, parties conducting the trial on the basis that the authenticity of the contract was an issue in dispute. Court assuming, in the respondent's favour, that the parties re-defined the issues arising from the pleadings to place the authenticity of the contract in dispute. Applicant proving on a balance of probabilities that he concluded the contract with the respondent and therefore entitled to the relief sought.

JUDGMENT

BARNES AJ

INTRODUCTION

[1] This matter began as an application in terms of section 77(3) of the Basic Conditions of Employment Act[1] ("the BCEA") in which the applicant, Mr Maloka, sought to compel specific performance with the terms of an employment contract allegedly concluded with the respondent.

[2] Specifically, Mr Maloka sought to compel the respondent to comply with clause 5.5.1 of the employment contract which, he contended, entitled him to the payment of commission after the termination of his employment, it being common cause that Mr Maloka had resigned from his employment with the respondent on 13 March 2013.

[3] The clause on which Mr Maloka sought to rely entitled a person employed as a sales broker, provided that he or she had worked for the respondent for five years from the date of signature of the agreement, to the payment of commission after the termination of employment for a period equivalent to his or her term of service. In Mr Maloka's case this period was twelve years and three months.

[4] In its answering affidavit filed in opposition to the application, the respondent admitted that it had concluded the employment contract in question with Mr Maloka. However, the respondent contended that, prior to Mr Maloka's resignation, a new payment structure had been negotiated and agreed in terms of which post termination commissions were no longer payable. On that

[1] 75 of 1997.

basis, the respondent denied that Mr Maloka was entitled to the relief he sought.

[5] In his replying affidavit, Mr Maloka denied having agreed to any new payment structure and persisted with the claim set out in his founding papers.

[6] The respondent then took the unusual step of launching an interlocutory application in which it sought to withdraw certain admissions made in its answering affidavit. These were the admissions to the effect that it had concluded the employment contract in question with Mr Maloka.

[7] In its founding affidavit in support of its interlocutory application, the respondent denied that it had employed Mr Maloko as a sales broker and, for the first time, disputed the authenticity of the employment contract.

[8] However, in its replying affidavit in the interlocutory application the respondent changed its version again. It stated in the reply that it did not dispute the authenticity of the employment contact but contended that the contract had never been implemented and was therefore “null and void.”

[9] Ultimately, the main application was converted into an action and the interlocutory application was never determined. The parties held a pre-trial conference, the minutes of which recorded that the affidavits in the applicant’s main application as well as the respondent’s interlocutory application would constitute the pleadings in the trial.

[10] In order to crystallise the issue for determination in this trial, it is useful to set out the facts which are not in dispute between the parties. They are the following:

10.1 The respondent is in the business of selling insurance policies and related products. The business was started in the late 1990s by two brothers – the Ferreiras – who contracted with the Police and Prisons Civil Rights Union (“POPCRU”) to sell funeral policies and other products to its members.

10.2 At its inception, the business was a close corporation which went by the name of Ferreira Brokers CC. In 2000 the business was converted to a company and changed its name to C & J Ferreira Brokers (Pty) Ltd. Later, the Ferreira's business was taken over as a going concern[2] by Lesaka Employee Benefits (Pty) Ltd. Thereafter it changed its name to Workerslife Direct (Pty) Ltd, the respondent. The parties are in agreement that all references to the respondent should be taken to include its predecessors.

10.3 Mr Maloka commenced employment with the close corporation, Ferreira Brokers CC, on 2 September 1997. He did so as an administrative clerk. Mr Maloka was however permitted to sell the products of the business and did so, with significant success. For this he received commission. The employment contract concluded between Mr Maloka and Ferreira Brokers CC on 2 September 1997 made provision for Mr Maloka's salary for his position as administrative clerk and for the payment of commission for products sold. I will refer to this as "the initial employment contract."

10.4 In 2000, as a result of the conversion of Ferreira Brokers CC to a company, all employees were required to sign new contracts of employment. On 20 November 2000, Mr Maloka signed a contract of employment with C & J Ferreira Brokers (Pty) Ltd. In terms of this contract, Mr Maloka was appointed as an administrative clerk backdated to 1 September 1997. This contract made provision for the payment of a salary to Mr Maloka. It made no provision for the payment of commission. I will refer to this as "the admin contract."

10.5 Throughout his employment with the respondent, Mr Maloka sold

[2] In terms of section 197 of the Labour Relations Act 66 of 1995 ("the LRA").

the products of the business and received commission therefor. On 13 March 2013, Mr Maloka resigned.

[11] All of this is common cause. Now comes the dispute:

11.1 Mr Maloka contends that on the same day that he signed the admin contract, that is, on 20 November 2000, he also signed a second contract with C & J Ferreira Brokers (Pty) Ltd, in terms of which he was appointed as a sales broker, termed a Group Scheme Broker ("GSB") by the respondent. This contract made no provision for the payment of a salary. It made provision for the payment of commission on products sold and for the payment of a target bonus when applicable sales targets were met. This is the contract on which Mr Maloka relies for his claim. I will refer to it as "the GSB contract."

11.2 As stated above, the respondent initially admitted that it had concluded the GSB contract with Mr Maloka. Thereafter, it brought an interlocutory application in which it first disputed the authenticity of the GSB contract and then, in an about turn, admitted it. Despite this admission on the pleadings,[3] the parties conducted the trial on the basis that the authenticity of the GSB contract was in dispute.

11.3 The respondent accepted that the GSB contract in issue is the standard form contract which it utilises for the sales brokers employed by it. Clause 5.5.1 of the contract provides as follows:

> "Should the GSB leave the service of the COMPANY after five years from the date of signing this agreement or should the GSB die or retire as a result of ill health (the condition to be certified by two medical practitioners that he /she is permanently unable

[3] As stated above, the pre-trial minute records that the affidavits in both the main application and the interlocutory application constitute the pleadings in the trial.

to continue with employment as GSB), payment of the Provida commission will continue for a period equal to his term of service."

[12] Having regard to the above, counsel for the respondent, Mr Kirstein, accepted, correctly, that if it is established that Mr Maloka and the respondent concluded the GSB contract, then Mr Maloka is entitled to the post termination commission payments provided for therein and accordingly to the relief which he seeks. The issue for determination before me is therefore whether the evidence establishes, on a balance of probabilities, that Mr Maloka concluded the GSB contract with the respondent.

THE PLEADINGS

[13] Mr Maloka's pleaded case is the following:

"5.2 On or about 20 November 2000 I entered into a written employment contract with C & J Ferreira Brokers, a copy of which is attached hereto marked **'Annexure EM1.'** I was employed as a Group Scheme Brokers ('broker') and I sold various policies and products of my employer as well as facilitated the lending of funds on behalf of my employer.

5.3 I was remunerated by way of commissions earned on products sold as well as by way of a target bonus as applicable when targets were met. My remunerations structure is detailed in the Employment Contract in clause 5.

5.4 Clause 5.5.1 of the agreement states inter alia the following:

Should the GSB [broker] leave the service of the COMPANY after five years from the date of signing this agreement, or should the GSB die or be compelled to

> *retire as a result of ill-health (the condition to be certified by two medical practitioners that he/she is permanently unable to continue with employment as GSB), payment of the Provida commission will continue for a period equal to his term of service."*

[14] Mr Maloka attached a copy of the GSB contract to his founding affidavit. The copy is of a poor quality. It has however been signed and witnessed and is dated 20 November 2000.

[15] Mr Maloka pleaded that he resigned from his employment with the respondent on 13 March 2013. After his resignation, he was paid only his basic salary for the month of March and not the commission he was entitled to. Nor was he paid the commission which he contends he is entitled to in terms of clause 5.5.1 of the GSB contract. Mr Maloka accordingly approached attorneys who sent a letter of demand to the respondent in the following terms:

> "Today our client was only paid an amount of R3896.03. Our client is entitled to receive his salary and commission for the month of March. In addition, our client is entitled, in terms of the provisions of his contract, to be paid Provida commissions for a period of time equal to his term of service, after his resignation, which term at date of his resignation, is more than 12 years."

[16] This letter elicited no favourable response. Nor did a further letter of demand. Mr Maloka accordingly launched his application. In it he claimed *"payment of outstanding commissions for the months of March, April, May and June 2013."*

[17] Mr Maloka also asked for orders in the following terms:

17.1 "that the Respondent be ordered to comply with clause 5.5.1 of the Applicant's employment contract;

17.2 that the Respondent be ordered to pay the Applicant all outstanding commissions that accrued to him post the termination of the employment relationship;

17.3 that the Respondent be ordered to pay the Applicant all commissions on a monthly basis as they become payable in the future of the remainder of the period post termination of his employment which is equal to his length of service, being twelve years and three months;

17.4 that the Respondent be ordered to provide the Applicant with a breakdown of all commissions due to the Applicant on a monthly basis."

[18] The respondent's answering affidavit was deposed to by Mr Prince Charles Nonkonyana, its Managing Director at the time.

[19] The respondent conceded in its answering affidavit that Mr Maloka was entitled to his commission for the month of March 2013. It did so in the following terms:

> "I concede and submit that the Applicant should have received his commission payment for the month of March 2013 (up until his termination) and tender that the Respondent will pay same."

[20] For reasons which have not been explained, the respondent has not made good on this tender. During the trial however, the respondent confirmed that it is liable to pay Mr Maloka this amount.

[21] As for the rest of Mr Maloka's claim, the respondent pleaded as follows in its answering affidavit:

"3.1 I confirm that the Applicant was employed by the Respondent and on the basis as set out in paragraph 5 of the Applicant's founding affidavit after the Respondent took over the employment contract dated November 2000.

3.2 The Applicant however conveniently fails to mention to this Honourable Court that terms of the initial employment contract was revised during June 2010 and effectively amended after the Respondent restructured the employment benefits and commission structure for all employees."

[22] The respondents' defence, in essence, was that a new payment structure had been implemented, after having been agreed to by all employees, including Mr Maloka, which did away with post termination commission payments.

[23] Mr Maloka denied this in his replying affidavit. He pleaded as follows:

> "44 I was never consulted on any amendment to my contract and no amendment was ever agreed to. No documentary proof of any amendment is attached to the answering affidavit."

[24] After the filing of Mr Maloka's replying affidavit, the respondent brought an interlocutory application in which it sought to withdraw its admissions to the effect that it had concluded the GSB contract with Mr Maloka. The affidavit in support of this application was deposed to by Mr Jan Jooste, the respondent's General Manager.

[25] Mr Jooste stated that in preparation for the hearing of the application he had *"personally investigated the [personnel] file of [Mr Maloka]."* He stated further that:

> "During my investigation it appeared that the terms of the employment contract on which the respondent relies were admitted in error by Mr Nonkonyana in the answering affidavit and that the respondent was never appointed or remunerated as a Group Scheme Broker.

[26] On how the respondent had made an error of this nature, Mr Jooste stated that Mr Nonkonyana had simply accepted Mr Maloka's version in his founding affidavit *"without performing any investigation into the veracity thereof."* Mr Nonkonyana confirmed this in a one page confirmatory affidavit. As to why, or the circumstances in which Mr Nonkonyana did this, there is no explanation.

[27] Mr Jooste then deposed to a new answering affidavit which purported to replace the answering affidavit deposed to by Nonkonyana. In it, he stated as follows:

> "The respondent employs two kinds of employees, namely brokers and administrative personnel. These two types of personnel are employed in two distinct types of contracts. I need to emphasise that one employee cannot be employed as both an administrative type of employee, as well as a broker. Every employee can only be employed as either a broker or as an administrative employee.
>
> The applicant was at all relevant times employed by the respondent as an administrative employee and not as a broker. The allegation by the applicant that he has been employed as a Group Scheme Broker is devoid of truth."

[28] In relation to the GSB contract attached to Mr Maloka's founding affidavit, Jooste said the following:

> "In the circumstances, it is denied that the document attached by the applicant to his papers as the alleged employment contract is authentic, or reflects the correct factual and legal relationship between the parties."

[29] In his answering affidavit in the interlocutory application, Mr Maloka stated that *"[the respondent] does not allege that my GSB contract was never concluded."* This was not correct, having regard to the challenge to the

authenticity of the GSB contract in the respondent's founding affidavit.

[30] However, in its replying affidavit, the respondent changed its version yet again. It now stated as follows:

> "**<u>Contract as GSB</u>**
>
> <u>I do not place the authenticity of the GSB contract, or the handwriting of the respondent in issue</u>. I simply contend that the GSB contract and the employment contract cannot co-exist and that the GSB contract is invalid. When viewed from a historical perspective, it appears that the company never implemented the GSB contract, which supports my point that the GSB contract is null and void and never co-existed with the employment contract. I emphasise that a person cannot be employed as GSB and as an administrative employee at the same time. The two are mutually exclusive." (emphasis added)

[31] The respondent's version in the replying affidavit in its interlocutory application is thus that it accepts the authenticity of the GSB contract but contends that it was not implemented, could not co-exist with employment contract, and was therefore "invalid" and "null and void."

[32] Clearly, this constitutes an admission by the respondent on the pleadings as to the authenticity of the GSB contract. Despite this, as will be evident below, the parties conducted the trial on the basis that the authenticity of the GSB contract was an issue in dispute.

<u>THE EVIDENCE</u>

<u>The Evidence for the Applicant</u>

Mr Edmond Maloka

[33] Mr Maloka began working for Ferreira Brokers CC on 2 September 1997. He was employed as an administrative clerk. He was however permitted to sell

the products of the business and did so. His initial contract of employment (concluded on 2 September 1997) made provision for his salary for his position as administrative clerk and for commission on products sold.

[34] Mr Maloka testified that on 20 November 2000, Ms Pillay, a secretary in the employ of Ferreira Brokers CC, approached him and requested him to sign two new contracts of employment. This was necessary because Ferreira Brokers CC had converted to a company and changed its name to C & J Ferreira Brokers (Pty) Ltd. Mr Maloka testified that the contracts presented to him for signature were the admin contract and the GSB contract respectively. The contracts were unsigned upon presentation to him. Mr Maloka testified that he signed both contracts in the presence of Ms Pillay. Ms Pillay then witnessed Mr Maloka's signature on both contracts and left with them. Mr Maloka was later provided with copies of the contracts which had been signed and witnessed on behalf of the company. The signature on behalf of the company appears to be identical on both contracts. Mr Maloka testified that he does not know who signed the contracts on behalf of the company.

[35] In 2009, Mr Maloka was promoted from administrative clerk to branch secretary. This was also an administrative position. Mr Maloka testified that he continued to earn a salary and to sell products for which he earned commission. Mr Maloka enjoyed significant success as a sales broker and the commission he earned comprised the vast majority of his total earnings. Mr Maloka also received a target bonus if he achieved applicable sales targets, which he regularly did. Mr Maloka referred the Court to a number of his salary advices, which bore out the above. Mr Maloka's salary advice for February 2013 reflected that he earned the following:

"Target Bonus	R1 565.55
IPHC Commission	R1 221.00

Cleaning & Beverage Allowance	R250.00
Basic Salary	R7 540.20
Commission	R36 558.40"

[36] Mr Maloka testified that his wife, Ms Ella Maloka, was employed by C & J Ferreira Brokers (Pty) Ltd for a period of 5 years from 2005 to 2010, when she resigned. Ms Maloka's employment contract was virtually identical to the GSB contract signed by Mr Maloka on 20 November 2000. In particular, it contained a clause identical to clause 5.1.1 quoted above.[4] After Ms Maloka resigned, the respondent paid her post termination commissions for a period equivalent to her term of service in terms of the aforesaid clause.

[37] Mr Maloka testified that he resigned from the respondent's employment on 13 March 2013. He was not paid his commission for the month of March 2013. Nor was he paid the post termination commissions due to him in terms of clause 5.5.1 of the GSB contract, despite demand.

[38] In cross examination, Mr Kirstein put to Mr Maloka that the respondent had established, after the first day of the trial, that the signatures on the admin contract and the GSB contract on behalf of the company appeared to belong to Mr Helbut Nebur – the respondent's Pretoria branch manager in 2000. It was put to Mr Maloka that Mr Nebur would testify that while he had signed the admin contract and while the signature on the GSB contract appeared to be his, he had not in fact signed the GSB contract. Mr Maloka reiterated that he did not know who had signed the GSB contract on behalf of the company.

[39] Mr Kirstein put it to Mr Maloka that the respondent had two types of employee: administrative staff and sales brokers and that employees signed either an administrative contract or a GSB contract but not both. Mr Maloka maintained that he had worked as both an administrative staff member and a

[4] In Ms Maloka's contract this clause is not numbered 5.1.1 but appears as an unnumbered sub clause under clause 5.

sales broker and had signed both the admin contract and the GSB contract.

[40] Mr Kirstein also put the following to Mr Maloka in cross examination:

40.1 that Mr Jooste would testify that he was not aware of the GSB contract and that in fact the GSB contract did not exist;

40.2 that Mr Maloka had not signed the GSB contract;

40.3 that the signature on the GSB contract resembled not his but that of his wife; and

40.4 that the GSB contract was a "false contract."

[41] Mr Maloka consistently denied these allegations. Notably, it was not put to Mr Maloka in terms that he and/or his wife had forged the GSB contract.

Mrs Ella Maloka

[42] Mrs Maloka testified that she commenced employment with C & J Ferreira Brokers (Pty) Ltd in 2005 as a GSB. She initially received commission only, however this changed in 2010 when after complaints from GSBs, the respondent restructured to provide for a basic salary for GSBs in addition to commission.

[43] Ms Maloka testified that Mr Maloka worked for the respondent as both an administrative clerk (and later a branch secretary) and as a GSB.

[44] Ms Maloka confirmed that the signature on the GSB contract belonged to her husband.

[45] Ms Maloka was not aware of whether other employees of the respondent worked as both administrators and sales brokers. She maintained however that her husband had done so.

[46] Ms Maloka testified that she resigned from the respondent's employ in 2010.

The respondent paid her post termination commissions for a period equivalent to her period of service in terms of her contract of employment.

[47] In cross examination, it was put to Ms Maloka that the signature on the GSB contract resembled hers and not her husbands. Ms Maloka denied this and reiterated, in terms, that the signature on the GSB contract belonged to her husband.

<u>The Evidence for the Respondent</u>

Mr Jan Jooste

[48] Mr Jooste has been the General Manager of the respondent since 2008. Prior to that he was Manager of Operations and IT. Since 1995, Mr Jooste has been the manager in charge of the payment of all salaries and commissions on behalf of the respondent.

[49] Mr Jooste testified that he became involved in the matter when, as a result of Mr Nonkonyana's resignation from the company, the directors asked him to step in and assist. He had regard to Nonkonyana's answering affidavit and to Mr Maloka's personnel file and formed the view that the facts deposed to by Nonkonyana did not accord with the contents of Mr Maloka's file. This was because the file contained only the initial employment contract and the admin contract. It did not contain the GSB contract.

[50] Mr Jooste testified that prior to Mr Maloka's application, he had never seen the GSB contract. He testified that had he been aware of it, Mr Maloka would have been categorised as a GSB and remunerated as such. In fact, he had not been.

[51] Mr Jooste testified that there were three categories of employee at the respondent: purely administrative staff, administrative staff who were permitted to sell products and receive commission therefor, and GSBs. The first category received a salary and benefits, the second category received

salary, benefits and commission and the third category received commission only (until 2010 when the respondent restructured and paid GSBs a salary in addition to commission). Mr Jooste testified that Mr Maloka fell into the second category of employee.

[52] Mr Jooste confirmed that Mr Maloka signed the initial employment contract on 2 September 1997. He confirmed further that by reason of the conversion of the business from a CC to a company, Mr Maloka signed the admin contract on 20 November 2000. Mr Jooste accepted that while the admin contract made provision for Mr Maloka's salary, it made no provision for the payment of commission. When asked in terms of what instrument Mr Maloka was paid commission, Mr Jooste answered that it was in terms of the initial contract of employment.

[53] Mr Jooste testified that at the conclusion of the first day of the trial, he took photographs of the signatures on the admin contract and the GSB contract and mailed them to the respondent's managerial employees in an effort to establish who they belonged to. Mr Jooste was then contacted by Mr Nebur who said that the signatures appeared to be his but that he had not signed the GSB contract.

[54] Mr Jooste expressed the view that the signature on the GSB contract which Mr Maloka claimed to be his did not resemble his signatures elsewhere. Jooste stopped short, however, of accusing Mr Maloka of having committed forgery.

[55] In cross examination, Mr Kuhn who appeared for the applicant, put it to Mr Jooste that had Mr Maloka not been a GSB, this would have been obvious to the respondent and it would have said so in response to his letters of demand and certainly, his application. Mr Jooste could not explain why this had not happened.

[56] As for the respondent's claim that its Managing Director had simply accepted

Mr Maloka's version that he was a GSB without checking the veracity thereof, Mr Kuhn put it to Mr Jooste that this was implausible and unreasonable. Mr Jooste offered no further explanation or comment.

[57] Mr Kuhn put it to Mr Jooste that if the respondent had been genuinely concerned about the authenticity of the GSB contract it would have investigated the matter years ago. Mr Kuhn pointed out that the respondent had challenged the authenticity of the GSB contract in August 2014 yet it was only in February 2017, after the commencement of the trial, that it took steps to establish who had signed the GSB contract on behalf of the company. Mr Jooste's response was that it had not seemed necessary to investigate the matter earlier.

[58] The following important exchange then occurred between Mr Kuhn and Mr Jooste during cross examination:

58.1 Mr Kuhn asked Mr Jooste on what basis he contended that the GSB contract was not authentic.

58.2 Mr Jooste answered that it had not been on Mr Maloka's personnel file and it had not been implemented.

58.3 Mr Kuhn asked Mr Jooste whether his version was that the GSB contract was a forgery. Mr Jooste expressed reluctance to answer. Mr Kuhn pressed on and asked the question in a different form, namely whether Mr Jooste was accusing Mr Maloka of presenting a false contract to court. Mr Jooste's answer was yes.

58.4 Mr Kuhn then pointed out that the fact that the GSB contract was not on the personnel file did not render it fraudulent. Mr Jooste agreed with this.

58.5 Mr Kuhn then asked what other facts or reasons Mr Jooste based his allegation of fraud on. Mr Jooste answered that if the GSB contract had come to his attention he would have remunerated Mr Maloka differently.

58.6 Mr Kuhn then asked whether it was possible that the GSB contract had been concluded and signed but had not been placed on Mr Maloka's personnel file. Mr Jooste's answer was yes.

58.7 Finally, Mr Kuhn asked whether Mr Jooste's challenge to the authenticity of the GSB contract was therefore purely administrative. Mr Jooste's answer was yes.

Mr Helmut Nebur

[59] Mr Nebur was employed by the respondent from 1996 to 2016, when he retired. In 2000 he was the respondent's Pretoria branch manager.

[60] Mr Nebur testified that, at the conclusion of the first day of the trial, he was sent photographs of the signatures on the admin contract and the GSB contract and asked whether he recognised them. He indicated that they appeared to be his. He was asked to testify.

[61] Mr Nebur testified that he signed the admin contract on behalf of the company. He testified that the signature on the GSB contract appeared to be his, but he does not believe that he signed it. He gave three reasons for this:

61.1 Firstly, he stated that he could not see his initials on the contract and he would not have signed without initialling.

61.2 Secondly, he stated that he would not have signed two contracts for the same person on the same day.

61.3 Thirdly, he stated that he was not authorised to sign contracts for GSBs. He stated that only the Sales and Marketing Manager was authorised to do so.

[62] Under cross examination, Mr Nebur conceded that his testimony that he had not signed the GSB contract was based on deductive reasoning and that he had no independent recollection thereof, one way or another.

Mr Derek Le Roux

[63] Mr Le Roux was employed at the respondent from 1994 to April 2010. In 2000 he was the respondent's Group Sales and Marketing Director.

[64] Mr Le Roux had no personal knowledge of the conclusion of the admin contract or the GSB contract or of who had signed them on behalf of the company. He testified that it would have made sense for Mr Nebur to have signed the admin contract.

[65] Mr Le Roux testified that the GSB contract could only have been signed by himself or another authorised person within the sales structure. He testified that there was a clear distinction at the respondent between salaried employees and sales brokers and that people were not employed in both capacities. He testified that the respondent would not have signed two contracts with one person on the same day.

[66] Under cross examination, Mr Le Roux conceded that some salaried staff in the respondent's employ were permitted to sell products and earned commission therefor.

[67] Mr Le Roux testified that only GSBs were entitled to a target bonus. When presented with Mr Maloka's salary advices in cross examination, Mr Le Roux could not explain why Mr Maloka received a target bonus if he was not a GSB.

<u>ANALYSIS</u>

[68] As stated above, the pre-trial minute provides that the affidavits in the main

application as well as the interlocutory application constitute the pleadings for purposes of the trial. Those pleadings effectively render the issue of the authenticity of the GSB contract moot. This is because the respondent admitted the authenticity of the GSB contract in its replying affidavit in its interlocutory application. Ordinarily, the respondent would, in law, be bound by that admission.[5]

[69] Despite this however, the parties conducted the trial on the basis that the authenticity of the GSB contract was an issue in dispute. Moreover, the pre-trial minute lists as one of the issues that the court is requested to determine: *"whether the GSB contract is authentic."*

[70] The apparent contradiction between these two portions of the pre-trial minute was not explained during the trial. Parties may of course, by agreement, re-define the issues arising from the pleadings[6] and it may be that this is what the parties sought to do in relation to this particular issue. This was not however explicitly stated by either of the parties during the trial.

[71] Given the conclusion I ultimately reach on the merits, the result in this case, would be the same. I shall therefore assume, in the respondent's favour, that the parties agreed to redefine the issues arising from the pleadings to place the authenticity of the GSB contract in dispute.

[72] It is to an assessment of the merits that I now turn, accepting as both parties did during the trial that the onus is on Mr Maloka to prove his case.

[73] Mr Maloka gave direct evidence to the effect that he signed the GSB contract in the presence of Ms Pillay on 20 November 2000. He identified his

[5] Section 15 of the Civil Proceedings Evidence Act 25 of 1965 provides that *"It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings."* See also *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Laquers v Smit* 2000 (2) SA 789 (SCA) at 729I.

[6] *Price NO v Allied-JBS Building Society 1980 (3) SA 874 (A) at 881E – 882E.* This is most commonly done by making admissions of fact in relation to issues that may initially have been placed in dispute by way of a denial in a pleading. In principle, a plaintiff could also permit admissions in the pleadings to be withdrawn by agreement at a pre-trial conference, so creating a dispute in relation to an issue that was previously common cause.

signature on the last page of the contract, as did his wife. The evidence of Mr and Mrs Maloka was clear and consistent and was not impugned in any material respect under cross examination.

[74] Moreover, their evidence, in my view, accords with the probabilities. It was common cause that Mr Maloka was paid commission and, on a regular basis, a target bonus. The admin contract made no provision for either of these. Mr Jooste's evidence that Mr Maloka was paid commission in terms of his initial contract of employment concluded on 2 September 1997 cannot be accepted. That contract was replaced by the contracts concluded in November 2000 when the business converted from a CC to a company. Mr Maloka's initial contract of employment was superceded at that point. Moreover, while the initial contract of employment may have provided for commission, it made no provision for the target bonus which Mr Maloka regularly received.

[75] In summary, the payments received by Mr Maloka as evidenced in his salary advices accorded precisely with the provisions of the GSB contract making it far more probable than not that the GSB contract was indeed concluded.

[76] The respondent's case is, by contrast, riddled with contradictions and implausibilities.

[77] The respondent pleaded that it had two categories of employee only: administrative staff and sales brokers and that and it was not possible for one employee to work in both these capacities or to conclude contracts of employment in both categories. Yet the evidence for the respondent was markedly different. Mr Jooste testified that there was in fact a third category of employee: the administrative staff member who was permitted to sell products and received commission therefor. Mr Jooste testified that Mr Maloka fell within this category. The respondent led no evidence as to the contractual arrangements pertaining to this category of employee or the basis on which they received their commission and there does not appear to

be any logical reason why the respondent would not have entered into GSB contracts with some or more of the employees in this category. Under cross examination, Mr Le Roux could not explain why Mr Maloka received a target bonus if he had not signed a GSB contract.

[78] Furthermore, it is difficult to understand why, if Mr Maloka was not a GSB, this would not have been obvious to the respondent and it would not have said so in response to his letters of demand or, at the very least, his court application. Instead, the respondent admitted that it employed Mr Maloka as a GSB. The respondent's claim that this was done in error because its Managing Director simply assumed without checking that Mr Maloka's version was correct is implausible. The terse character of the explanation for this error and the fact that it was given not by Mr Nonkonyana himself, but by Mr Jooste and merely confirmed by Mr Nonkonyana, does not help matters.

[79] Having made the allegation that the GSB contract was not authentic, the respondent took no steps to establish who the signature appearing on the contract on its behalf belonged to. The reason for this becomes clear when one has regard to the respondent's replying affidavit in its interlocutory application. There it changed its version yet again, stating that it did not dispute the authenticity of the GSB contract. Its case in the replying affidavit was that the contract was not implemented and is therefore invalid. It is however clear from the evidence that Mr Maloka received commission and a target bonus, for which express provision was made in the GSB contract.

[80] While the respondent persisted with its authenticity challenge in the trial, this was not done with the rigour that one would expect of a serious and well founded challenge. Instead the challenges to the Malokas during cross examination were tentative at best, with the respondent's counsel merely suggesting that the signature on the GSB contract did not "resemble" Mr Maloka's signatures elsewhere and more closely "resembled" Mrs Maloka's signature. At no stage was it put to either Mr or Mrs Maloka, in terms, that they had forged the GSB contract.

[81] The respondent's challenge to the authenticity of the GSB contract finally collapsed during the cross examination of Mr Jooste when he conceded that the GSB contract may have been concluded and signed and simply not placed on Mr Maloka's personnel file.

[82] As for the evidence led on behalf of the respondent, neither Mr Jooste nor Mr Le Roux had personal knowledge of the conclusion of the GSB contract. Mr Nebur testified that he did not believe that he would have signed the GSB contract but conceded that he had no personal recollection of the matter one way or another. Mr Nebur stated that he could not see his initials on the GSB contract. This may however simply have been a consequence of the poor quality of the copy of the contract. Mr Nebur accepted that he had signed the admin contract and accepted further that the signatures on the admin contract and the GSB contract appeared to be identical.

[83] Mr Nebur's evidence was accordingly inconclusive at best and is certainly not sufficient to disturb the probabilities, which for the reasons stated above, favour the applicant.

[84] For all these reasons, I am satisfied that Mr Maloka has proved his claim and is entitled to the relief that he seeks. He is of course also entitled to his commission for the month of March 2013 which the respondent has conceded it owes him.

[85] As far as costs are concerned, I see no reason why they should not follow the result.

[86] I accordingly make the following order:

ORDER

1. The respondent is ordered to pay the applicant the commission he

earned for the month of March 2013, within 7 days of the date of this judgment.

2. The respondent is ordered to comply with clause 5.1.1 of the applicant's GSB contract of employment concluded between the parties on 20 November 2000 ("the contract").

3. The respondent is ordered to pay to the applicant all outstanding commissions that have accrued to the applicant in terms of clause 5.1.1 of the contract from March 2013 to the date of the judgment, within 30 days of the date of this judgment.

4. The respondent is ordered to pay the applicant all commissions on a monthly basis as they became payable in future for the remainder of the period envisaged in clause 5.1.1, which is a period equal to the applicant's term of service from date of signature of the contract to date of resignation, namely twelve years and three months.

5. The respondent is ordered to provide the applicant with a breakdown of all commissions due to the applicant on a monthly basis.

6. The respondent is to pay the applicant's costs, including the costs, if any, occasioned by the postponement of the trial on 10 February 2017.

H BARNES

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr R Kuhn of Rudolph Kuhn Attorneys

For the respondent: Advocate P Kirstein

Instructed by: Grosskopf Attorneys