



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Not of interest to other judges

Case no: JS 1108/11

DICK JOHN MUIR

Applicant

And

GOLDEN LIONS RUGBY UNION

Respondent

In the matter between:

Heard: 19 – 21 April 2017

Delivered: 14 December 2017

JUDGMENT

SALOOJEE AJ

Introduction

- [1] This is a contractual dispute in which the applicant seeks payment in the amount of R6 440 000 for specific performance on a fixed term employment contract.
- [2] The respondent opposed the action and counterclaimed for enrichment in the amount of R 900 000.
- [3] The applicant gave evidence in support of his claim and called one other witness, David Craig Livingstone ("Livingstone"), the applicant's agent.
- [4] The respondent closed its case without leading any evidence.

Summary of the applicant's case

- [5] The applicant is a past provincial and national rugby player. He is currently a rugby coach and a businessman.
- [6] The applicant entered into a fixed term written employment agreement with SA Rugby (Pty) Ltd for the period 08 May 2008 to April 2011 ("the SA Rugby agreement") as an assistant coach for the South African national rugby team.
- [7] During October 2009, the applicant entered into a second fixed term employment agreement ("the second agreement") with the respondent for the period 01 November 2009 to 31 October 2012.
- [8] The second agreement was concluded in two parts; the first part was to confirm the terms of his employment with the respondent and was agreed on 16 October 2009 and the second part to confirm the remuneration and was agreed on 22 October 2009.
- [9] The dispute relates to non-payment of the applicant's salary from December 2010 to the end of the second agreement and a performance bonus.

Summary of the respondent's opposition

- [10] The respondent pursued two defences at trial. Firstly, that the second agreement is void as the applicant misrepresented that he had obtain written permission from SA Rugby (Pty) Ltd to conclude the second agreement.
- [11] In term of Clause 5.2.1 of the SA Rugby agreement, the applicant was bound to render coaching services to the South African national rugby team, the national squad or another team as directed by SA Rugby (Pty) Ltd or the South African Rugby Union ("SARU"). The applicant would be allowed to coach another team upon obtaining written permission from SA Rugby (Pty) Ltd or SARU.
- [12] Secondly, the respondent would pay the applicant his full salary and claim payment from SA Rugby (Pty) Ltd for the period that the applicant was away with the South African national rugby team. SA Rugby (Pty) Ltd did not make payment to the respondent when requested to do so resulting in the respondent withholding payments to the applicant.

Validity of the second agreement

- [13] The validity of the second agreement would entitle the applicant to his claim.
- [14] It is accepted that an employee can have more than one employer.¹ The stipulation in the SA Rugby agreement that the applicant was bound to obtain written permission from SA Rugby (Pty) Ltd or SARU to render the same services to another employer does not affect the validity of the second agreement. This is an issue between the applicant and SA Rugby (Pty) Ltd.

¹ *Boumat Ltd v Vaughan* 1992 (13) ILJ 934 (LAC). See also *Camdons Realty (Pty) Ltd v Hart* (1993) 14 ILJ 1008 LAC.

- [15] The validity of the second agreement is dependent on the fulfilment of the conditions discussed in the meeting between the applicant and Kevin De Klerk ("De Klerk") during August 2009.
- [16] The first condition discussed at the meeting was that the applicant required the permission from South African national rugby team management and the relevant decision makers at SA Rugby.² The second condition was that the second agreement would be separate from the SA Rugby agreement.
- [17] In order to prove fulfilment of the first condition, the applicant has to prove that he obtained permission from the South African national rugby team management and relevant decision makers at SA Rugby.
- [18] The applicant stated in evidence that he obtained permission to enter into the second agreement from Mr Pieter De Villiers, the national head coach, Mr O'Reagan Hoskins, the SA Rugby President and Mr Mark Alexander, the SA Rugby Deputy President. The applicant regarded the permission obtained from these three persons to be substantial compliance of the condition.
- [19] The applicant's amended statement of claim states that the applicant obtained permission from Mr Pieter De Villiers, Mr O'Reagan Hoskins and Mr Andy Marinos, the SA Rugby CEO.
- [20] Despite the amended statement of claim differing from the applicant's evidence and the applicant leading evidence on the roles played by the above persons, the applicant did not lead evidence on which persons constituted the South African national rugby team management and the relevant decision makers at SA Rugby.
- [21] Further, SA Rugby is defined in the SA Rugby agreement to be SARU and SA Rugby (Pty) Ltd.³ The applicant did not define SA Rugby in his amended statement of claim or in his evidence.
- [22] In the event that the applicant referred to SA Rugby as SA Rugby (Pty) Ltd, the applicant had to present evidence that he obtained permission from

² Paras 13.2 and 15 of the amended statement of claim.

³ Clause 1.2.4 of the SA Rugby agreement.

members of the Board of Directors of SA Rugby (Pty) Ltd, who would constitute the relevant decision makers at SARU.

[23] In the event that the applicant referred to SA Rugby as SA Rugby (Pty) Ltd and SARU, then the applicant had to present evidence that in addition to the board members of SA Rugby (Pty) Ltd, he also obtained permission from the relevant decision makers at SARU.

[24] On either interpretation of SA Rugby, the applicant did not present evidence that the condition was fulfilled.

[25] Lastly, substantial compliance of the condition refers to fictional fulfilment of the condition that; a condition in a contract will sometimes be considered to have been fulfilled as against one party even though it has not been fulfilled.

[26] The test for fiction fulfilment was formulated in *Scott and Another v Poupard and Another*⁴ where the Court said that:

“... what must a plaintiff prove when invoking the doctrine? Must he prove (a) non-fulfilment of the condition, (b) the defendant’s breach of his duty with intention to frustrate the fulfilment , and (c) a causal link between (a) and (b)? Does (c) involve prove by the plaintiff that, but for (b), the condition would probably have been fulfilled?”

[27] The applicant did not lead evidence that the respondent breached its duty with intention to frustrate the fulfilment of the condition. Thus, the applicant did not prove substantial compliance or fictional fulfilment of the condition.

[28] In light of the above, the applicant did not prove that the second agreement was valid and enforceable.

The counterclaim

[29] The respondent did not lead evidence in support of its counterclaim, which is dismissed.

⁴ 1971 (2) SA 373 (A) at 379.

[30] In the premises, the following order is made:

Order

1. The applicant's claim is dismissed.
2. The respondent's counterclaim is dismissed.
3. Each party to pay its own costs.

YF Salooje

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv G Fourie

Instructed by: Van Der Merwe Incorporated

For the respondent: CE Watt-Pringle SC

Instructed by: Erasmus Inc Attorneys

LABOUR COURT

Appearances

For the Applicant: Advocate J Partington

Instructed by: Chris Baker and Associates.

For the Respondent: Vusi Masinga legal officer of AMCU

LABOUR COURT