REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG HIGH COURT
LOCAL DIVISION, JOHANNESBURG

CASE NO: 2012/47015

2013/06184

2013/30024

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED

21 September 2014 G DAMALIS

In the matter between

MUTEPE, TSHINETISE SIDNEY **Plaintiff**

And

NATIONAL HOUSING FINANCE CORPORATION **Defendant**

STATE OWNED COMPANY LIMITED

J U D G M E N T

DAMALIS AJ:

[1] In this matter the Plaintiff, an individual, instituted three separate actions against the Defendant, his erstwhile employer, a State Owned Company, as follows:

[2] In the first action (under case number 2012/47015), the Plaintiff claims damages in an amount of R9 185 944,00 which he alleges he sustained as a result of

the Defendant's unlawful and premature termination of his three year contract of employment ("*the damages claim*").

[3] In the second action (under case number 2013/06184), the Plaintiff claims an amount of R2 363 181,00 from the Defendant based on bonuses allegedly due to the Plaintiff by the Defendant in terms of an incentive scheme incorporated in his contract of employment ("*the incentive scheme*").

[4] In the third action (under case number 2013/30024), the Plaintiff claims an amount of R400 000,00 based on an offer of gratuity made by the Defendant to the Plaintiff on 12 October 2012 ("*the gratuity claim*").

[5] The three actions were consolidated before the commencement of the proceedings in terms of a court order granted by his Lordship Tsoka on 17 April 2014. The matter came before me on 26 May 2014 and the trial ran for five days. Subsequent thereto, at the request of the court, the Plaintiff's Counsel and the Defendant's Counsel presented heads of argument. Closing argument was heard on 5 September 2014 and on 12 September 2014 respectively.

Summary of the pleadings

[6] It is common cause that the Plaintiff was employed by the Defendant for a period of three years in terms of a written contract of employment for the period 1 August 2008 to 31 August 2011 ("*the initial agreement*").

[7] Pursuant to the initial agreement, the Plaintiff was deployed by the Defendant to perform various roles. During 2011 the Defendant was deployed to deliver a mortgage default insurance ("*MDI*") operating model within the structures of the Defendant's organisation and he was also deployed to the Department of Public Service and Administration ("*DPSA*"), on behalf of the Department of Human Settlements ("*DHS*"), to design a concept paper for the establishment of a Government Employees' Housing Scheme ("*GEHS*").

[8] The initial agreement provided that upon the expiry of the initial agreement the Plaintiff would remain employed for a further three months service period. It is not in

issue that both parties complied with their reciprocal obligations to each other in terms of the initial agreement.

[9] During the three month service period, negotiations ensued between the Plaintiff and the Defendant's CEO, Mr Moraba ("*Mr Moraba*") in relation to the Plaintiff's future employment with the Defendant. On 22 September 2011, the Plaintiff received Annexure POC 2 ("*POC 2*") attached to the Particulars of Claim containing a draft written proposal regarding his future employment with the Defendant and his deployment to the GEHS. POC 2 provides for the Plaintiff to be employed by the Defendant for a fixed period of one year commencing on 1 September 2011 and terminating on 31 August 2012.

[10] Subsequent to the Plaintiff receiving POC 2, according to the Plaintiff, he had discussions with Mr Moraba and presented him with a motivation for the establishment of the role of an Executive Manager Group Strategy to be occupied by him. The Plaintiff also proposed that the period of his employment be changed to three years, instead of a one year fixed period as provided for in POC 2.

[11] The Plaintiff alleges that on 21 October 2011, the Defendant presented him with a revised draft written proposal to POC 2 regarding the Plaintiff's continued employment with the Defendant and his deployment to the GEHS. This proposal is contained in Annexure POC 3 ("*POC 3*") attached to the Particulars of Claim. The Plaintiff further contended that on 24 October 2011 he presented the Defendant with a written counter proposal to POC 3 in the form of Annexure POC 4 ("*POC 4*") attached to the Particulars of Claim. The Plaintiff contended that, upon the expiration of the three month service period provided in the initial agreement, the Plaintiff was retained by the Defendant in its employ and he rendered services to the Defendant in terms of POC 4.

[12] The Plaintiff pleaded that by virtue of the aforesaid the parties concluded a tacit agreement of employment ("*the subsequent agreement*") on the terms embodied in POC 4. The salient terms were as follows: the Plaintiff would be employed by the Defendant in the position of Executive Project Manager: GEHS reporting to the CEO for the period up to either 29 February 2012, or such time as the GEHS was approved, whichever occurred first. In the event that the GEHS was approved on or prior to 29 February 2012, the Plaintiff would take up such employment as might be offered to him by the relevant Government programme. The Plaintiff pleaded further that, in the event that the GEHS was not approved on or prior to 29 February 2012, he would remain in the Defendant's employ in the position of Executive Manager Corporate Strategy for the remainder of a period of three years effective from 1 September 2011 and that his total remuneration package would be R1 500 000,00 per annum, payable by way of monthly

amounts of R125 000,00 (I note that these are amended amounts).

[13] The Plaintiff pleaded that he was entitled to a bonus award as part and parcel of his total remuneration package based on the Defendant's three year rolling incentive scheme calculated as a percentage of his annual package. The vesting of the incentive scheme would occur as follows: year 1- 50%; year 2- 30%; year 3- 20%.

[14] It is common cause between the parties that the GEHS was not approved by 29 February 2012. The Plaintiff pleaded an extension of the subsequent agreement as follows: during March 2012 the Plaintiff and the Defendant orally agreed that the approval of GEHS would be extended to 30 September 2012. The Plaintiff pleaded that the Defendant continued to employ him on terms similar to POC 4, save that: the time period afforded for the approval of GEHS was extended to 30 September 2012 and that if the GEHS was not approved on or before the 30 September 2012 the Defendant would continue to employ the Plaintiff and appoint him to the position of Executive Manager Corporate Strategy for a period of three years effective 1 September 2011, alternatively on a full time basis.

[15] The Plaintiff pleaded that on 12 October 2012 the Defendant notified him by letter that his employment contract with the Defendant was terminated as at 30 September 2012 (I mention that that this letter is also the basis of the Plaintiff’s gratuity claim). The Plaintiff contends that the Defendant’s failure to employ him beyond 30 September 2012 was unlawful and constituted a repudiation of the oral agreement. The Plaintiff rejected the Defendant’s repudiation and continued to tender his services to the Defendant, as set out in a letter dated 16 October 2012. The Plaintiff alleges that he has sustained damages equal to the amount which he would have earned if he remained in the Defendant’s employment until 30 September 2014.

[16] The Defendant pleaded that during September 2011, the Plaintiff and the Defendant orally agreed that the Plaintiff’s employment contract would be extended by one year from 1 September 2011 to 31 August 2012 on the terms set out in POC 2, alternatively in terms of a tacit renewal of the initial agreement terminable on one months notice. The Defendant denied that it presented POC 3 to the Plaintiff and alleged that no contract of employment was concluded between the parties on the terms embodied in either POC 3 or POC 4.

[17] Further, the Defendant pleaded that during March 2012, the Plaintiff and the Defendant orally agreed that the Plaintiff’s one year contract of employment with the Defendant would be extended by one month to 30 September 2012 in order to

accommodate the extension date of the approval of GEHS. On 23 May 2012, the Defendant presented the Plaintiff with a renewal of his employment contract on the terms embodied in annexure 1 attached to the Defendant's Plea in which the Plaintiff's employment with the Defendant was confirmed up to 30 September 2012.

[18] The Defendant contended that the Plaintiff's contract of employment terminated on 30 September 2012 due to the effluxion of time. According to the Defendant on 26 September 2012, the Defendant offered the Plaintiff a renewal of his contract of employment for a period of three years as Executive Manager Corporate Strategy on his existing remuneration, from 1 October 2012 to 30 September 2015 on the terms embodied in annexure 3 attached to the Defendant's Plea. The Defendant contends that the Plaintiff rejected this offer and that the Plaintiff has neither applied for nor taken up alternative employment. The Defendant contends that the Plaintiff has not suffered any damages.

[19] The Plaintiff replicated that he did not receive the Defendant's offer renewing his contract of employment on 26 September 2012.

[20] The pleadings relating to the incentive claim are by and large the same as that in the damages claim. The Plaintiff conceded, correctly in my view, that he is not entitled to most of this claim. The Plaintiff however persisted with the part of his claim for an incentive bonus for the prorated period from 1 April 2012 to 30 September 2012 being the last six months of his employment. The Plaintiff contends that he is entitled to payment of an incentive bonus for this period in terms of the Defendant's three year rolling incentive scheme, the vesting would occur as follows: March 2013 (year 1)- 50%; March 2014 (year 2)- 30%; March 2015 (year 3)-20%.

[21] The Defendant contends that the Plaintiff did not qualify for an incentive bonus for the March 2013 incentive year as he only worked for the Defendant for six months of the financial year which commenced on 1 April 2012 and ended on 31 March 2013.

[22] In relation to the gratuity claim the Plaintiff pleaded that on 12 October 2012, the Defendant made a written offer of gratuity to the Plaintiff in the termination letter in an amount of R400 000.00 The gratuity was offered in lieu of Plaintiffs meaningful contribution as a member of the Defendant's executive management team in relation to the various assignments carried out by him during his employment by the Defendant. The Plaintiff alleged that the gratuity was payable forthwith upon his acceptance of the written offer of gratuity, alternatively within a reasonable time after acceptance thereof. The Plaintiff continued that on 21 May 2013 his attorneys addressed a letter to the Defendant's attorneys in which the gratuity was accepted.

[23] The Defendant contends that the offer of gratuity was a thank you gesture for the Plaintiff's contribution, on the occasion of the termination of his contract of employment by effluxion of time and that the offer was based on the Plaintiff's acceptance of the lawful and consensual termination of his contract. The Defendant denied that the Plaintiff's letter dated 21 May 2013 constituted a valid acceptance of the offer and that the Plaintiff failed to accept the offer within a reasonable time. The Defendant pleaded that the Plaintiff's letter addressed to the Defendant dated 16 October 2012 in which he disputed the legality of his termination of employment together with the two actions instituted by the Plaintiff in the damages claim and in the incentive claim constituted a rejection of the Defendant's offer, alternatively that by the time the Plaintiff's attorneys wrote the letter of 21 May 2013, the offer had lapsed. Further alternatively the Defendant pleaded that it withdrew its offer of gratuity in terms of a letter dated 19 October 2012 addressed to the Plaintiff's attorneys by the Defendant's attorneys.

Findings

[24] I shall deal with the relevant evidence as part of my judgment.

[25] The court is faced with single witnesses as only the Plaintiff and Mr Moraba testified in this matter.

[26] The overall burden of proof rests on the Plaintiff to prove the subsequent agreement and the oral extension of the subsequent agreement. The Plaintiff also assumed the duty to begin.

[27] It is a trite principle in the law of contract that the party relying on a contract must prove the existence of the contract and the terms upon which he relies (see: *McWilliams v First* Consolidated *Mines (Pty) Ltd* 1982 (2) SA 1 (A); *Badenhorst v Van Rensburg* 1985 (2) SA 321 (T) at 335; *Cecil Nurse (Pty) Ltd v Nkola* 2008 (2) SA 441 (SCA) at 445E).

[28] The first issue to be decided is whether, on a balance of probabilities, a contract of employment was entered into between the parties for a period of three years terminating on 30 September 2014.

[29] The damages claim only comes into play if I find that the Plaintiff discharged his onus. It is evident from the pleadings that a number of disputes of facts would arise when the parties testify.

[30] *Stellenbosch Farmers' Winery Group Ltd and another v Martell Et Cie and others* 2003 (1) SA 11 (SCA) at p14I- 15B, summarizes the technique generally employed by Courts in resolving factual disputes as follows:

"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of A subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[31] Apart from the unsigned renewal of contracts of employments annexed to the parties' pleadings, various unsigned draft renewal of contracts of employments which were part of the trial bundle were also referred to in evidence. These documents, at first glance appeared to be duplicates. However closer scrutiny of these documents revealed that, when comparing same, they contained numerous differences and tracked changes appeared in certain of these documents. The court was confronted with a mass of same dated (21 October 2011) 'draft' contracts of employment containing differences.

[32] The Plaintiff interchangeably referred to POC 3 and the renewal of contract of employment at page 159-162 of the trial bundle ("*TB159*"). The Plaintiff contended that it is one and the same document. I pause to mention that POC 3 had a missing page, according to Plaintiff's Counsel TB159 was the complete contract. The Plaintiff testified that he received the document (referring to POC 3 and TB159 interchangeably) from Ms Edwina Kruger ("*Ms Kruger*"), the personal assistant of Mr Moraba under cover of an e-

mail on 21 October 2011 ("*the covering e-mail*"). These two documents are not the same. For example the words *"in the event that you are appointed into the position of Executive Manager: Corporate Strategy a new formal performance contract will be put into place on the expiry of this contract"* appear on TB159 and not in POC 3 or in the document at page 175-178 of the trial bundle to which I shall refer below.

[33] In order to identify the correct document, which was attached to the covering e-mail, I requested the Plaintiff's Counsel during closing argument to furnish both the covering e-mail and the enclosed attachment to the court. These documents were provided to the court by the Plaintiff. The contract of employment provided to the court was a document substantially similar to POC 3 (it was not TB159) and it contained the missing page of POC 3. I was informed by the Defendant's Counsel that the attachment was on page 175-178 of the trial bundle. Due to the fact that there were different versions of the same document dated 21 October 2011, I was unable to determine, if the document furnished to the court by the Plaintiff was the same document which was furnished to the Plaintiff by the Defendant.

[34] The Plaintiff testified that the covering email simply said: "*Herewith your renewal of employment contract. Kindly read and advise*". The words quoted by the Plaintiff do not appear on the covering e-mail. The covering e-mail by Ms Kruger to the Plaintiff states in the subject line: "Renewal of contract of employment 21 October 2011". The rest of the covering e-mail is blank.

[35] Mr Moraba in his evidence in chief testified that he and the Plaintiff orally agreed to the terms embodied in POC 2. He stated that POC 3 was not the document presented to the Plaintiff and that he did not know the origin of POC 3. He also testified that there was no agreement between him and the Plaintiff that if GEHS was not approved before 29 February 2012 the Plaintiff would be appointed to the position of Executive Manager Corporate Strategy for three years effective 1 September 2011 as provided in POC 3 or POC 4. During cross examination the Plaintiff's Counsel pointed out to Mr Moraba that there was a missing page in POC 3 and referred him to TB159. Mr Moraba under cross examination testified that he did not consider the document as it contradicted the terms of POC 2. He testified that he communicated this to the Plaintiff during October 2011, and it was for this reason the Plaintiff took so long to effect the changes to POC 3, POC 4 which the Plaintiff only presented to the Defendant the following year.

[36] Mr Moraba did not dispute the fact that POC 3/TB159 came about because 29 February 2012 was the date upon which the GEHS would be finalised and approved. Mr Moraba testified at that time the Plaintiff was under a one year

contract of employment in terms of POC 2 and it fell within the period of that contract. Mr Moraba denied the Plaintiff's contention that he was dissatisfied with the one year contract period. He also testified that the Plaintiff was content with the fact that he would be receiving an incentive of 100% in recognition of the shorter contract period. Mr Moraba said that as far as he was concerned the Plaintiff's assignment was for a one year period.

[37] Mr Moraba volunteered that the Plaintiff was a skilled and competent employee and the one year contract period was a special assignment and that it was always the Defendant's intention to retain the Plaintiff after the expiry of the one year period if GEHS was not approved. He stated that the Plaintiff was one of the "*key people*" and his employment would be extended even if it was "*in a different light*".

[38] During cross examination, the Plaintiff testified that at the time of the termination of his contract of employment TB159 was the existing contract of employment. In response to a question by Defendant's Counsel that this was the first time that the Plaintiff has indicated that the terms of his employment were contained in the document at TB159, the Plaintiff replied this is what he has been saying all the time. The Defendant's Counsel asked the Plaintiff the following question:

"But your pleaded case was that it was an oral agreement arising from the aforesaid and when I asked you what the aforesaid was you said it was POC 3 and POC 4 and it was an oral agreement you said in your pleadings". The Plaintiff replied thereto as follows: *"which was reduced to writing as you can see".*

[39] It is clear from the document provided by the Plaintiff to the court that TB159 was not the document which, as he contended in his testimony, was received from the Defendant. The correct document is at page 175-178 of the trial bundle.

[40] The Defendant's Counsel argued that the Plaintiff's case, as pleaded, is contrary to his testimony in that he no longer placed reliance on POC 3 and POC 4 in support of the alleged tacit contract. In support of his submission the Defendant's Counsel referred to the case of *Minister of Agriculture and Land Affairs and Another v de Klerk and Others* 2014 (1) SA 212 (SCA) at p223 para 39 where Madjiet JA stated that the parties are bound by their pleadings. The object of pleadings being to delineate the issues to enable the other party to know what case has to be met, and that it is impermissible to plead one particular issue and to then seek to pursue another at the trial (see also *Gusha v Road Accident Fund* 2012 (2) SA 371 (SCA) para 7 and *Imprefed (Pty) Ltd v National Transport Commission* [1993] ZASCA 36; 1993 (3) SA 94 (A) at 107G-H). Further it was stated in the case of *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk* 1984 (2)

SA 261 that a court in coming to a decision as to whether a tacit agreement has been proved must decide whether the relevant facts have been pleaded and proved.

[41] The Plaintiff had ample opportunity to amend his pleadings and in the absence of an amendment I consider the Plaintiff bound by his pleadings. I am not prepared to accept that a party who interchangeably refers to different documents containing various differences (POC 3 or TB159 or trial bundle page 175-178 or any other document) in support of the conclusion of a tacit contract can expect a finding in his favour. This militates against the conclusion of a tacit contract. If the Plaintiff failed to prove the conclusion of the tacit contract as pleaded on a balance of probabilities and it follows that the Plaintiff by necessary implication that he also failed to prove the oral agreement.

[42] However, if I am wrong, I find that the Plaintiff failed to prove the conclusion of the oral agreement itself on the basis of the quoted portion of the record. If the Plaintiff could, as he goes along, rely on any contract, it would not meet the standards required of pleadings specifically the provisions of Rule 18(6) of the Uniform Rules of Court and it would create uncertainty to a degree which, if allowed, would inevitably result in prejudice to opposition parties. A party must decide when putting ink on paper and plead his case with reasonable accuracy so that the other party knows which case he has to meet and what to expect. He should refer to the documents upon which he intends to rely.

[43] The Plaintiff pleaded as follows in his Particulars of Claim:

"14 on or about 24 October 2011, the Plaintiff presented the Defendant with his written counter proposal to the revised draft proposal.
14.1 Annexure "POC 4" annexed hereto is a copy of the Plaintiff's written counter proposal, the content thereof is incorporated herein by way of reference".

[44] A counter proposal cannot in my view give rise to a tacit contract unless accepted by the Defendant. It was not alleged by the Plaintiff that his counter proposal contained in POC 4 was either expressly or tacitly accepted by the Defendant. The ongoing negotiations and further proposals by both parties destroy any prospect of the establishing of a tacit contract as contended by the Plaintiff.

[45] The HRER Committee Meetings dated 7 September 2011 and 15 September 2011 respectively make reference to a one year contract period as follows:

"HRER Committee Meeting dated 7 September 2011: ...In the case of Sydney Mutepe (the Plaintiff), the following events have overtaken the original plan to retain him in the

role of Executive Manager: MDI for three years:...Sidney has been instrumental in packaging the GEHS proposal on behalf of the Department of Human Settlements. As a result, his contract with NFHC will be extended to one year instead of the original three years, within which time a decision (depending on the turn of events) will be made. In view of this his incentive will be kept at 100% of T.O.C.E".

"HRER Committee Meeting dated 15 September 2011…As a result of Mr Mutupe's contribution in the formation of the GEHS's proposal, he was asked to head up the team. The CEO, approached him to be seconded for a year in the GEHS project and he is willing to enter into a one year contract with NFHC in this regard, instead of his employment contract being renewed for a fixed three years. Mr Ntsaluba and Ms Ramarumo raised concerns that appointing Mr Mutupe's for one year to oversee GEHS and not for three years as Executive Manager: MDI, would pose a risk and might have a negative impact on Mr Mutupe's morale. Mr Moraba, responded that Mr Mutupe's is comfortable with taking up the one year secondment and is looking forward to work with DPSA, National Treasury, and National Department of Human Settlements to structure GEHS. His role might change within that year".

[46] The Plaintiff testified that he did not indicate to Mr Moraba that he was willing to accept a one year contract period. In my view, it is improbable that Mr Moraba would have presented a fabrication to the HRER Committee that there was a change of the original plan of extending the Plaintiff's employment from a three year period to a one year period and that the Plaintiff was "*willing"* and *"comfortable*" to accept a one year contract of employment if he had not discussed it with the Plaintiff beforehand. Soon thereafter, on 22 September 2011 presented POC 2 to the Plaintiff which provides a one year contract.

[47] Mr Moraba testified that he was obliged to present any amendments effected to the terms of the Plaintiff's contract of employment to the HRER Committee for approval. It follows that if the period of the contract of employment had changed from a one year contract period to a three year contract period based on POC 3 or POC 4 or TB159 or any other document relied upon by the Plaintiff, the HRER Committee Meeting held on 17 November 2011 would have reflected such a change. The fact that it did not is a strong probability against the Plaintiff's version of the events.

[48] The Plaintiff's evidence vacillated to such a degree that it is impossible to determine the basis upon which a tacit contract of employment or the oral extension of the contract on the terms contained in POC 4 was concluded.

[49] I considered the Plaintiff's evidence in chief regarding these various renewals of contracts of employment and compared it with his pleadings as well as the answers

furnished by the Plaintiff under cross examination. In evidence in chief, the Plaintiff testified as follows: Firstly, the Plaintiff stated that he effected changes to POC 3 which are contained in POC 4, these changes were one or two additions *"mainly to say are we renewing my contract as credit executive or are you giving me a new contract…" and* the second addition was to improve governance. He stated that he presented POC 4 to the Defendant and he thought the Defendant would incorporate all the *"suggestions"* he made and that he would provide him with a *"proper contract"* as POC 4 was "*a draft".* Secondly, the Plaintiff testified further that he was satisfied with POC 3 and that *"after the 21 October"* he knew, as he had reached agreement with Mr Moraba that he was employed by the Defendant for a period of three years seconded to GEHS until February 2012 and that he would thereafter return to the Defendant as Executive Manager Corporate Strategy. Thirdly, on the 19 March 2012 he presented to Mr Moraba a proposed renewal of contract of employment, he was of the view that as it was a *"final amendment"* of his renewal of contract of employment and it might have to go to HRER Committee for a *"formal contract"* to be formulated.

[50] However, under cross examination the Plaintiff, responded regarding these various renewals of contracts of employment as follows: Firstly, he stated the parties *"started having agreements on ....the 21 October and the request was a draft".* Secondly, he stated that agreement was reached between the parties on POC 3 and that POC 4 contained revisions which he effected to improve governance and if Mr Moraba wished to accept his proposals he would incorporate them otherwise his contract of employment would remain on the terms embodied in POC 3. Thirdly, also contrary to his pleadings where he stated that POC 4 was his written counter proposal to POC 3, he stated that POC 3/TB159 was the contract of employment and not POC 4. Fourthly, when Defendant's Counsel pointed out the differences between POC 3 and TB159 the Plaintiff replied that there were many versions but that TB159 was the document agreed upon and any subsequent agreement was an attempt by him to improve governance. The Plaintiff stated that he had a meeting with Mr Moraba on 19 March 2012 and he and Mr Moraba "*reached agreement"* that he would be employed by the Defendant for a period of three years as Executive Manager Corporate Strategy. The changes in the time line of the GEHS had necessitated this meeting with Mr Moraba to incorporate the changes in the contract of employment they were finalizing and that the Plaintiff *"accepted"* that Mr Moraba *"accepted the changes"* and he *"waited for the final contract.... that does not have addition and divisions and all this for signatures, which never came".*

[51] In my view, the Plaintiff attempted to overcome the difficulties by providing the explanation that he was improving governance. I do not accept his explanation that the reason he effected changes to POC 3 as appear in POC 4 was to improve governance and that the reason why the proposed renewal of contract of employment which he had presented to Mr Moraba on 19 March 2012 was not pleaded by him was *"because any other work which was done subsequent to the contract of 21 October 2011 was to improve governance and to accommodate changes in the strategy of GEHS".* A simple question arises, why did the Plaintiff deem it necessary to include POC 4 in his pleadings, which he pleaded was his written counter proposal to POC 3, if, as testified by him, it also pertained to the improving of governance. Significantly, the Plaintiff did not deem it necessary to include in his pleadings his proposed renewal of contract of employment emailed on 19 March 2012 to Mr Moraba. Instead the Plaintiff pleaded that it was orally agreed between the parties that the time afforded for the approval of GEHS would be extended to 30 September 2012. It was conceded by Plaintiff's Counsel during closing argument in response to a question posed by the court that the changes effected by the Plaintiff to the documents did not merely pertain to the improving of governance.

[52] The Plaintiff's testimony that he did not receive a response from Mr Moraba to the amendments effected by him to POC 4 and that he did not receive a response from Mr Moraba to his 19 March 2012 proposed renewal of contract of employment are indicative of the fact that no agreement was reached between the parties on the terms contended by him. Taking into consideration that on 23 May 2012 Mr Moraba instead presented to him a renewal of contract of employment annexure "1" for a period of one year and one month to 30 September 2012 to accommodate the extension date for the approval of GEHS. It could be expected that the Plaintiff would have immediately contacted Mr Moraba to query the termination date of 30 September 2012, which he failed to do. I do not accept the explanation of the Plaintiff that it would have been *"disrespectful"* for him to do so. Another question arises, if the Plaintiff had a three year contract with the Defendant why would Mr Moraba present him with a one year contract extended by one month under cover of an e-mail which stated that he would ask Ms Kruger to arrange a meeting with the Plaintiff to conclude on the matter. Contrary to the evidence of Mr Moraba, the Plaintiff testified that no meeting was held between him and Mr Moraba.

[53] I refer to an e-mail the Plaintiff addressed to Mr Moraba on 21 September 2012. In this e-mail the Plaintiff requested his "*renewal of contract of employment and job description is expedited……noting that we have agreed that all these issues be concluded before the end of September 2012…"* This request occurred long after the date upon which the alleged tacit contract and the oral extension was concluded. It is improbable that a party would make such requests if there was a prior meeting of the

minds between them.

[54] If, as contended by the Plaintiff, his contract of employment terminated on 30 September 2014 and the position allocated to him was that of Executive Manager Corporate Strategy it would not have been necessary to request that his renewal of contract of employment and job description be expedited. I do not accept the submission made by Plaintiff's Counsel in response to a question by the court, that this e-mail should be interpreted on the basis that it purely relates to the issue of the Plaintiff's job description as the position of Executive Manager Corporate Strategy was awarded to Ms Mamatela. The content of the above quoted e-mail is clear. Further, the Plaintiff's testimony that he had a discussion with Mr Moraba regarding the appointment of Ms Matamela as Executive in charge of strategy and Mr Moraba told him that it was his "*prerogative*" as to who he appoints, shows that no agreement was reached between the parties that the Plaintiff was assigned to the position Executive Manager Corporate Strategy.

[55] The test to be applied when considering whether or not a tacit contract has been concluded has been enunciated in a number of cases and there is no controversy about the test to be applied. In order to establish a tacit agreement, it is necessary to for the Plaintiff to allege and prove unequivocal conduct that establishes on a balance of probabilities that the parties intended to, and did in fact contract on the terms alleged. It must be proved that there was an agreement (see: *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A) at 292; *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3); *Muller v Pam Snyman Eiendomkonsultante (Edms) Bpk* [2000]). The party alleging a tacit agreement must catalogue and prove the unequivocal conduct and circumstances from which the tacit agreement is to be inferred and must allege and prove the terms of the contract (see: *Roberts Construction Co Ltd v Dominium Earthworks (Pty) Ltd* 1968 (3) SA 255 (A); *First National Bank of Southern Africa Ltd v Richards Bay Taxi Centre (Pty) Ltd* (1999) 2 ALL SA 533 (N)).

[56] In *Muhlmann v Muhlmann* 1984 (3) 102 (A) at 124 C it was stated that the true enquiry is whether it was more probable or not that a tacit agreement had come into existence.

[57] In the case of *McDonald v Young 2012* (3) SA 1 (SCA) at p11 para 25 the following was stated regarding tacit agreements:

"It is trite that a tacit agreement is established by conduct. In order to establish a tacit agreement, the conduct of the parties must be such that it justifies an inference that there was consensus between them. There must be evidence of conduct which justifies an inference that the parties intended to, and did, contract on the terms alleged".

[58] The Plaintiff's Counsel referred to the case of *City of Cape Town (CMC Administration) v Bourbon- Leftley NNO* 2006(3) SA 488 para 19 where the following was stated by Brand JA regarding tacit agreements:

"A discussion of the legal principles regarding tacit terms is to be found in the judgment of Nienaber JA in Wilkins NO v Voges [1994] ZASCA 53; 1994 (3) SA 130 (A) at 136H-137D. These principles have since been applied by this court, inter alia, in Botha v Coopers & Lybrand 2002 (5) SA 347 (SCA) paras 22-25 and in Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and another [2004] 1 All SA 1 (SCA) paras 50-52. As stated in these cases, a tacit term is based on an inference of what both parties must or would necessarily have agreed to, but which, for some reason or other, remained unexpressed. Like all other inferences, acceptance of the proposed tacit term is entirely dependent on the facts. But, as also appears from the cases referred to, a tacit term is not easily inferred by the courts. The reason for this reluctance is closely linked to the postulate that the courts can neither make contracts for people, nor supplement their agreements merely because it appears reasonable or convenient to do so (see Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 532H). It follows that a term cannot be inferred because it would, on the application of the well known 'officious bystander' test, have been unreasonable of one of the parties not to agree to it upon the bystander's suggestion. Nor can it be inferred because it would be convenient and might therefore very well have been incorporated in the contract if the parties had thought about it at the time. A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such a term if it had been suggested to them at the time (see Alfred McAlpine supra at 532H-533B and Consol Ltd t/a Consol Glass supra para 50). If the inference is that the response by one of the parties to the bystander's question might have been that he would first like to discuss and consider the suggested term, the importation of the term would not be justified. In deciding whether the suggested term can be inferred, the court will have regard primarily to the express terms of the contract and to the surrounding circumstances under which it was entered into. It has also been recognised in some cases, however, that the subsequent conduct of the parties can be indicative of the presence or absence of the proposed tacit term (see Wilkins NO v Voges supra at 143C-E; Botha v Coopers & Lybrand supra para 25)".

[59] In my view the objective facts such as the various draft agreements which exchanged hands and which were never signed as well as the correspondence exchanged between the parties and the minutes of meetings referred to in evidence, all of which constitutes objective evidence, militates against the coming into being of a tacit three year contract of employment.

[60] The Plaintiff testified that he did not receive the attachment to the covering e-mail

dated 26 September 2012 from Mr Moraba in respect of the renewal of the Executive employment contract for a period of three years. This e-mail states inter alia as follows:

"Subject RE: Renewal of Executive Employment Contract- Sydney Mutupe- 15-05-2012 Importance: High

Dear Sydney

Attached please find a copy of Renewal of the Executive Employment Contract for your consideration...

Looking forward to finalising the Renewal of your Contract..."

[61] The Plaintiff testified that he received the e-mail but did not receive the attachment. He stated that as the subject line *"Re: Renewal of Executive Employment Contract- Sydney Mature- 15-05-2012"* was always the same in his communications with Mr Moraba he did not give much thought to it. Surely the Plaintiff must have been alerted or at least curious when he read the first sentence and if not the first sentence, then the last sentence of the above quoted e-mail and one would have expected the Plaintiff to query the e-mail and/or to request Mr Moraba to send the attachment to him. The e-mail further stated *"Importance High".* Contrary to the Plaintiff's explanation that the subject line was always the same, in an e-mail, six days earlier, dated 20 September 2012, by Mr Moraba to the Plaintiff, the subject line read *" Re: Bonus Payment Reconciliation"*, - completely different to the subject line of the email dated 26 September 2012. The Plaintiff testified that the first time he saw the renewal of contract of employment was when he saw the Defendant's Plea.

[62] The following day on 27 September 2012, the Plaintiff addressed an e-mail to Mr Moraba and enclosed an internal memorandum dated 26 September 2012 which provides inter alia as follows:

"Proposal to conclude discussion on the following outstanding matters:

1. *Bonus calculation*
2. *<u>Renewal of employment contract and role description</u> (my underlining)*
3. *Nature of risks I am deemed to have undertaken by accepting secondment to GEHS"*

[63] Once again, the Plaintiff makes no mention in the internal memorandum that he has a contract of three years until 2014 as Executive Manager Corporate Strategy. The words *"outstanding matters"* that the Plaintiff utilised in his internal memorandum indicate that his employment contract and role description still needed be determined.

The Plaintiff also mentioned in this internal memorandum that the Defendant requested him to sign a one year contract backdated to September 2011. It is clear that the Plaintiff was disappointed that the position of Executive Manager Corporate Strategy in April/May 2012 was allocated to Ms Mamatela. This is clear from the Plaintiff's internal memorandum in which he addressed the issue and stated "*without notice*", the Defendant appointed head of strategy in April/May 2012 to Ms Mamatela…" The Plaintiff's testified regarding the meetings of 4 September 2012 and 17 September 2012 which he referred to in his internal memorandum that he and Mr Moraba *"did not seem to be agreeing, we did not seem to have anything concrete that we can work on, there is no foundation that we are working on"* confirms that there was no animus contrahendi between the parties.

[64] Mr Moraba testified that the three year fixed term contract of employment was attached to the covering email dated 26 September 2012. Mr Moraba also testified that subsequent two meetings were held between him and the Plaintiff on 27 September 2012 and on 10 October 2012 and that the Plaintiff was emotional at these meetings. The Plaintiff had heated discussions with Mr Moraba as he was not *"the person"* appointed as Executive Manger Corporate Strategy, the position offered to the Plaintiff in the said renewal of contract of employment. The Plaintiff denied that such meetings were held. Under cross examination the Plaintiff evaded answering the question as to whether he was prepared to share the position of Executive Manager Corporate Strategy with Ms Mamatela. After being asked the same question by the Defendant's Counsel three consecutive times, as the Plaintiff evaded answering, he finally responded :

"the issue is that it cannot be shared, it is one corporate, Executive Manager Corporate Strategy, you cannot share that".

[65] This evidence corroborates the testimony of Mr Moraba that the Plaintiff in the discussions he had with Mr Moraba was not prepared to share the position with Ms Mamatela as he did not want to be part of a pool of two persons as Executive Manager Corporate Strategy. The Plaintiff was in the employment of the Defendant up to 12 October 2012. On the Plaintiff's own version his internal memorandum dated 26 September 2012, which he sent to Mr Moraba on 27 September 2012, was a proposal to conclude on outstanding matters. It is highly improbable that Mr Moraba without having any further discussions with the Plaintiff would present him with the letter of 12 October 2012 terminating his services.

[66] It is most unfortunate what transpired in this matter. The Plaintiff was an experienced person who delivered outstanding results in the performance of his work. It

evident from Mr Moraba's testimony, as well the contents of the letter dated 12 October 2012 offering the gratuity wherein Mr Moraba stated *"…Your diligence in the leading and managing of both the MDl and GEHS projects, was self evident and will certainly leave a legacy"* that he held the Plaintiff in high regard. He complemented the Plaintiff right until the end. When reading the numerous e-mails exchanged between the Plaintiff and Mr Moraba it is clear that Mr Moraba ensured that all the Plaintiff's requests, which included above normal salary increases, as well as bonus recalculations, were satisfactorily addressed coupled therewith the Plaintiff was unable to furnish any facts which would have caused a change in Mr Moraba's cordial relationship with the Plaintiff. There was no reason or motivation for Mr Moraba to act in a manner which would be prejudicial to the Defendant to lose a skilled and exceptionally competent employee such as the Plaintiff. There would be absolutely no reason for Mr Moraba to lie.

[67] The fact that the parties orally agreed to the extension of time period of the GEHS by a period of one month supports the fact that there was a real possibility of the Plaintiff being employed by the GEHS. There would have been no other probable explanation as to why the Plaintiff would agree to the extension of this period if the Plaintiff already had a three year fixed period of employment with the Defendant if the possibility was that he would be employed by the Government programme after the GEHS was approved. It would not have been necessary to include the three year contract period especially in light of the fact that as testified by Mr Moraba the Plaintiff was at all times aware and this was conveyed to him on many occasions by Mr Moraba that the intention was to retain him in the Defendant's employment. This was duly done, when the Defendant offered him the renewal of contract of employment on 26 September 2012.

[68] It is noteworthy and significant that the Plaintiff testified that even if he did receive the renewal of contact of employment attached to the covering e-mail dated 26 September 2012 he nevertheless would have requested the involvement of HRER Committee as he and Mr Moraba was unable to agree. The Plaintiff did not elaborate or provide the reasons why he would need the involvement of HRER as his job description was that of Executive Manager Corporate Strategy. The probabilities once again indicate that he was aggrieved and disappointed with the position offered to him by the Defendant. It seems to me that he was expecting a position that he would not be sharing and a role description which was most suited to his competencies and skills as stated by him in his internal memorandum of the 26 September 2012.

[69] The Plaintiff's Counsel submitted that in applying the principles in the City of Cape Town supra, which was reaffirmed in the *Mc Donald v Young* supra, to the facts of the matter is not an easy task. Counsel for the Plaintiff continued that this is so because on the Plaintiff's version many of the terms were express as provided in tb175 and the

Plaintiff's response thereto in POC 4. He submitted that the subsequent oral agreement entered into between the parties, in March 2012 was not an agreement to extend the Plaintiff's renewal of contract of employment but an oral agreement to extend the time period within which the GEHS would be approved. The Plaintiff's Counsel further submitted that what was not express was the parties assent to the terms contended for during argument and it is submitted that it was in this sense that the term "*tacit*" was used in paragraph 16 of the Particulars of Claim. Neither of the parties signed the documents in question giving an unequivocal indication of their assent to the material terms contained therein.

[70] The Plaintiff's Counsel submitted that despite the various draft versions of the renewal of contracts of employment, the essence of the terms of the contract of employment have been pleaded and proved, namely a period of three years, the Plaintiff's annual remuneration, and his job description as Executive Manager Corporate Strategy. The Plaintiff's Counsel submitted in his heads of argument that the testimony proved that the parties concluded a contract of employment on the terms as pleaded by the Plaintiff and that the court should therefore consider POC 3 read with POC 4. I do not agree with these contentions made by the Plaintiff's Counsel. Firstly the Plaintiff's evidence contradicted his pleadings. Secondly, the Plaintiff's own version does not support the conclusion of a contract of employment as alleged by the Plaintiff.

[71] In so far as the Plaintiff's contention that his contract of employment was prematurely terminated I quote hereunder from the transcript the questions posed to the Plaintiff by the Defendant's Counsel and his responses thereto:

"What was the contract that was prematurely terminated?--- Three year agreement as Executor Manager Corporate Strategy....
So when you were terminated, as you have put it, did you have a fixed three year contract? ---It was still under negotiation.
It was was still under negotiation? ---Yes...
So, it was not yet a contract? ---No.
So the NFHC (the Defendant) breached a contract that was not yet in existence is that the basis of your claim? ---The NFHC breached the contract that was in negotiation but not yet signed".

It is abundantly clear that no three year term contract of employment was concluded between the parties as contended by the Plaintiff. In this part of the Plaintiff's evidence, the Plaintiff destroyed any prospect of success which he might have had. It is clear that the parties were in negotiation at all relevant times and that they did not reach any

agreement regarding to at least the term (the period) of the Plaintiff's further employment with the Defendant.

[72] Taking into consideration the testimony of the Plaintiff and Mr Moraba, the various renewal of contracts of employments on the terms set out in POC 3 and/or POC 4 and the subsequent oral agreement as set out in the Plaintiff's pleadings, the different versions of the renewal of contracts of employment contained in the trial bundle, the numerous email correspondence, the various other documentation which were referred to in evidence, are in my view inconsistent with the parties having reached consensus on the terms as contended by the Plaintiff. The Plaintiff's evidence was contradictory and inconsistent.

[73] It is of no consequence whether the Plaintiff did receive the renewal of contract of employment referred to in the covering e-mail dated 26 September 2012 for the reason that the Plaintiff would not have accepted that appointment and the Plaintiff did not plead such version.

[74] Accordingly I find that the Plaintiff failed to establish the existence of a contract of employment as contended by him and I dismiss the damages claim.

[75] I now turn to the Plaintiff's incentive claim.

[76] The Plaintiff's pleadings in this claim are substantially the same as in his damages claim. Plaintiff's Counsel conceded, correctly in my view, that there was insufficient evidence to support the Plaintiff's claim which was based upon the premise that his performance, and that of the Defendant, had to be rated at 100% and that the Defendant's performance was not to be taken into account in the calculation of the Plaintiff's bonuses. The Plaintiff's Counsel conceded the Plaintiff's claim for underpaid bonuses and also conceded that part of the Plaintiff's claim in respect of incentive bonuses which the Defendant pleaded were premature as such amounts were due but not yet payable at the time the Plaintiff instituted action. I add that subsequently the Defendant did make payments up to date of these amounts when they became payable.

[77] The Plaintiff's Counsel submitted, however, that the Plaintiff is entitled to an incentive bonus which the Defendant has not paid is in respect of the prorated period being the Plaintiff's last six months of his employment for the period 1 April 2012 to 30 September 2012. He contended further that the Defendant did not plead that the claim in respect of this prorated period was premature at the date the action was instituted by the Plaintiff. The Plaintiff's Counsel argued that the Defendant in paragraph 44.4 and

44.5 of its Plea stated that certain incentive amounts were due to the Plaintiff but not yet payable in respect of the period March 2011 and March 2012. The Plaintiff's Counsel argued that the Defendant pleaded that the Plaintiff's action is premature in respect of "these amounts " (my underlining). He submitted that the words "these amounts" as contained in the Defendant's Plea did not pertain to the part of the claim pertaining to the prorated period of six months. Accordingly, this part of the Plaintiff's claim relating to the prorated period is not premature.

[78] The Defendant's Counsel submitted that the onus is on the Plaintiff to prove the incentive amounts claimed is due and payable, it is thus not necessary for the Defendant to plead that the claim is premature. He further argued that, the Plaintiff's pleadings state that the incentive amounts for the prorated period were due and the amounts were payable as at from March 2013, the Plaintiff, however instituted action against the Defendant on 18 February 2013 prior to the amounts becoming payable. In support of this submission Defendant's Counsel referred to the case of *Weenen Transitional Local Council v Van Dyk* 2002 (2) ALL SA 482 (AD).

[79] As stated hereinabove, it is trite law, that he who alleges must prove and that the onus is on the Plaintiff to prove his claim. On the Plaintiff's own version, he failed to establish that the amount claimed was due and payable to him at the time he instituted action on 18 February 2013. I quote paragraph 31 of the Plaintiff's Particulars of Claim of the incentive claim where the following is pleaded:

"… the Plaintiff became entitled to receive the following percentages of his annual remuneration by way of a bonus from the Defendant in the years set out below….. March 2013 year 1 50%, March 2014, year 2 30% and March 2015 year 3 20%".

[80] It is abundantly clear that on the Plaintiff's own version the incentive claim in respect of the prorated period was prematurely launched in that the Plaintiff instituted action against the Defendant on 18 February 2013 and the amounts became payable in March 2013, March 2014 and March 2015 respectively.

[81] I add that, in paragraphs 7.5.5 and 7.5.5.1 of the Defendant's Plea in the gratuity claim the following is stated:

"On the 18 February 2012 the Plaintiff instituted an action against the Defendant…. claiming R 2 363 181.00 (the total amount claimed by the Plaintiff in the incentive claim-my insertion) as specific performance of an alleged obligation on the Defendant to pay incentive amounts to the Plaintiff: the aforesaid claim for payment of incentive payments was inflated, and premature…"

[82] Taking all the above factors into consideration I find that the Plaintiff's claim in respect of the prorated period was also prematurely launched.

[83] Even if I am wrong and also due to the fact that all the issues have been crystallised and have been canvassed and considering that during the course of the proceedings the Plaintiff's claim in respect of the incentive amounts of the 50% and the 30% for the prorated six month period became payable (save for the 20% incentive amount which becomes payable in July 2015) I will determine whether the Plaintiff would be entitled to receive payments of such amounts.

[84] The Plaintiff's Counsel submitted that the Defendant's contention that prorated bonuses are not paid cannot be accepted as the Plaintiff's initial bonus, for the period 1 August 2008 to 31 March 2009 was prorated. He added that the three year rolling incentive scheme, as set out in the DPE Remuneration Guidelines has no provision depriving employees of prorated bonuses when they leave employment, nor could Mr Moraba point to one when asked to do so in cross-examination. The Plaintiff's Counsel submitted that none of the written instruments bandied about during the negotiations between the Plaintiff and Mr Moraba contained a provision excluding bonuses for uncompleted years upon departure. The Plaintiff's initial agreement also did not refer to such a limitation. The Plaintiff's Counsel submitted that there is also no provision requiring the employee to be in employment to become entitled to a bonus already earned – in fact Maroba testified that the Board of Defendant was considering introducing such a provision.

[85] The Plaintiff's Counsel continued, the question is not whether there is something prohibiting it, it is whether there is something entitling it. According to the Plaintiff's Counsel all the various contracts of employment referred to by the Plaintiff and the Defendant provide for an incentive scheme based on the DPE Remuneration Guidelines. The DPE Remuneration Guidelines state that when you are employed you are entitled to an incentive bonus. He argued, that it is not stated therein that the incentive bonus has to be calculated with reference to the financial year of the institution concerned and that there is no provision in the DPE Remuneration Guidelines that an incentive bonus for a prorated period cannot be awarded.

[86] The Plaintiff's Counsel argued further that the DPE Remuneration Guidelines provide as follows: *"in the event of early termination there should be no automatic entitlement to the incentive".* Neither on the Plaintiff version, (the Plaintiff's contract of employment was unlawfully terminated by the Defendant, nor on the Defendant's version the Plaintiff's contract terminated on 30 September 2012) was there an early termination. Accordingly, the prohibition as provided in the DPE Remuneration Guidelines does not apply to the Plaintiff's claim of an incentive bonus.

[87] The Plaintiff's Counsel submitted that given the above considerations the Plaintiff is entitled to receive a bonus in respect of the period 1 April 2012 to 30 September 2012. His annual remuneration during this period was R1 605 000, 50% of which is R802 500. Assuming 80% performances by both the Plaintiff and the Defendant and that he was entitled to a calculation on 100% of his income (see para 5.1 page 330 of the trial bundle):

R802 500 x .8 x .8 = R513 600 together with interest from date of judgment. Even on the way in which the Defendant paid such bonuses, the Plaintiff would have received 80% of this amount by the time judgment is delivered – 50% in July 2013 and 30% in July 2014. The interest the Plaintiff has lost in not receiving these payments more than compensates for the failure to discount the 20% he would have received in July 2015.

[88] The Defendant's Counsel submitted that the Plaintiff has not pleaded or proved any contractual basis upon which the Plaintiff is entitled to an incentive payment for a prorated period. The Defendant's Counsel argued that the Plaintiff's employment with the Defendant terminated on 30 September 2012, accordingly, he did not qualify for an incentive payment for the March 2013 financial year end, as he only worked for the Defendant for six months of the financial year which commenced on 1 April 2012 and ended on 31 March 2013. The Defendant's Counsel further argued that the various renewal contract of employments relied upon by the Plaintiff and the Defendant provide that the performance of the Plaintiff and the Defendant is to be determined at the end of the financial year, being March 2013 and the Plaintiff was employed until the 30 September 2012.

[89] The Defendant's Counsel submitted that the payment of incentive bonuses are discretionary and that Mr Moraba representing the Defendant did not exercise his discretion at the end of the financial year in March 2013 to assess the Plaintiff's performance and there was no contractual obligation for him to do so. Moreover, Mr Moraba did not provide evidence in this regard. The Defendant's Counsel submitted that the Plaintiff's performance cannot be determined on a speculative basis, to assume the Plaintiff's performance for the last six month period when he was no longer employed by the Defendant. He further argued that the Plaintiff cannot base his bonus claim

calculations, as set out in the contract of employment POC 2 as it has been not pleaded and in any event POC 2 is a contract upon which the Defendant relies and the Plaintiff rejects. In support of this submission the Defendant's Counsel referred to the Rhodesian Appellate Division case of case of *Sager Motors (PVT) v Patel* 1968 (4) [RAD] p99.

[90] I agree with the Defendant's Counsel. The Plaintiff pleaded his case on a three year rolling incentive scheme. He did not plead any contractual basis upon which the court can entertain the Plaintiff's entitlement to an incentive bonus for a prorated period. The Plaintiff did not plead any basis upon which the Defendant could or should have exercised its discretion to award an incentive for a prorated period. In any event, I accept the testimony of Mr Moraba that it is the practice of the Defendant that the sustainability of performance of both the Plaintiff's performance and the Defendant's performance is only determined at the financial year end. Mr Moraba testified that the Plaintiff would only be entitled to an incentive, if the Plaintiff was in the employment of the Defendant at the financial year end March 2013 and as the Plaintiff left in the middle of the financial year he would not be entitled thereto. Mr Moraba evidence was that the Defendant's performance for the year ending 31 March 2013 was "*80% something*" however he was not certain. Mr Moraba stated that the Plaintiff's performance was 82% in the April 2012 review. However, no evidence was led and nor was evidence obtained by Mr Moraba as to whether he assessed the Plaintiff's performance at the end of the financial year March 2013. In so far as the submission that the Plaintiff in his first year of employment was allocated a prorated incentive bonus, I point out that the Plaintiff at that stage was in the employment of the Defendant until the financial year end March 2009.

[91] I mention further that the Plaintiff's Counsel in calculating the Plaintiff's incentive bonus for the prorated period 1 April 2012 - 30 September 2012 (no evidence was obtained or provided by Mr Moraba) assumed Plaintiff's performance at 80% which was the percentage awarded to the Plaintiff by Mr Moraba in the April 2012 review. The Plaintiff's Counsel further in calculating the Plaintiff's incentive placed reliance upon the renewal of the contract of employment which the Defendant relied upon and which the Plaintiff rejected (see Sager case supra p101).

[92] In any event considering my finding that the Plaintiff has failed to discharge its onus to establish the existence of a renewal of contract of employment on the terms contended by the Plaintiff, I find that there is no contractual basis entitling the Plaintiff to payment of an incentive bonus in respect of the prorated period.

[93] Accordingly I dismiss the incentive claim.

[94] In relation to the gratuity claim, I will determine, firstly, the Plaintiff's entitlement

thereto and in this context I will consider whether the offer of gratuity was validly withdrawn and secondly whether there was a tacit rejection by the Plaintiff of the offer of gratuity.

[95] During closing argument, the Defendant amended its Plea to include the further alternative defence of the withdrawal of the offer of gratuity on the basis of an e-mail dated 19 October 2012 by the Defendant's erstwhile attorneys to the Plaintiff's erstwhile attorneys.

[96] The Defendant made an offer of gratuity in an amount of R 400 000.00 as contained in a letter dated 12 October 2012 addressed by Mr Moraba to the Plaintiff. The letter provides as follows:

"... END OF FIXED PERIOD CONTRACT

1) We refer to your fixed contract of employment with the National Housing Finance Corporation ("the Corporation") - [the Defendant- my insertion] concluded on or about September 2011 and terminating on 30 September 2012 ("the Contract").

2) We refer to the various interactions between yourself and the Corporation with regard to identifying a suitable role for you to occupy. While the Corporation expressed its willingness to create a strategy pool, where your competences would have been utilised, in return, you expressed your unwillingness to accept this role.

3) Accordingly, we confirm that the Contract terminated on 30 September 2012, and that at present, there are no prospects of you assuming a different role to that already offered by the Corporation.

4) The Corporation would like to thank you for the meaningful contribution you have made, as a member of the Corporation's Executive Management team and in the various assignments you carried out while in the employ of the Corporation, Your diligence in the leading and managing of both the MDI and GEHS projects, was self evident and will certainly leave a legacy.

5) After much consideration, as a gesture of good faith, the Corporation would like to extend a gratuity, equivalent of R400 000.00..."

[97] On the same day an e-mail was sent by the Plaintiff to Mr Moraba in which the

Plaintiff stated *inter alia* as follows:

"I will brief my legal Counsel on this matter on Tuesday. In all probability, the matter will enter a new arena, all communications will be thru legal Counsel".

[98] On 16 October 2012 the Plaintiff's erstwhile attorneys sent a letter to Mr Moraba in response to his e-mail dated 12 October 2102. In this letter it is stated that the Defendant summarily and unilaterally terminated the Plaintiff's services. A fixed term contract is alleged and that Plaintiff's services were unlawfully terminated on 30 September 2012. The letter, recorded that the Plaintiff tendered his services to the Defendant, as his services were prematurely terminated.

[99] On 19 October 2012 the Defendant's erstwhile attorneys sent an e-mail to the Plaintiff's erstwhile attorneys which stated as follows:

"...in light of what is happening, the spirit in which the gratuity was extended by our client to your client on 12 October 2012 has been sullied. As a result, our client shall no longer be paying to your client a gratuity..."

[100] The Plaintiff's Counsel in argument, did not dispute that the e-mail by the Defendant constitutes a withdrawal of the offer of gratuity prior to acceptance thereof by the Plaintiff. However, the Plaintiff's Counsel argued, that there is no evidence before the court regarding the withdrawal of the offer of the gratuity. The Plaintiff's Counsel submitted that the agreement by the legal representatives at the pre-trial conference regarding documents was that they are what they purport to be but not to the proof of the contents thereof. I refer to the pre-trial minutes regarding the production of documents, it is stated therein as follows: *"the documents in the trial bundle be accepted as being what they purport to be, without production of the original, unless either party advises the other, in writing, to the contrary by 16 May 2014, in which event the document will have to be proved in the normal way".* The Plaintiff's Counsel argued that the Defendant had to lead the evidence by the author of the document as well as the evidence of the Defendant who gave the instruction to its attorney to withdraw the offer of gratuity.

[101] During cross-examination the Defendant's Counsel questioned the Plaintiff regarding the e-mail dated 19 October 2012 containing the withdrawal of the offer of gratuity. Plaintiff's Counsel objected to the line of questioning on the basis that the

withdrawal of the offer of gratuity had not been pleaded. However, he submitted, that he assumed that the question by Defendant's Counsel had other relevance, and on that basis he did not object. I quote the relevant questions by Defendant's Counsel and the Plaintiff's responses thereto:

"Up to the time of this...email [21 May 2013] there is not a single document from either you or your attorney ...to the Defendant and say, we accept the offer of R 400 000.00? --- No
In fact, even this email is not an acceptance it is a letter of demand, not so? --- Yes..."

Later under cross examination:

[102] The Defendant read out the contents of the email containing the withdrawal of the offer of gratuity to the Plaintiff during the proceedings. *"You never actually came back to the Defendant and said I accept this offer? --- No*

In the time you did not accept the offer, you sued them twice? --- Yes..."
And you received an email saying, the offer has been sullied by your behaviour, not so? --- I received the email..."

[103] The Plaintiff acknowledged that he had received this e-mail and that the offer of gratuity was rejected by the Defendant in the e-mail dated 19 October 2012. The Defendant's Counsel argued that it was the Plaintiff who discovered and produced the document and therefore the Plaintiff obviously received it.

[104] The e-mail was clearly written by the Defendant's erstwhile attorney. It is trite that a letter emanating from an attorney has been written on the instructions of the client. The intention of the Defendant to withdraw the offer of gratuity is expressed in the said e-mail. It is clearly not a forgery as it relates to the subject matter in question and was produced by the Plaintiff. Accordingly I find no merit in the Plaintiff's Counsel's argument.

[105] In the event I am wrong, the second issue I will determine is whether the Plaintiff tacitly rejected the Defendant's offer of gratuity.

[106] The wording contained in the gratuity letter are of primary importance and are sufficiently clear that a conclusion can be reached from the "*linguistic treatment*" alone (see: *Blaikie- Johnstone v Holliman* 1971 4 SA 108 (D)). It is clear from the wording of the offer of gratuity that it was made as the Plaintiff's contract of employment had been terminated by the effluxion of time and the Defendant extended the gratuity as a gesture

of goodwill in thanks for the meaningful contribution the Plaintiff made whilst he was in the employment of the Defendant. The contents of the letter are explicit, the Plaintiff's contract of employment was terminated through the effluxion of time on 30 September 2012.

[107] On the same day, 12 October 2012, that the Plaintiff received the offer of gratuity as his contract of employment had expired, the Plaintiff sent the e-mail quoted above to Mr Moraba that he would be briefing legal Counsel and that all communications between the parties would be through legal Counsel. It is clear therefrom that the Plaintiff did not accept the termination of his contract of employment. The Plaintiff duly instructed attorneys to act on his behalf. Four days after the offer of gratuity was made, the Plaintiff's erstwhile attorneys sent the letter dated 16 October 2012 to Mr Moraba disputing the legality of his parting. Soon thereafter the Plaintiff instituted the two actions against the Defendant in the damages claim and in the incentive claim. The Plaintiff in his testimony stated that that there was no agreement between the parties to terminate his contract of employment and he did not accept the offer of gratuity as he was for all intents and purposes still in the employ of the Defendant. In *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 Watermeyer ACJ said: *"...Generally, it can be stated that what is required in order to create a binding contract is that acceptance of an offer should be made manifest by some unequivocal act from which the inference of acceptance can be logically drawn".* (see further *Be Pop a Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2003 SA 327 SCA[10]; *Hubbard v Mostert* 2010 SA (WCC) [10]. In my view it cannot be inferred by the conduct of the Plaintiff that there was any such unequivocal act from which an inference of acceptance can be drawn. To the contrary the Plaintiff's conduct was tantamount to a tacit rejection of the offer of gratuity.

[108] I add that even the letter on the 21 May 2013, seven months after the gratuity was made by the Plaintiff's erstwhile attorney to the Defendant's erstwhile attorneys was formulated as a letter of demand which is also against an intention to accept the offer of gratuity.

[109] Accordingly I dismiss the gratuity claim.

Costs

[110] It is in the discretion of the court as to whether the costs for the employment of two Counsel is warranted. The question is whether it was reasonable for the Defendant to employ two Counsel. It is a matter of judicial discretion to be exercised, with regard to the amount involved, the complexity of the matter, the nature of the issues in dispute and the length of the hearing and the argument in the three actions. I am of the view that the complexity of this matter involving the numerous contracts, the calculations of

the incentive bonuses and the amount of the quantum in respect of the three actions warrant the appointment of two Counsel. The damages claim was previously set down for trial as a separate action on 26 March 2014. This was before the three claims were consolidated. At the time, both the Defendant's senior and junior Counsel was on brief for the trial. The trial on 26 March 2014 was postponed at the Plaintiff's request. The Plaintiff tendered the costs occasioned by the postponement including the costs of one Counsel. The costs of the second Counsel were reserved for decision by the trial court. I am of the view for the reasons aforementioned that the employment of two Counsel was reasonable and necessary and, I accordingly award the costs of second Counsel in respect of the first action which was postponed on the 26 March 2014.

[111] I accordingly make the following order:

The three actions (under case numbers 2012/47015; 2013/06184; 2013/30024) constituting the consolidated action are dismissed with costs including the costs of two Counsel, such costs to include the costs of the second Counsel for the postponement of the trial on 26 March 2014 in respect of the first action under case number 2012/47015.

_____
G DAMALIS
ACTING JUDGE OF THE HIGH COURT

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DATES OF HEARING	26-30 MAY 2014; 5 SEPTEMBER 2014; 12 SEPTEMBER 2014
DATE OF JUDGMENT	21 NOVEMBER 2014