REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Reportable: Yes
Of interest to other judges: Yes
12 March 2021 Vally J

Case number: 17766/2020

In the application of:

Benjamin Trisk **Applicant**

and

Exclusive Books Group (Pty) Ltd **Respondent**

JUDGMENT

Vally J

[1] The applicant, Mr Benjamin Trisk (Mr Trisk) is the erstwhile Chief Executive Officer (CEO) of the respondent, Exclusive Books (Exclusive). His employment with Exclusive terminated on 19 March 2018 by dint of a settlement agreement concluded between himself and Exclusive (the agreement). He and Exclusive are not able to agree on the meaning and import of sections of the agreement, which prompted him to launch this application. He seeks an order compelling Exclusive to,

a. apply to the South African Revenue Service (SARS) for a tax directive in respect of payments made to him in terms of the agreement and,

b. issue a revised IRP5 for the 2019 tax year to him.

[2] If Exclusive does not apply for the directive, he asks for he 'will bring an action against' it 'for payment of R531 769.00' for damages incurred by him due to its failure to adhere to the agreement.

Background

[3] On 29 September 2017 Mr Trisk met with a Mr Mark Barnes (Mr Barnes) and a Mr Frank Boner (Mr Boner) of Exclusive to discuss certain concerns Exclusive had with regard to his conduct. At the conclusion of the meeting Mr Trisk agreed to accept a final written warning and acknowledged that he was indebted to Exclusive for a substantial amount of money. Four months later, on 28 January 2018, Mr Trisk received the final written warning letter from Exclusive which letter, (i) details a litany of very serious misconducts - involving the misappropriation of large sums of money - he is alleged to have committed, (ii) calls upon him to sign an acknowledgement of debt of R876 844.70, in addition to another acknowledgement of debt in the amount of R891 806.00 he had already signed and, (iii) records that he is to follow certain protocols regarding the execution of his duties.

[4] On 12 February 2018 Mr Trisk was suspended on full pay. He was informed that a disciplinary enquiry would be held allowing him an opportunity to meet a case of misconduct that Exclusive would be making against him. This was prompted by the fact that, subsequent to the issuing of the final written warning letter, more evidence

of misconduct on his part came to the attention of the board of Exclusive. The letter reads in full:

'12 February 2018

ATTENTION: BENJAMIN TRISK

Dear Benjamin

RE: NOTIFICATION OF SUSPENSION

1. It is to be recorded that you chose not to attend this board meeting.

2. I confirm that the prima facie allegations against you that have come to the fore (and tabled at the meeting) relate to, inter alia, the following:-

   2.1 on the 22nd December 2016 you sent an e-mail to Len Stapelberg without authority and instructed him to pay you an amount of R400,000.00 (four hundred thousand Rand) in respect of a unilateral salary increase taken by yourself for the year to 31 March 2017. Neither Frank Boner nor Mark Barnes authorized any such increase;

   2.2 during the period from April 2016 to March 2017 you wrongfully made a total of 69 (sixty nine) cash withdrawals on your Company credit card from various ATM machines totalling the sum of R273,000,00 (two hundred and seventy three thousand Rand). These amounts remain as owing by you in the books of the Company;

   2.3 during the period from 1 March 2016 to 31 March 2017:

      2.3.1 you were advanced a total of R552,602.15 (five hundred and fifty two thousand six hundred and two Rand fifteen Cents) in Foreign Currency in respect of overseas trips undertaken by yourself, some of the expenditure of which was only submitted in November / December 2016 and finally checked by the Company in January 2018. Of the aforementioned amount only R103,788-87 was accounted for with appropriate vouchers. The balance of R448,803-28 remains owing by you in the books of the Company

      2.3.2 During the period from June 2016 to February 2017 you utilised, without authority, the Company credit card for personal expenses totalling the sum of R40,309.35 (forty thousand three hundred and nine Rand thirty five Cents). This amount remains owing by you in the books of the Company;

   2.3 you, without authority, took a cash advance of an amount of R30,000.00 (thirty thousand Rand) by a direct payment from the Company into your personal bank account on the 8th April 2016; This amount remains owing by you in the books of the company;

   2.4 Between the 1st September 2017 and 11 November 2017 both locally and whilst travelling to China on a business trip, you without authorisation from Frank Boner, used the Company credit card for

personal expenses in the sum of R19,116-58 (Nineteen Thousand One Hundred and Sixteen Rand fifty eight cents). Further, upon your return you failed to disclose these personal expenses to Frank Boner. Whilst the Company has deducted the aforementioned sum of R19,116-58 from your salary advance in January 2018, it will be submitted that your conduct is unacceptable and cannot be condoned.

2.5 despite you relinquishing your company credit card to Frank Boner, as a result of your continued unauthorised use thereof, you in or about December 2017 without authorisation from Frank Boner, instructed Ben Williams to furnish you with his company credit card in order for you to use same on a business trip to Cape Town. This conduct is *una*cceptable and cannot be condoned. Insofar as you needed to cover company expenses during the trip, this could have been discussed with Frank Boner prior to your departure.

2.6 despite you agreeing in September 2017 that the restaurant and coffee shops would report directly to Frank Boner, during January 2018, you proceeded to advise the employment agency and to interview an executive chef for the restaurant without Frank Boner's knowledge. You subsequently met with the candidate and Frank.

2.7 you continually do not invite Frank Boner, who is the Chief Financial Officer ("CFO") and representative of the majority shareholder of the Company, from what are considered to be corporate affairs directly related to Frank Boner's responsibilities in the business. These include, inter alia:-

2.8 ACSA negotiations;

2.9 Design meetings, which involve CAPEX;

2.10 Store stock turnover reviews which relate directly to working capital.

2.11 Lease and Rental matters relating to existing and proposed new stores;

2.11[sic] during December 2017, you gave an instruction to Andrew Robson and Jacinta Boyle in the finance department without the prior authorisation of Frank Boner, to pay you in advance your January 2018 and your February 2018 salaries. Whilst the amount was eventually advanced to you after it had been brought to Frank Boner's attention, Frank Boner made it clear that it was unacceptable conduct, and would not ever be entertained in the future. Despite Frank Boner's invitation that you engage with him in order for him to understand your financial situation, you have failed to even acknowledge his communication. It will be submitted that your conduct is unbecoming of an employee in the position of CEO, and it sets a negative precedent and example to employees in the business.

2.12 you have not since December 2016 convened a director's board meeting nor have you had any interaction or reported back to the shareholders of the Company

2.13 on 25 January 2018 and 28 January 2018 respectively, you were forwarded and Instructed to sign an amended final written warning and an acknowledgement of debt which had previously been agreed to at a meeting held on the 29th September 2017. To date you have neither acknowledged receipt thereof nor signed same. This conduct, it will be submitted, is indicative of your conduct towards Frank Boner and the shareholders, in that you have failed to embrace the new structure positively as agreed at the meeting and in fact display a flagrant disregard to instructions given to you.

3. These are the preliminary allegations against you which the Company intends to investigate further and they do not constitute the final complaints of misconduct which may or may not be brought against you in due course.

4. Following the board meeting, during which you were to be given the opportunity to be heard prior to making a final decision *as* to whether or not you should be disciplined (and which meeting you chose not to attend), I confirm that the board has resolved that it is appropriate for you to be suspended, pending the outcome of a formal disciplinary enquiry.

5. Accordingly, your services as an employee are hereby suspended on full pay and without loss of benefits and with immediate effect, pending the outcome of a disciplinary enquiry before an appropriate chairperson.' (the quotation is verbatim)

[5] Just over a month later Exclusive decided to abort the planned disciplinary hearing. Instead it decided to terminate Mr Trisk's employment and simultaneously compensate him handsomely, despite him being accused of serially committing acts of extremely serious misconduct. According to Exclusive this was done 'to facilitate a speedy exit and avoid public embarrassment and scandal for both parties, but mainly for Mr Trisk'. Exclusive also says that this arrangement 'is commonly the case'. Whether this is so or not is irrelevant for our purposes though it does raise, even if only for academic reasons, the question of whether such an arrangement is consistent with the ethical values promoted by the *Constitution of the Republic Act 108 of 1996* or even by the common law.[1]

[1] In insolvency law, the concept 'commercial morality' is referred to, though the courts have yet to furnish a comprehensive meaning of it, see Nyhonyha and Others v Venter NO and Others (35508/20) [2021] ZAGPJHC 20 (22 January 2021)

[6] The compensation was recorded in the agreement, which was signed on 19 March 2018 and which in relevant parts reads:

> '2. RECORDAL
>
> It is recorded that:
>
> 2.1 the Employee is employed by the Company in the position of Chief Executive Officer;
>
> 2.2 the Parties have agreed that the employment of the Employee by the Company will terminate on the Termination Date by mutual consent;
>
> 2.3 the Parties hereby record the terms which govern the Termination of the Employee's employment by the Company on the grounds of mutual consent.
>
> 3. TERMS OF SETTLEMENT
>
> 3.1 The Employee hereby resigns as an employee and as director of the Company with immediate effect. The Company shall provide the Employee with the requisite CIPC documents to sign, reflecting his resignation as director.
>
> 3.2 The Company shalt pay the Employee his remuneration for the period 1 March 2018 to 19 March 2018. Such amount, less PAYE deduction, shall be paid to the Employee by 31 March 2018.
>
> 3.3 The Company shall pay to the Employee the equivalent of 9 (nine) months remuneration in the gross sum of R2 400 000.00 (two million four hundred thousand Rand), which amount includes notice pay, leave pay and any other statutory amount to which the Employee is entitled.
>
> 3.4 The amount to be paid by the Company in terms of clause 3.3 above shall be paid to the Employee (less any deductions which the Company may be required to make in terms of the applicable Income tax legislation and other statutory deductions) within 48 (forty eight) hours of the Company receiving a tax directive from SARS. The Company undertakes to do all things necessary, with utmost expedition, to assist the Employee in applying for, and receiving, a tax directive from SARS.
>
> 3.5 ...
>
> 3.6 The Company will extinguish the Employee's loan account [which stood at R1 644 564.00 at the time] with it, upon conclusion of this agreement, as a consequence of which the Employee will no longer be

indebted to the Company for any amount whatsoever, howsoever arising.

...

4. FULL AND FINAL SETTLEMENT

4.1 The Parties hereby acknowledge and agree that *by* entering into this Agreement. they shall have no further claim/s of any nature whatsoever, howsoever arising, against the other, including any claim arising from the Employee's employment by the Company, and its termination.

4.2 The Employee understands the consequences of entering into this Agreement, more particularly in regard to the waiver of his rights to refer an unfair dismissal dispute or any other dispute or claim of whatsoever nature arising from the employment relationship and the subsequent termination thereof.

4.3 The Employee has entered into this Agreement freely and voluntarily and has obtained independent legal advice in regard thereto.'

[7] In essence, Mr Trisk was compensated in the amount of a salary for 19 days, a cash payment of R2 400 000.00 and R1 644 564.00 in the form of a loan write-off in order to agree to the termination of his employment, despite being accused of filching more than R1m and of being derelict in his duties. In short, Mr Trisk accepted a handsome pay-out as *quid pro quo* for the termination of his employment. What the agreement demonstrates is that Exclusive is an employer that treats its employees, especially its CEO, very leniently.

[8] Two years later, Mr Trisk launched the present application which is based on the terms of the agreement. According to Mr Trisk the agreement specifically caters for Exclusive to apply for a tax directive for the payments received by him. This, he says, is consistent with an undertaking given to him by Exclusive that it would do all things necessary to apply for and receive a tax directive. He says further that Exclusive's obligation to apply for and receive a tax directive arises by operation of

the law. In this regard Mr Trisk draws attention to par 9(3)(d) of the Fourth Schedule to the Income Tax Act 113 of 1993 (the Act).

[9] Mr Trisk maintains that the payment of R2 400 000.00, being nine months' remuneration, plus the write-off of his debt constitute a 'severance benefit' as contemplated in par 9(3)(d) of the Fourth Schedule. Therefore, the payment qualifies for a tax deduction that can be obtained by application of a tax directive, which can only be applied for by Exclusive. After acquiring the tax directive, Exclusive would then use the source code 3901 on the IRP5/it3(a) certificate. Sometime during the latter part of 2019 Mr Trisk received an IRP5 certificate from Exclusive. The certificate reflected that Exclusive used source code 3601 and not source code 3901 to record the payment it made to Mr Trisk. Source Code 3601 applies to income received by the employee, whereas source code 3901 applies to gratuities. The former attracts a tax liability higher than the latter. The latter can only be used once the tax directive has been applied for and received. Hence, Mr Trisk's call for an interdict compelling Exclusive to apply for the tax directive.

[10] Exclusive disagrees. It says, firstly, Mr Trisk was orally alerted by Mr Boner that Exclusive regards the payment as remuneration and that it would be deducting pay as you earn (PAYE) taxation from it. He agreed to this and hence he is estopped 'from denying the correctness of the amount paid to him'. Secondly, his interpretation of the agreement as well as his contention regarding the applicability of par 9(3)(d) of the Fourth Schedule is plainly wrong. In support of its interpretation of the agreement Exclusive placed emphasis on the fact that Mr Trisk succeeded in avoiding having to face a disciplinary hearing where he risked being found guilty and being disgracefully

dismissed. Bearing this surrounding circumstance in mind, it says there never was any intention on its part to pay him - and any intention in his part to accept - 'severance benefits' in order to leave its employ. He wanted remuneration for nine months, as well as a write-off of his debt to Exclusive, to leave voluntarily and silently. That is what he received. Furthermore, he was not retrenched – as is understood in employment law - and therefore not entitled to the tax benefit he sought to acquire through the directive. Nor was his employment terminated because he had reached the age of 55 years.

[11] Mr Trisk agrees that he was not retrenched but maintains that this does not preclude him from receiving the benefits of a directive, as a directive is not reserved only for persons who are retrenched.

[12] After the founding and answering affidavits were filed Exclusive decided to apply for a tax directive by first writing to the Head: Stakeholder Relations at SARS, Mr Mark Kingon (Mr Kingon) in order 'to obtain advice on what Mr Kingon believed was the best way forward.' The Group CEO, a Mr Grattan Kirk (Mr Kirk) had a telephonic conversation with Mr Kingon. Mr Kingon asked for 'the documentation' to be sent to him. This was done. Mr Kingon addressed correspondence to Exclusive – I presume it was to Mr Kirk as it was Mr Kirk who telephoned him, but this is not in the papers – which correspondence has not been placed before court as it is marked 'confidential'. At some point during the exchange of correspondence Mr Kingon assumed the role of the 'Acting-Commissioner'. Why Mr Kingon who was a very senior employee of SARS was involved in what is a relatively simple dispute between one erstwhile employee and his erstwhile employer is not explained in the papers.

[13] After the correspondence was received, Exclusive instructed a tax consultant to apply for the directive online. This, according to Exclusive, is the very directive Mr Trisk asked for initially. Exclusive received the directive. It contains the following information:

> 'Reason for directive: Resignation
> ..
> Under the provisions of paragraphs 2 and 11 of the Fourth Schedule to the Income Tax Act, you are required to comply with directive as set out below, regarding the remuneration paid to the above-named employee or member of fund.
> Tax amounting to R2 026 656.00 to be deducted from the gratuity/lump sum payment of R4 503 680.00.' (Underlining added.)

[14] Exclusive took the view that the matter should now rest. Mr Trisk disagrees. He complains that the directive 'was incorrectly applied for'. By this he means that the application was flawed in that it designated the reason for the termination of his employment as a 'resignation'. Having accepted that he was not retrenched, Mr Trisk now takes issue with the claim that he resigned. Nevertheless, he remains adamant that Exclusive did not apply for the directive and should be compelled to do so by this court. In other words, this court should grant him the prayers referred to in [1] above.

Analysis

[15] Mr Trisk's case is that clause 3.4 of the agreement obliges Exclusive to apply for the directive. To this end, he relies particularly on the last sentence of the clause, which provides that Exclusive 'undertakes to do all things necessary, with utmost expedition, to assist' Mr Trisk 'in applying for, and receiving, a tax directive from SARS.' Mr Trisk understands this clause to mean that Exclusive had to apply for the tax directive. He is not oblivious to the fact that it actually says that Exclusive has only

undertaken to do everything 'to assist' him in acquiring the directive. His contention is that only Exclusive can apply for the directive. If he could apply for it he would do so, and then seek Exclusive's assistance if it was required. Since he seeks the directive but cannot acquire it, Exclusive is obliged to apply for it. By so doing it is complying with its obligation to 'assist him' to obtain it. There is much force in his logic. However, Exclusive's obligation only arises if it agrees that he qualifies for the directive. He does not qualify if the amount is paid as remuneration.

[16] Clause 3.3 states that the amount of R2 400 000.00 is the 'equivalent of 9 months remuneration'. It does not say that it is remuneration. However, clause 3.2 specifically makes reference to the payment as his remuneration – albeit for the period of 1 March 2018 to 19 March 2018 - while clause 3.3. does not. On the face of it, the phrase in 3.3 indicates that the payment is not remuneration. However, there is a further factor that has to be borne in mind. It is that the amount includes 'notice pay, leave pay and any other statutory amount to which the Employee [Mr Trisk] is entitled.' The inclusion of these amounts due to him indicates that the payment – albeit a lump sum one – is actually remuneration that is paid in advance. In terms of par 1 of the Fourth Schedule 'Remuneration' refers to payment received by an employee from an employer, 'whether in cash or otherwise and whether or not in respect of services rendered.' On this interpretation, and bearing in mind the evidence presented by Mr Boner that he and Mr Trisk understood the payment to be remuneration, I conclude that the payment was meant, and was understood by all concerned, to be remuneration. It was remuneration he received for avoiding the disciplinary hearing while agreeing to leave the employment of Exclusive voluntarily and silently.

[17] In the same vein, the payment to him was not a severance benefit as defined in s 1 of the Act which reads:

> 'severance benefit means 'any amount ... received by or accrued to a person by way of a lump sum from or by which arrangement with the person's employer or an associated institution in relation to that employer in respect of the relinquishment, termination, loss, repudiation, cancellation, or variation of the person's office or employment or of the person's appointment (or right or claim to be appointed) to any office or employment if:
>
> (a) such person has attained the age of 55 years.

[18] Mr Trisk's employment was not terminated because he reached 55 years of age and therefore his receipt of the money had nothing to do with his age.

[19] Exclusive, therefore, was correct in not applying for the directive. In any event it did subsequently apply for it and received it save that the outcome was not favourable to Mr Trisk. Mr Trisk's complaint that its application was flawed as it designated his termination as resignation is, in my holding, incorrect. He accepts, without more, that it was not because he was retrenched – sometimes referred to as a 'dismissal' for operational reasons. If we are to further accept that he was not terminated because he was found guilty of a misconduct serious enough to warrant immediate dismissal or because he was incapacitated, then at best for him he voluntarily resigned. Hence the characterisation of his termination as being a resignation is correct.

[20] Once the directive was received, Mr Trisk's complaint fell away. Exclusive could not be compelled to do that which it had already done.

[21] Exclusive also raised the issues of non-joinder of SARS, as well as estoppel based on Mr Trisk's representation to it at the time the agreement was concluded and for a period of two years after the payment was received by him. The conclusion I have arrived at makes it unnecessary for me attend to these issues.

Costs

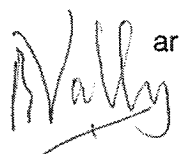
[22] Both parties sought costs on an attorney and client scale. They each believed that they should not be out of pocket. Mr Trisk contends that Exclusive was unnecessarily intransigent, forcing him to launch the application. Exclusive contends that Mr Trisk was not only unreasonable, deliberately untransparent and lacking in candour in the application. He did not inform the court of the fundamental reason for the termination of his employment, which was to save him the disgrace of being found guilty of misappropriating large sums of money over time and of being derelict in his duties. Thus, he should not have hauled it before court and forced it to expend resources defending itself, especially after it had applied for the directive and furnished it to Mr Trisk when it received it. Mr Trisk received it through his attorneys on 26 November 2020. I agree.

Order

[23] The following order is made:

a. The application is dismissed

b. The applicant is to pay the costs which costs after 20 November 2020 are to be taxed on an attorney and client scale.



Vally J
Gauteng High Court (Witwatersrand Local Division)

Date of hearing:	01 February 2021
Date of judgment:	12 March 2021
For the applicant:	Cathryn Read
Instructed by:	Bowman Gilfillan Inc
For the respondent:	Roxanne Blumenthal
Instructed by:	Lee Attorneys