REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

14/11/2016

CASE NO: A307/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

14:11:2016
DATE

SIGNATURE

THE OPEN WINDOW Appellant

and

DELAIDA ADELENE ADENDORFF Respondent

JUDGMENT

AC BASSON, J

[1] This is an appeal against the whole of the judgment of Magistrate Khoele in terms of which the court granted summary judgment against the appellant (the defendant) with costs.

The particulars of claim

[2] The respondent – Ms Adendorf (the plaintiff in the court *a quo)* - instituted action against the appellant - the Open Window (the defendant in the *court a quo*) - in terms whereof she claimed payment from the appellant arising from a written employment agreement ("the agreement") entered into between the parties. The respondent claimed that, in terms of this agreement, a bonus would be paid to her by the appellant in the month of her birthday equal to one month's salary.

[3] In December 2012 the respondent was paid her full bonus that was already due in September 2012. The appellant, however, failed to pay the respondent her bonuses for the respondent's birthday month (being September) for the years 2013 and 2014.

[4] The bonus due in September 2013 was for an amount of R 44 940.00 (before tax) and the bonus due in September 2014 was for an amount of R 47 636.40 (before tax). The respondent therefore claimed an amount of R 92 576.40 (before tax) from the appellant.

[5] The appellant filed a notice of intention to defend and the respondent applied for summary judgment against the appellant. As already pointed out, the court *a quo* granted summary judgment in favour of the respondent. It is against this judgment that the appellant is appealing.

[6] Before I turn to what is contained in the affidavit resisting summary judgment, it is necessary to briefly point out what is required of a defendant/respondent in such an affidavit. In essence the defendant/respondent must in the opposing affidavit disclose a *bona fide* defence that is good in law wherein is stated the nature and grounds of the defence and wherein the material facts on which the defences are based are disclosed.[1] A court must consider the facts upon which the defendant/respondent relies in order to decide whether the affidavit discloses a *bona fide* defence(s). Although the defendant/respondent need not deal exhaustively with the facts and the

[1] Rule 32((3) of the Uniform Rules of Court.

evidence relied upon to substantiate his or her defence, he or she must at least disclose a defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence(s).

[7] I am mindful of the fact that the defendant/respondent is not required to satisfy the court that the allegations are true. All that he or she needs to show is that there is a reasonable possibility that the defence(s) he or she advances may succeed on trial.[2] The defendant/respondent is therefore not required to advance a convincing defence, he or she is only required to advance a *bona fide* defence which is good in law. The Supreme Court of Appeals in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*[3] placed the purpose of summary judgment in its proper context as follows:

> "[31] So too in South Africa, the summary judgment procedure was not intended to 'shut (a defendant) out from defending', unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.
>
> [32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G - 426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and

---

[2] See in general: *Marsh and another v Standard Bank of SA Ltd* 2000 (4) SA 947 (W).
[3] 2009 (5) SA 1 (SCA).

> the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.
>
> [33] Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G - 426E."

Salient terms of the contract of employment

[8] In terms of clause 8.1 of the agreement the appellant would remunerate the respondent for her services in 2012 in an amount of R 32 000.00 (before tax) per month. The rate of remuneration is contained in a document annexed to the agreement as "Annexure A". Annexure A only refers to the respondent's salary and makes no mention of bonuses.

[9] In terms of clause 8.2 the appellant may, at the company's sole discretion on each anniversary of the agreement, revise the employee's remuneration. In doing so, the company shall take into account work ethics, performance, attendance, initiative, loyalty and the overall financial performance of the appellant's business as a whole during the preceding financial year. Further in terms of this clause all revisions made by the appellant to employees' remuneration shall be determined in the absolute discretion of the company "and are not guaranteed". Clause 8.2 makes no mention of any bonuses to be paid to employees.

[10] Clause 8.4 of the agreement on the other hand, deals exclusively with bonuses and stipulates that a "bonus will be paid by the company in the month of an employee's birthday, equal to one month salary". The issue of a bonus

is therefore addressed separately in the agreement and is not dealt with as part and partial of the clauses dealing exclusively with remuneration.

[11] Clause 15 of the agreement further states that "[n]o variation of this agreement shall be of any force or effect unless recorded in writing and signed by or on behalf of the parties or their representatives, duly authorised thereto".

Affidavit resisting summary judgment

[12] The appellant relied on two possible defences in its affidavit resisting summary judgment. (i) In terms of the first defence it is stated that there was an implied and/or tacit agreement between the parties in respect of the obligation to pay a bonus. In essence it is claimed that the appellant has a discretion whether or not a bonus is payable. (ii) In terms of the second defence, it is claimed that the parties had consulted on the issue pertaining to bonuses and have reached an agreement or understanding in respect of bonuses which amounted to an amendment to the obligation to pay bonuses as contained in clause 8.4.

[13] I will deal with each defence separately herein below. I should, however, point out that the two defence are, in my view, mutually exclusive: Either the parties have tacitly agreed to vary or amend the obligation to pay a bonus or the parties have expressly agreed to amend the obligation to pay a bonus pursuant to a consultation process during which the respondent agreed to accept a regime which amounted to a change in the obligation to pay a bonus.

Consultation

[14] The appellant contended that it was not in a financial position to make payment of the bonuses to the respondent and that this fact was communicated to her. In support of this contention a copy of an e-mail dated 1 March 2013 is attached to the papers. The author of the e-mail is a one Wimpie Jansen van Resburg ("Van Rensburg"). In this e-mail the respondent is invited by Van Rensburg to a consultation meeting scheduled for 4 March 2013 in order to discuss remuneration packages including the bonus structure.

From the e-mail it can be discerned that the aim of the meeting was to consult with the respondent and attempt to reach consensus in respect of changes to the written and binding conditions of employment between the parties and more in particularly in respect of the obligation to pay bonuses which obligation clearly emanates from the provisions of clause 8(4).

[15] According to the affidavit resisting summary judgment, the deponent to the affidavit (Mr Gert Dirkse du Toit – "Du Toit") was informed by Van Rensburg that the respondent had indicated that she would accept the fact that bonuses would not be paid on condition that she could have study leave every Friday in order to have to work on her doctoral degree.

[16] I have several difficulties with this defence: (i) Firstly, the deponent to the affidavit has no personal knowledge of the alleged agreement or understanding between Van Rensburg and the respondent. Du Toit merely states in the affidavit that he was informed by Van Rensbug of the understanding. No confirmatory affidavit has been attached to the affidavit resisting summary judgment. (ii) Secondly, the deponent relies on an e-mail inviting the respondent to a consultation meeting. Apart from a bold unsubstantiated allegation that there was such a meeting and what the outcome of the consultation meeting was, nothing is attached to the papers confirming firstly that the meeting did in fact take place and secondly what the outcome of the consultation meeting was. (iii) Thirdly, the allegation that an agreement was reached should also be read against the fact that clause 15 (1)(and (2) specifically provides that "[n]o variation of this agreement shall be of any force or effect unless recorded in writing and signed by or on behalf of the parties or their representatives, duly authorised thereto". No document is attached to the papers confirming that a consensus had indeed been reached and reduced to writing reflecting or confirming that an agreement had been reached which amended the clear and unambiguous obligation on the appellant to pay a bonus. In this regard the Appeal Court (as it then was) SA *Sentrale Ko-Op Graanmaatskappy Bpk v Shifren en Andere*[4] held that where

[4] 1964 (40 SA 760 (A).

the written contract between the parties provided that '... any variations in the terms of this agreement as may be agreed upon between the parties shall be in writing otherwise the same shall be of no force or effect'[5] that the contract could not be altered verbally and that to hold otherwise would be tantamount to deviating from the elementary and basic general principle that contracts entered into freely and seriously between parties authorised to enter into such contracts are in the public interest to enforce.[6] In *Brisley v Drotsky*,[7] the Court held that the principle laid down in the *Shifren*- case to the effect that a term in a written contract that all amendments to the contract have to comply with specified formalities, was still binding.[8] See also *Nyandeni Local Municipality v Hlazo*[9] where the Court also upheld the *Shifren*-principle as being good law:

> "[43] The judgment in *Shifren* convincingly deals with policy considerations such as the need to avoid disputes, evidential difficulties often associated with oral agreements, the need for certainty and clarity in the commercial environment, and the infringement of the right to contractual freedom to allow a departure from the elementary principle of *pacta sunt servanda*. The principle in *Shifren* has consistently been reaffirmed by the Supreme Court of Appeal and remains good law.

[17] In summary therefore and on a proper construction of the agreement, it cannot be concluded that there is a discernable or sustainable defence put up by the appellant: There is simply nothing before this court, apart from a unsubstantiated allegation, that the appellant and the respondent had come to some kind of agreement in respect of the non-payment of the bonus. The further e-mail attached to the papers to sustain the allegation of an agreement also does not take the matter any further. Firstly, the e-mail in which reference is made to a "vergunning" is dated more than a year later and secondly, does not refer to any agreement in respect of bonuses.

---

[5] Ibid at 764 A.
[6] Ibid at 766-767.
[7] 2002 (4) SA 1 (SCA).
[8] Ibid at paras 6-10.
[9] 2010 (4) SA 261 (ECM).

Tacit and/or implied term

[18] In the affidavit resisting summary judgment the appellant also contended that the bonus referred to in the agreement at all times represented a bonus that would only be payable to the respondent, as tacitly and/or impliedly agreed between the parties under circumstances where -

(i) the performance of the respondent warranted such a bonus; and
(ii) under circumstances where the financial performance of the appellant allowed for such a bonus to be paid. (I will return to the issue of a tacit or implied agreement in more detail herein below.)

[19] On a plain reading of clause 8.4 it is clear that there is an obligation on the appellant to pay the respondent a bonus equal to one month's notice. I should also point out that it is not disputed that clause 8(4) intended to convey that a bonus "will" be paid to the respondent in the month of her birthday equal to one month's salary. It is therefore not necessary for this court to interpret what the parties agreed upon in respect of bonuses as it is quite clear from a plain reading of the contract what the obligation of the appellant was in terms of the agreement.

[20] The appellant contended that a bonus constitutes "remuneration" and because it does clause 8.2 likewise affords the appellant a discretion whether or not it has to pay a bonus: The appellant will exercise the discretion in favour of the respondent and pay a bonus in the event that the performance of the respondent warrants it and where the financial position of the appellant allows for such a bonus to be paid.

[21] I am not persuaded that this constitutes a sustainable defence for the following reasons: (i) Firstly, clause 8(4) dealing with bonuses is unqualified. On a plain reading of this clause the appellant has no discretion whether or not to pay the bonus. (ii) Secondly, there is on a plain reading of clause 8(4) no room to import an implied term into this clause that the appellant has a discretion whether or not to pay a bonus. Clause 8(4) simply does not allow for a discretion and is framed in peremptory language. (iii) Thirdly, the parties

clearly had intended to deal with bonuses separately and distinctly from ordinary monthly remuneration. This is also borne out by the fact that Annexure "A" to the agreement only deals with remuneration and makes no mention of bonuses.

[22] On a plain reading of the contract it is therefore, in my view, clear that the parties have expressly provided for a discretion regarding remuneration in clause 8(2) of the agreement but have intentionally omitted such a discretion in the context of clause 8(4) in respect of the payment of bonuses. There is, therefore "no room for importing the alleged implied term". See in this regard: *Pan American World Airways Incorporated v SA Fire And Accident Insurance Co Ltd*[10]

> "When dealing with the problem of an implied term the first enquiry is, of course, whether, regard being had to the express terms of the Agreement, there is any room for importing the alleged implied term. Considering the wording of the Bilateral Agreement I see no reason to hold that the door is closed. On the contrary, the manner in which the parties have expressed themselves as to the rights granted has left an ambiguity which, in my opinion, leaves the door wide open."

[23] There is also no ambiguity in clause 8(4). That much was also conceded on behalf of the appellant. The parties have expressly agreed on a term and the agreement is contained in clause 8(4) of the agreement. In these circumstances there is no room to import a discretion which was expressly not included in clause 8(4) of the agreement. See in this regard: *South African Mutual Aid Society v Cape Town Chamber of Commerce*:[11]

> "A term is sought to be implied in an agreement for the very reason that the parties failed to agree expressly thereon. Where the parties have expressly agreed upon a term and given expression to that agreement

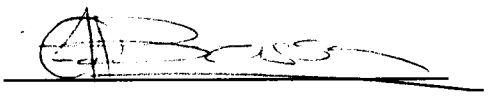
---

[10] 1965 (3) SA 150 (A).
[11] 1962 (1) SA 598 (A) at 615C – E.

in the written contract in unambiguous terms no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement only. See *Delmas Milling Co. Ltd v du Plessis*, 1955 (3) SA 447 (AD) at p. 454. In *Mullin (Pty.) Ltd v Benade Ltd.*, 1952 (1) 211 (A.D.) at p. 215, CENTLIVRES, C.J., refused to imply a term in an undertaking expressed in words which disclosed no ambiguity."

[24] For the reasons set out above, the appeal must therefore fail. The following order is made:

"The appeal is dismissed with costs."



AC BASSON
JUDGE OF THE HIGH COURT

I agree

PH MALUNGANA
ACTING JUDGE OF THE HIGH COURT

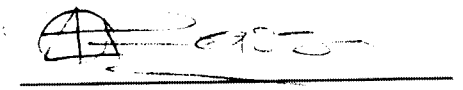
Appearances:

For the appellant	:	Adv M Jacobs
Instructed by	:	WWB Botha Attorneys
For the respondent	:	Adv V Vergano
Instructed by	:	Macrobert Inc

"A term is sought to be implied in an agreement for the very reason that the parties failed to agree expressly thereon. Where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement only. See *Delmas Milling Co. Ltd v du Plessis*, 1955 (3) SA 447 (AD) at p. 454. In *Mullin (Pty.) Ltd v Benade Ltd.*, 1952 (1) 211 (A.D.) at p. 215, CENTLIVRES, C.J., refused to imply a term in an undertaking expressed in words which disclosed no ambiguity."

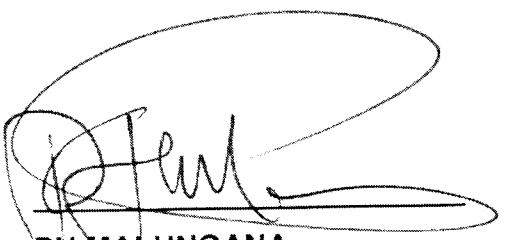
[24] For the reasons set out above, the appeal must therefore fail. The following order is made:

"The appeal is dismissed with costs."



AC BASSON
JUDGE OF THE HIGH COURT

I agree



PH MALUNGANA
ACTING JUDGE OF THE HIGH COURT