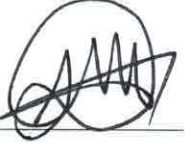




**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**Case no:40061/2016**

(1)	REPORTABLE: NO/ <del>YES</del>
(2)	OF INTEREST TO OTHER JUDGES: NO/ <del>YES</del>
(3)	REVISED. NO/ <del>YES</del>
31 MARCH 2022	
DATE	SIGNATURE

**In the matter between:**

**DISCOVERY LIFE LIMITED**

**Plaintiff**

**AND**

**JAMES NEHEMIA WRIGHT**

**Defendant**

---

## JUDGMENT

---

### MAKHOBBA J

1. The plaintiff is Discovery Life Limited, a public company with limited liability duly registered and incorporated in terms of the Company Laws of the Republic of South Africa and a duly registered long-term insurer in terms of the provisions of the Long-Term Insurance Act 52 of 1998, with registration number 1966/03901/06 with principal place of business at 155 West Street, Sandton, Johannesburg, Gauteng Province.
2. The Defendant is James Nehemia Wright residing at Opperman street, Alberton. On the 8<sup>th</sup> September 2011, the defendant and the plaintiff entered into a contract of employment as per annexure “DLA”. Thereafter the plaintiff and the defendant entered into a written addendum to the Discovery agreement (hereinafter referred to as “the addendum”) Annexure “DLB”.
3. In terms of the agreement the plaintiff employed the defendant as a Financial Adviser to market and sell the plaintiff’s products and policies and to provide financial services in relation to the plaintiff’s products and policies to prospective customers of the plaintiff.

4. The plaintiff called 2 (two) witnesses namely Ms A.Hornsby and Mt T. Greyling. Both witnesses testified about the agreement between the plaintiff and the defendant and the pros and cons thereof.
5. Ms Hornsby testified that the defendant was responsible to find clients for the plaintiff and will receive commission in respect of the premiums discovery receives.
6. She testified that according to the agreement the defendant's remuneration was structured as follows:
  - 6.1 When the defendant was recruited he left the previous employer's books behind to compensate him a cash amount was to be paid to him.
  - 6.2 The defendant was also paid phantom shares or bonuses. Phantom shares is a bonus structure issued by Discovery and is linked to the actual share price for the day. These shares are equal to 50%(fifty percent) of the IRP5 amount and is divided by the prevailing share price at the end of business on 31 July 2011.
  - 6.3 The vesting of the shares depends therefore on the following two conditions
    - (i) The defendant was supposed to meet production standards in the three-year period.
    - (ii) The defendant had to be employed for five years.

- 6.4 Furthermore, she testified that since the defendant did not meet the production standards in the three-year period therefore the shares did not vest in him.
- 6.5 In addition Ms Hornsby testified that according to the contract of employment the amount of the Phantom shares is paid when the defendant achieves his production targets. However, the defendant requested the advance to be paid to him when he started his employment. That is how the disputed R 502 208.00 was paid to the defendant. A total of R 176 1421.00 as follows:
- Thus amount is made up of R125 9140.00 which is defendant's annual commission totalling R125 9140.00 and R502 280.00 advance requested by the defendant.
- 6.6 The defendant's contract of employment was terminated on the 25<sup>th</sup> November 2015 and according to Ms Hornsby's testimony it was before the defendant achieved his production targets in accordance with his contract of employment.
7. Mr Greyling testimony corroborates the evidence of Ms Hornsby, furthermore he testified that if the defendant fails to meet the production standards he is then required to pay back the upfront cash amount if shares did not vest.
8. He further testified that if the defendant was able to meet the target in the amounts the R1.5 million or R7.5 million the shares would have vested in



him. However, in this case the defendant did not make the R7.5 million nor the minimum production target of R1.5 million therefore the Phantom shares did not vest. Furthermore, the defendant did not even meet the minimum production requirement.

9. In his testimony the defendant testified that the R502 280.00 was offered to him he did not request it. He testified that the plaintiff gave him additional Phantom shares worth R 502 280.00 to make it more attractive to him to enter into a contract of employment.
10. He further testified that the production standards he had to meet is R50 000.00 commission per month which equals R600 000.00 per annum. According to him he has meet the minimum production standards.
11. He denies that he failed to comply with his obligations in terms of the addendum. Between April 2012 to 2014 he was booked off sick. In September 2015 he had a short term memory loss. His contract of employment was terminated due to ill health.
12. In addition, defendant testified that the plaintiff is solely to be blamed for terminating his contract and causing him not achieve his production requirements. According to the defendant the plaintiff failed to grant him an opportunity to rectify production levels.
13. Both parties closed their cases and submitted heads of arguments.
14. Counsel for the plaintiff argued that the defendant did not succeed in rebutting the plaintiff's case and also did not succeed in his defences.

15. Counsel for the defendant submitted that due to the unilateral termination of the defendant's employment, plaintiff is to be blamed and cannot therefore claim forfeiture of benefits by the defendant. Had the defendant's contract of employment not terminated, he would have complied with the production requirements. It is further submitted that the plaintiff failed to grant the defendant the opportunity to rectify production levels.
16. Counsel for the defendant submitted further that the claim by the plaintiff against the defendant is a punitive damages claim which is not permitted in our law.
17. Should the court be inclined to find in favour of the plaintiff it is submitted that the court should take into consideration that the defendant was ill between 2012 and 2015 and as a result, defendant could not discharge his obligations in terms of the contract and the addendum.
18. The court is further urged to consider that the Labour Court found that the defendant was unfairly dismissed. If he was not unfairly dismissed, he would have complied with the production requirements. Defendant was therefore not in breach of the contract of employment and the addendum.
19. It is trite that the onus rests on the plaintiff to prove its case on the balance of probabilities see *Pillay v Krishna* 1946 SA 946
20. The interpretation of the agreement between the parties is a question of law. The law regarding interpretation has been stated by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), par 18, as follows:

*“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or un-business-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross divide between interpretation and legislation. In a contractual context it is to make contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”*

21. In my view the contract and the addendum does not address the situation where the financial advisor is absent from work due to illness. The contract and the addendum is silent as to what must happen in an instance where the defendant is unable to discharge his obligations in respect of production levels.
22. This court cannot read into the contract what is not reflected in it. Therefore, this court is obliged to abide to the words of the contract as they appear in the contract see *Municipal Pension Fund v Endeumeni Municipality Supra*.



23. Ms Hornsby and Mr Greyling gave their testimony in a clear and direct manner. They are trustworthy witnesses I accept their evidence.
24. According to Ms Hornsby even if the defendant were to complete his five years it was impossible for him to rectify his production levels because of the time lapse of his contract due to his illness.
25. In my respectful view it is immaterial that the defendant was ill for some time and that he was unfairly dismissed. Under the terms of the contract and addendum he had to deliver the production levels for the advance money he had received.
26. The submission by the defendant that it is punitive damages to pay back what he has not worked for is misplaced and incorrect.
27. It is only fair that the defendant to return back the advance money he earned before he actually worked for.
28. The plaintiff proved its claim on a balance of probabilities. The defendant did not succeed in rebutting the plaintiff's case. There are no cogent grounds for punitive costs.
29. I, make the following order:
  - 29.1 Defendant to pay the plaintiff the amount of R 502 280.00.
  - 29.2 Interest on the amount R 502 280.00 at the rate of 10.25% per annum  
*a tempore morae.*
  - 29.3 Cost of suit



A handwritten signature in black ink, consisting of a large, stylized 'M' and 'A' followed by a long horizontal stroke, positioned above a solid horizontal line.

**D MAKHOB**

**JUDGE OF THE GAUTENG DIVISION PRETORIA**

**APPEARANCES:**

**For the plaintiff:** Advocate W. Botes

**Instructed by:** VZLR Attorneys

**For the defendant:** Advocate L.Siyo

**Instructed by:** Snyman Attorneys

**Date heard:** 04 February 2022

**Date of Judgment:** 31 March 2022