

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE NUMBER: J 2424/06

In the matter between:

SEAN MICHAEL MULLIGAN

APPLICANT

AND

MICTVAR

RESPONDENT

Judgment

MOLAHLEHI AJ

Introduction

[1] The applicant is a former employee of the respondent who was retrenched through the letter dated 30th June 2006, which *inter alia* set out what was to be paid to him. The applicant contended that he was not paid a commission which was due to him on retrenchment. In this regard the applicant seeks an order from this court compelling the respondent to pay his outstanding

commission for the period 15 January 2006 to 31st July 2006. The matter was unopposed.

Background Facts

- [2] After his retrenchment the applicant demanded payment of the commission which he claimed was due to him in terms of the contract of employment. The respondent refused to pay the commission and as a result the applicant approached both the Commission for Conciliation Mediation and Arbitration (the CCMA) and the Department of Labour (DoL) for assistance. Both institutions could not assist the applicant as they ruled that they each did not to have jurisdiction over the matter.
- [3] The applicant contended that the commission was due to him in terms of his contract of employment. Attached to his letter of appointment dated 1st January 2006 was his contract of employment. The letter of appointment *inter alia* stated:

“2. Remuneration

(a) Your remuneration will be Total Cost to Company of R 5000.00 per month inclusive of medical aid and provident fund.

(b) You will also be paid commission as per “ATTACHMENT C.”

- [4] The formula and conditions for the payment of the commission to the applicant is set out in an addendum to the contract of employment headed “REMUNERATION PACKAGE” wherein it is stated:

“A package based on “Total cost of employment” of R 5000 Five Thousand Rand Only for the first month of employment. Structured as follows: (A) Basic R 5000.00 (B) Cell Phone allowance R230. 00 (C) Petrol Allowance R800-00 only. Should your GP exceed R 30 000.00 (Thirty Thousand Rand Only) during your first month of employment, then Commission will be paid in accordance with the structure as detailed below.”

[5]_ On 17th October 2006, the applicant addressed a letter to the respondent wherein he claimed that the commission due and owing to him was R 29 096.69. In response to this letter, the respondent in the letter dated 20th October 2006, stated:

“We hereby confirm that we will on receipt of payment from the Deloitte/CBS account pay to you the amounts due for your commission.”

[6] The applicant responded to the above letter on the same day and reminded the respondent that it had 7 (seven) days within which to settle the outstanding commission. In the same letter the applicant pointed out to the respondent that he had no contractual relationship with Deloitte/CBS. He further pointed out the duties of the respondent arising from s40 (c)(i)(ii) of the Basic Conditions of Employment Act 75 of 1997 (the BCEA).

[7] In the letter dated 25 October 2006, the respondent in response to the letter of the applicant dated of 20th October 2006, disputed the

existence of a term in the contract entitling the applicant payment of a commission.

[8] Section 77 of the BCEA confers jurisdiction on the Labour Court to determine any matter concerning a contract of employment. Section 77 (A) (e) confers on the court the power to make an order of specific performance in making a determination in respect of any matter concerning a contract of employment.

[9] In terms of s40 of the BCEA on termination of employment, the employer is obliged to pay an employee unpaid monies for time off, annual leave which was not taken, including any amount which accrued in terms of contract of employment. Thus an employee is entitled to enforce the rights that accrued from the contract of employment even after the dismissal.

[10] In *Walker's Fruit Farm v Sumner* 1930 TPD at 401, the court held that in order for the applicant to claim the monies, the right thereto must not only have vested in the applicant but must have become enforceable

prior to the cancellation of the contract. The court went on to say that the employee must have had a right which was at that date accrued, due and enforceable as a cause of action independent of any executory part of the agreement. (See *Crest Enterprises (Pty) Ltd v Ryckof Beleggings (Edms) Bpk* 1972 (2) SA at 870 A-H, *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 8, *Thomas Construction (Pty) Ltd (In Liquidation) v Grafton Furniture Manufactures (Pty) Ltd* 1998 (2) SA 546 (A) at 552.

[11] Having concluded that this court does have jurisdiction to consider this matter, the issue that needs to be considered is whether or not the right to the payment of the commission vested in the applicant and was enforceable prior to his retrenchment.

[12] The addendum “A” under the subheading “Commission” provides:

“The employee will be paid the commission on all Gross Profit (GP) achieved exceeding 30k, i.e. that is if the employee achieves 40K GP then the employee will be paid commission on all GP over and above 30K, therefore commission will be payable... (seven) days after the month of receipt ... customer, and in accordance with schedule (see

Addendum B - Category adjustments for loan equipment as set employee will be required to generate gross profit of R 180, 00 (One Hundred ... Rand) per quarter.)”

- [13] The applicant testified under the oath that the commission accrued from the work he did with Delloites/ CBS. The answer from the applicant to the question, of whether or not Delloites/ CBS had paid the respondent for the work upon which the claim for the commission is based, was in the affirmative. In this regard, the applicant submitted two documents as proof that the said account was paid for by Delloites/ CBS on the 21st June 2006.

CONCLUSION

- [14] In the absence of any other evidence to the contrary, I accept the version of the applicant that the respondent has failed to pay the applicant's commission in breach a term of the employment contract. The amount due and owing as commission is R29 096.69.

[15] The application for specific performance is granted and the respondent is ordered to pay the applicant the sum of R29 096.69 within 14 (fourteen) days of receipt of this order.

[16] The respondent is ordered to pay the applicant's cost.

MOLAHLEHI AJ

DATE OF HEARING : 28 MARCH 2007

DATE OF JUDGMENT : 11 MAY 2007

Appearances - Applicant in Person