REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 433/2012

In the matter between:

R J FEBRUARY **Applicant**

and

ENVIROCHEM CC **First Respondent**

CHEMSMART CC **Second Respondent**

Heard: **8 June 2012**

Delivered: **11 June 2012**

Summary: Urgent application for specific performance – plea of *lis alibi pendens.* Application not urgent. Dismissed on urgency and merits.

JUDGMENT

STEENKAMP J

Introduction

1] The applicant, Ms February, is employed as a sales consultant by the first

respondent. She earns remuneration based on commission. She alleges that the respondent has unilaterally reduced her remuneration and seeks an order for specific performance on an urgent basis.

2] The respondents have argued, firstly, that the application is not urgent. They also raised a specially plea of *lis alibi pendens.* And in any event, they argue, the applicant has not established a clear right for the relief she seeks; she has an adequate alternative remedy in the form of damages; and she is suffering no irreparable harm.

Background facts

3] The applicant was employed by the first respondent from 1 March 2006. The contract of employment stipulates that:

> "As remuneration for services rendered by the employee in terms of this agreement the company shall pay her commission at the rate as specified in her letter of appointment, payable on the first day of each month."

4] The letter of appointment sets out the following:

> "As discussed during the interview, your remuneration will be based on a strict commission basis on total chemicals sales as per specified prices, excluding VAT.
>
> Details of the commission structure referred to above is [*sic*] as follows:
>
> A price list = 10% commission on VAT exclusive price.
>
> B price list = 25% commission on VAT exclusive price.
>
> C price list = 30% commission on VAT exclusive price.

5] The first respondent manufactures and sells detergents and disinfectants. (The second respondent is a distributor and is not the applicant's employer. Where I refer to "the respondent" or "the company" henceforth, it is a reference to the first respondent).

6] The applicant has primarily been responsible for selling a product called "Triple X" to the City of Cape Town. The three-tiered price list referred to

comprises a band of prices determining the commission to which the applicant is entitled. The respondent sells the same product (e.g. Triple X) to different customers at different prices. For example, a big buyer like the City of Cape Town may buy the product at a discounted rate (tier A). A small company may buy the same product at a higher price (tier B or C). If the sales consultant (such as the applicant) sells the product at price A, she will earn 10% commission on the (lower) price. If she sells the same product at price B or C, she will earn 25% or 30% commission respectively.

The claim

7] The applicant alleges that, on 31 January 2012, the respondent "unilaterally and without informing [her]" changed her commission on sales of Triple X from 25% to 18%. She relies on an oral side agreement, concluded separately to her written contract of employment and letter of appointment, on 1 March 2006. In terms of that agreement, she says, she would have the "sole mandate" to market Triple X and she would be paid 25% commission on sales.

8] The respondent disputes the existence of an oral side agreement. According to it, the sales and commission structure is clear – as set out in the applicant's letter of appointment – and any payment of lower commission is in accordance with that three-tier structure. The applicant was not given the "sole mandate" to market Triple X and the respondent did not change the commission structure. Where products are being sold at a lower price than may have been the case historically, lower commission would be paid accordingly.

9] The application, albeit that the relief sought is for specific performance, is in the form of a final mandatory interdict. The applicant has to establish her case along with the requirements in *Setlogelo v Setlogelo.*[1] The applicant did not file a replying affidavit. In terms of the rule in *Plascon-*

1 1914 AD 221.

Evans Paints (Pty) Ltd v Van Riebeeck Paints Ltd[2] I must accept the respondent's version of the facts.

Jurisdiction

10] Ms *Steyn*, for the applicant, submitted that this court has jurisdiction to entertain a claim for specific performance, referring to *Fatima Abrahams v Drake & Scull Facilities Management (SA) (Pty) Ltd.*[3] Mr *Ackermann*, for the respondents, did not take issue with the court's jurisdiction, save to point out that the applicant still had to meet the requirements for the granting of a final interdict. However, he raised a special plea of *lis alibi pendens.* But first, the question of urgency.

Urgency

11] On the applicant's own version, she was told of the alleged unilateral reduction in her remuneration by way of commission on 31 January 2012. One and a half months later, on 14 March 2012, she referred a dispute in terms of s 64 of the Labour Relations Act[4] to the National Bargaining Council for the Chemical Industry. At that stage, she was already represented and advised by her attorneys of record, Malcolm Lyons Brivik Inc – indeed, those attorneys' contact details are provided on the referral form to the bargaining council. It appears that the dispute was then transferred to the CCMA.[5] Conciliation failed and the conciliating commissioner issued a certificate of outcome stating that the matter remained unresolved on 13 April 2012. The applicant took advice from her

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2 1984 (3) SA 623 (A)

3[2012] 5 BLLR 434 (LC), [2011] ZACCT 30 (C1105/10), 11 November 2011.

4 Act 66 of 1995 ("the LRA").

5 Why and how this happened is not clear; nor even how it was possible, as s 147(3) of the LRA provides for a matter to be transferred from the CCMA to a bargaining council with jurisdiction, but no reciprocal power to transfer is to be found in the Act. Nothing turns on this.

attorneys and, apparently on the strength of the judgment in *Drake & Scull*[6], formed the view that she could not strike as envisaged in s 64 of the LRA. Yet she only brought this application – on three days' notice – on 5 June 2012.[7]

12] The applicant explains that she "intended to bring this application after the meeting of 7 May 2012." That refers to a meeting convened at her request, where the respondent's Managing Director, Mr Peter Daley, told her "Triple X was not under discussion, as this matter was going to court." That is a reference to a pending High Court action, of which I shall say more shortly.

13] The applicant's father sadly fell ill and passed away on 20 May 2012. The applicant was apparently granted compassionate leave. She returned to work on 28 May 2012 and launched this application a week later.

14] The court has extended its condolences to the applicant and expressed its sympathy with the loss of her father. However, that sad event does not explain her inaction from the time the certificate of outcome was issued on 14 April until at least 7 May 2012, other than reference to a letter of complaint that she wrote on 4 May 2012; nor does it explain the lapse of time from 31 January until 14 March 2012, when she referred a dispute to the bargaining council.

15] The matter should be struck off the roll for lack of urgency even when one has regard only to these time periods. But there is a more startling aspect to the matter.

16] The respondents brought it to the court's attention for the first time in their answering papers that the applicant's attorneys of record had raised issues very closely linked with the current application with the respondent as long ago as October 2010. In his letter of 11 October 2010, written on the instructions of the applicant, Mr Brivik claimed that it had been agreed

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6 .*supra.*

7 The application was first served on the respondents after hours on Friday 1 June 2012 for hearing on Wednesday 6 June. A fresh application was delivered on 5 June for this hearing on Friday 8 June 2012.

that the applicant would be the sole agent for Triple X; and that another employee, Ms Yolanda Colli, was distributing the product contrary to that agreement. Mr Brivik claimed that the applicant derived most of her commission from the sale of Triple X; and asked for an undertaking that the respondents would not pay any other sales agent commission for sales of Triple X and that the applicant would be the sole beneficiary of commissions from sales to the City of Cape Town. The respondent's Daley denied the existence of such an agreement in a responding letter dated 5 November 2010.

17] The application is not urgent. But Mr *Ackermann* argued that it should not simply be struck off the roll, as it would then not lead to finality and the matter should be dealt with once and for all. This argument carries some weight, especially given the special plea raised. I turn to that aspect.

Lis alibi pendens

18] The applicant did not disclose in her founding papers that an action arising from very closely related subject matter is pending between the same parties in the Western Cape High Court.

19] On 30 June 2011, the applicant, represented by her attorneys of record in this application, issued summons out of the Western Cape High Court, Cape Town, under case number 13099/11 against the same respondents. As in the case before me, she purported to rely on an oral agreement between the parties concluded on 1 March 2006 in terms of which she was allegedly appointed as the sole agent to market Triple X. She relied on the following "express, alternatively tacit, alternatively implied, terms of the said agreement":

> "6.1 Plaintiff would have the sole mandate to market the said product, Triple X, for and on behalf of the defendants; and
>
> 6.2 Plaintiff would be paid commission equivalent to 25% on the retail price at which the product, Triple X, was sold by defendants to its customers."

20] She claimed that the defendants in the High Court action (respondents in this application) were in breach of the agreement and she claimed contractual damages.

21] In the current application, the applicant relies on the same alleged agreement, stating that "the express, alternatively tacit, alternatively implied, terms of the agreement included *inter alia*, the following":

> "6.1 I would have the sole mandate to market Triple X for and on behalf of the respondents; and
>
> 6.2 I would be paid commission equivalent to 25% on the retail price at which the product, Triple X, was sold by respondents to its customers."

22] In this application, though, she seeks specific performance arising from the alleged unilateral reduction in those commission payments rather than damages.

23] For a special plea of *lis pendens* to succeed, the two matters before court must be based on the same cause of action and in respect of the same subject matter. *Erasmus*[8] states that the two actions need not be identical in form. The requirement of "the same cause of action" is satisfied if –

> "...the other case necessarily involves a determination of some point of law which will be *res judicata* in the action sought to be stayed."

24] In *Nestlé SA (Pty) Ltd v Mars Incorporated*[9] the Supreme Court of Appeal stressed the need for finality in litigation:

> "The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper

8 Erasmus, *Superior Court Practice* p B1-144.

9 2001 (SA) 452 (SCA); [2001] 4 All SA 315 (SCA) para [16].

conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally."

25] That requirement has not been satisfied in the case before me. The pending High Court action – that the applicant did not disclose – involves the same parties, the same issues of fact, and the same cause of action arising from the alleged agreement between the parties, albeit that the relief sought differs.

26] I am satisfied that the special plea should succeed. But even if I am wrong, the applicant has not satisfied the requirements for the urgent and final relief that she seeks.

Clear right?

27] The applicant relies, not only on her written contract of employment read with her letter of appointment, but also on a collateral oral agreement concluded on1 March 2006. The existence of such an agreement was disputed by the respondent's Daley in his letter to the applicant's attorneys of 5 November 2010 and again in his answering affidavit in these proceedings. The applicant did not reply. Based on the principles set out in *Plascon-Evans*[10], I must accept the three-tier price structure and attendant commission payments as explained by Daley. That explanation is also consistent with the wording of the contract of employment read with the letter of appointment.

28] The applicant has been aware of and has been working in accordance with the commission structure, as explained by Daley, for the past six years. She has made out no case for her contention that she has established a clear right that it would remain at 25% in perpetuity.

Irreparable harm?

29] The applicant has shown no proof of an injury actually committed or reasonably apprehended. It may well be so that she is, in fact, earning

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10 *Supra.*

less than before. No doubt this causes her hardship. But that is how the commission structure works, and that is what she agreed to when she signed her contract of employment and those are the terms under which she has worked for the past six years. There is no suggestion that the contract was entered into *in fraudem legis* or is otherwise void or voidable; and the applicant has not been able to prove the existence of an oral side agreement that varies the contract.

Alternative remedy

30] The applicant, as an individual employee, cannot rely on the prescribed route of power play envisaged by s 64 of the LRA, having initially referred a dispute under that section.[11]

31] However, as her pending action in the High Court shows, the applicant is not without a remedy. Even if she has a valid claim, she can pursue a claim for damages – indeed, she is already doing so. As the court held in *Wynne & Godlonton NN.O. v Mitchell & another*[12]*:*

> "An interdict was refused where it was held that there was 'an equally effective, if not more effective, remedy available' to the applicant to obtain 'the same result' as would be achieved by obtaining an interdict."

32] An applicant for a permanent interdict must allege and establish on a balance of probabilities that it has no alternative remedy. And the courts will not, in general, grant an interdict when the applicant can obtain adequate redress by way of a damages claim. In this regard, Trengove J in *Erasmus v Afrikander Proprietary Mines Ltd*[13] referred with approval to the earlier *dictum* of De Villiers J in *Lubbe v Die Administrateur, Oranje Vrystaat:*

> "Daar is geen bewyslas op 'n respondent om enige feit of feite te bewys om applikant se reg tot 'n interdik te weerlê nie. En in 'n geval soos die

11 See the discussion in *Drake & Scull (supra).*

12 1973 (1) SA 283 (E) at 295H, referring to *Draper v British Optical Association* (1938) 1 All E.R. 115 (Ch. D.) and *Reserve Bank of Rhodesia v Rhodesia Railways* 1966 (3) SA 656 (SR).

13 1976 (1) SA 590 (W) at 965H.

> onderhawige waar ‘n permanente interdik aangevra word by wyse van mosie – te meer waar applikant nie gevra het dat feite wat in geskil is by wyse van *viva voce* getuienis opgelos moet word nie – kan die aansoek slegs toegestaan word indien die feite soos uiteengesit in respondent se verklarings, tesame met feite in applikant se verklarings wat deur respondent erken word, die aansoek regverdig ... Die enigste ander regsmiddel war hier ter sprake is, is ‘n aksie vir skadevergoeding en die vraag ontstaan of applikant op ‘n oorwig van waarskynlikhede bewys het dat so ‘n aksie, in die omstandighede van hierdie saak, nie voldoende is om sy regte te beskerm nie.”

33] In the application before me, the applicant has such a remedy and is clearly aware of it, as she has already instituted a claim for damages against the respondents.

Conclusion

34] For all of these reasons, the application must fail. With regard to costs, Mr *Ackermann* submitted that the applicant must be visited with a punitive costs order, given that the applicant has not disclosed the existence of the pending High Court action. Although I agree that costs should follow the result, I do not agree that the applicant’s conduct has been so egregious that it warrants a special costs order.

Order

35] The application is dismissed with costs.

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AJ Steenkamp

Judge of the Labour Court of South Africa

APPLICANT:	Adv MH Steyn
	Instructed by Malcolm Lyons Brivik.
RESPONDENTS:	Adv LW Ackermann
	Instructed by Smith Tabatha Buchanan Boyes.