THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

NOT REPORTABLE

Case no: C1009/2014 & C330/2015

In the matter between:

ROSS PENNELL **Applicant**

and

DELEVERE INVESTMENTS SOUTH AFRICA (PTY) LTD **Respondent**

Heard: **6-8 June 2016; 23 November 2019**

Delivered: **21 April 2017**

JUDGMENT

RABKIN-NAICKER J

[1] Two matters were consolidated for hearing before me. Under case number C1009/2014, the applicant seeks payment of outstanding commission ("straight, override and trail commission"), notice pay and an unpaid portion of his bonus.

Under case number C330/2015, the applicant seeks compensation in respect of an alleged unfair labour practice relating to demotion. This matter was referred to this Court in terms of section 191(6) of the LRA.

[2] When this matter was first enrolled for trial in November 2015, the respondent raised two points in limine on which I ruled ex tempore on the 18 November 2015. The trial proceeded on the basis of the said ruling on 6-8 June 2016 in short,I found that applicant could not persist with relief sought under C1009/14 in respect of his alleged promotion to Senior Area Manager. Further, that applicant could persist with a claim in respect of an alleged oral bonus agreement. I heard oral argument on the 23 November 2016.

[3] The following chronology of events which led to the claims before court are common cause as follows:

3.1 The applicant was employed by the respondent from 1 June 2011. As from 1 February 2013, he was promoted to the position of Area Manager (Cape Town).

3.2 The applicant is British and worked in South Africa under a work permit (spousal permit). His permit expired on 12 June 2014. At trial applicant clarified that he was in South Africa on a temporary residence visa, a spousal visa, and that it was endorsed for him to run his own business. He alleged in testimony before me, that was not gainsaid, that the nature of the endorsement was known to the respondent and despite same they entered into an employment contract.

3.3 On about 30 April 2014, applicant had a meeting with Nigel Green, the De Vere's Group CEO and a director of the respondent. It is the applicant's case that an oral agreement was concluded at this meeting in terms of which the respondent would pay the applicant a bonus of GBP 150 000, of which to date only GBP 20 000 has been paid. The applicant claims the balance of GBP130 000.

3.4 The respondent suspended the applicant with effect from 4 July 2014.

3.5 On 16 July 2014, the applicant was called to attend a meeting with Greg Stockton (who at the time held the position of Divisional Manager- Africa). It is applicant's case that he was told in this meeting that he was to be demoted to the position of Senior Wealth Advisor and that such demotion was subsequently announced to the entire team that reported to him.

3.6 The applicant faced a disciplinary hearing in August 2014. The main issues were dishonesty and negligence pertaining to his work permit. The chairperson found that the applicant had been negligent but not dishonest in respect thereto. The applicant was issued with a final written warning on 21 August 2014.

3.7 On 8 September 2014, the respondent terminated the applicant's employment in writing on the basis that he was not in possession of a work permit. He was informed that since this was a no-fault termination he would be paid one month's notice pay. This has not been paid to date.

3.8 The applicant has also not been paid various amounts of outstanding salary (commission) which he alleges are due to him.

[4] The respondent's defences regarding commission payments are summarised in applicant's heads of argument as follows:

4.1 Because the applicant's work permit had expired, it was impossible for the respondent to perform its obligations under the contract (paying the applicant his commission); alternatively, the respondent is exempt from paying him.

4.2 The respondent relied on clause 7.4 of the applicant's contract, alleging (a) that the applicant has breached his restraint of trade agreement; and (b) that therefore the respondent is entitled to deduct any commission owing to him "as a contribution towards the damages for that breach". This line of defence was not pursued before me in argument on behalf of the respondent.

4.3 That the applicant was never entitled to "trail" commission.

[5] The quantum of notice pay claimed is GBP 29 461 which amount includes the outstanding commission claimed. In respect of trail commission GBP 4 250 is claimed. Straight commission is claimed by the applicant in the amount of GBP 15 279. Further override commission is claimed in respect of the period of 6 months following applicant's promotion to Area Manager, an amount of GBP 24 837, and the period of his suspension 4 July to 8 September 2014, GBP 21 657.

[6] The applicant testified that the respondent is a financial advisory business giving financial advice to expatriates, primarily British and internationally minded investors. He clarified that straight commission was on business he was actually responsible for writing. Override commission was payable in respect of 10% of all commissions earned by the team which he managed. He testified that the trail commission he claims, was derived from 0.35% per annum of monies invested by Cape Town clients advised by Cape Town Consultants, under his management, in trail paying funds as designated by the respondent. This was supposed to be paid to him quarterly in arrears. Trail paying funds are investments that pay trail investment to incentivise financial advisors to leave their client's monies invested in those funds for a long period of time. The last time he was paid trail commission was on the 29 May 2014.

[7] No evidence was led by the respondent to challenge applicant's entitlement to trail commission and no questions were put to applicant in cross examination in this respect. Although the respondent had denied the applicant's entitlement to this type of commission in the pleadings, its own schedules produced for trial reflected that he was paid this commission from time to time.

[8] In as far as straight commission was concerned, the claim being for GPB 15 279, the respondent disputed the applicant's entitlement to commission in respect of the following clients: Judd, Read, Nowicki and Wells.

[9] The respondent disputed the Judd claims on the basis that that client had moved to Spain and it was contrary to an internal De Vere policy to write business for a client who was not in South Africa. The applicant testified that there were two separate claims arising from business written for Judd, one dated the 26

November 2013 (GPB 3692) and one dated 25 June 2014 (GPB 1911). Judd was in South Africa at the time of the first transaction and only moved to Spain at the end of the second one.

[10] The applicant testified that he knew of a general internal policy that if a client lived in another country, any business should be referred to the De Vere branch of that country. He approached his line manager Mr Taylor to authorise the business and received this authorisation. The business was approved by De Vere's compliance departments in South Africa and Malta.

[11] In response to the applicant's request for admissions the respondent disputed applicant's claims in respect of business written for Read on the basis that the relevant paperwork was "unlawfully amended" without getting Read's consent. Applicant testified that there were five separate claims in respect to Read. The first transaction dated the 1 November 2013 (for GBP 720) had nothing to do with the respondent's complaint which related to four "fund allocation" transactions dated 22 April 2014. Applicant's testimony was that he had obtained a final dealing instruction from Read and that Read was happy with the investments. The respondent's documentation reflected that the fund selections had taken place and had successfully passed through the compliance departments in South Africa and Malta. He stated that the business had been issued. The evidence relating to Read was not challenged in cross-examination.

[12] The respondent disputed the Applicant's claims to commission in respect of Nowicki and Wells on the ground that at the time of Applicant's dismissal the applicant was not aware whether or not the business had been issued. The applicant was only able to testify that to his best knowledge and belief the business would have been issued. No evidence was led by the respondent on these claims.

[13] In as far as the applicant's claim for Area Manager Override Commission, the respondent raised a specific defence relating to the claim of GBP 21 657 covering the period when applicant was on suspension. This was put to the applicant in cross-examination and he conceded that two of his colleagues were appointed

area managers at this time. He agreed that if they were the area managers when commission was paid, they were entitled to such commission. At the same time he also insisted that although suspended he was also an area manager at that time.

[14] The respondent's primary defence to the applicant's commission and notice pay claims is that it was prohibited, with effect from 13 June 2014 (when the applicant's permit lapsed) from performing its obligations under the employment contract by virtue of the operation of the Immigration Act 13 of 2002.

[15] The respondent relies on section 38(1) of the Immigration Act, which provides that no person shall employ:

> *"(a) an illegal foreigner;*
>
> *(b) a foreigner whose status does not authorise him or her to be employed by such person; or*
>
> *(c) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status."*

[16] Section 49 of the Immigration Act provides that anyone *"who knowingly employs an illegal foreigner or a foreigner in violation of this Act, shall be guilty of an offence"*.

[17] Mr Leslie for the applicant relied on *Discovery Health Ltd v CCMA* (2008) 29 ILJ 1480 (LC) in which the court was called on to consider whether a foreign national who works for another person without a valid work permit was an "employee" within the meaning of the LRA. The court answered this question in the affirmative. The primary basis for its conclusion, he submitted, was that properly interpreted in line with the Constitution, the prohibition on employing illegal foreigners found in section 38 of the Immigration Act did not have the effect of rendering the employment contract invalid. At paragraphs 30 to 33 the court held as follows:

> *"[30] The right to fair labour practices is a fundamental right. There is no clear indication from the terms of s 38(1) of the Immigration Act (or any of the Act's other provisions) that the statute intends to limit that right, or accomplish more than to*

penalize persons who employ others on unauthorized terms. As I have noted, the Act does not penalize the conduct of any person who accepts or performs work that is not authorized. The Act does not explicitly proscribe contracts concluded with those who are engaged to render work in circumstances where their engagement is unauthorized, nor does it provide that contracts are not enforceable in those circumstances.

[31] There is a sound policy reason for adopting a construction of s 38(1) that does not limit the right to fair labour practices. If s 38(1) were to render a contract of employment concluded with a foreign national who does not possess a work permit void, it is not difficult to imagine the inequitable consequences that might flow from a provision to that effect. An unscrupulous employer, prepared to risk criminal sanction under s 38, might employ a foreign national and at the end of the payment period, simply refuse to pay her the remuneration due, on the basis of the invalidity of the contract. In these circumstances, the employee would be deprived of a remedy in contract, and if Discovery Health's contention is correct, she would be without a remedy in terms of labour legislation. The same employer might take advantage of an employee by requiring work to be performed in breach of the BCEA, for example, by requiring the employee to work hours in excess of the statutory maximum and by denying her the required time off and rights to annual leave, sick leave and family responsibility leave. It does not require much imagination to construct other examples of the abuse that might easily follow a conclusion to the effect that the legislature intended that contract be invalid where the employer party acted in breach of s 38(1) of the Act. This is particularly so when persons without the required authorization accept work in circumstances where their life choices may be limited and where they are powerless (on account of their unauthorized engagement) to initiate any right of recourse against those who engage them.

[32] Far from defeating the purposes of the Immigration Act, to sanction a claim of contractual invalidity in these circumstances would defeat the primary purpose of s 23(1) of the Constitution which is to give effect, through the medium of labour legislation, to the right to fair labour practices.

[33] In my judgment therefore, by criminalizing only the conduct of an employer who employs a foreign national without a valid permit and by failing to proscribe explicitly a contract of employment concluded in these circumstances, the legislature did not intend to render invalid the underlying contract. ..." (emphasis added)

[18] Mr Leslie submitted that it is now firmly established that the absence of a valid work permit does not invalidate an employment contract. The contract remains valid and enforceable. The respondent therefore cannot rely on the Immigration Act as a basis on which to avoid compliance with its contractual obligations. It should be noted that the cases relied on for this proposition[1] were decided in the context of whether undocumented workers were beneficiaries of the right to fair labour practices and in particular whether they bore the rights accorded by the LRA. Apart from the unfair labour practice claim, this matter brought in terms of section 77(3) of the BCEA, concerns contractual claims by a highly paid employee and issues regarding protection of the vulnerable are not in play. However, as the Court in **Edcon v Steenkamp, and Related Matters**[2] stated:

"*The principles governing non-compliance with statutory requirements, alluded to above, are well established. The crucial enquiry is whether the legislature contemplated that the relevant failure should be visited with nullity. The governing principle was encapsulated in an oft-cited passage in the English case of Howard v Bodington as follows:*

'No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of the courts . . . to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.'

Various factors must be considered, such as —

'the subject-matter of the prohibition, its purpose in the context of the legislation . . . the remedies provided in the event of breach, the nature of the mischief which it

[1] Discovery Health Ltd v CCMA(2008) 29 ILJ 1480 (LC); Ndikumdwayi v Valkenberg Hospital (2012) 8 BLLR 795 (LC); Southern Sun Hotel Interests (Pty) Ltd v CCMA (2011) 32 ILJ 2756 (LC); Ravhura v Zungu NO [2015] 4 BLLR 423 (LC).

[2] 2015 (4) SA 247 (LAC) at paras 44 & 45

was designed to remedy or avoid and any cognizable impropriety or inconvenience which may flow from invalidity'.

Then the court must ask whether it was truly intended that anything done contrary to the provisions in question was necessarily to be visited with nullity. The fact that a statute provides for remedies in the event of a breach of its provisions is a significant factor counting against an inference of invalidity. An equally important consideration is whether a declaration of invalidity would have capricious, disproportionate or inequitable consequences. The principle was enunciated as follows in Pottie v Kotze:

'A further compulsory penalty of invalidity would . . . have capricious effects, the severity of which might be out of all proportion to that of the prescribed penalties, it would bring about inequitable results as between the parties concerned and it would upset transactions which . . . the legislature could have no reason to view with disfavour……."

[19] Given the authority in this court in respect of the Immigration Act and its impact on employment contracts and employment relationships, and by virtue of the provision in that Act of a remedy for the breach of its provisions in regard to employment of non-citizens, the employment contract between the parties should not be regarded as invalid. The applicant's evidence that he had never in fact worked for the respondent with the correct endorsement on his visa and that the respondent had been aware of same, was not gainsaid at trial. This evidential material is an example of how inequitable results can come about if an additional penalty of invalidity is read into the statute.

The Bonus

[20] The applicant's testimony about the oral agreement between himself and Mr Green in respect of a bonus on or about 30 April 2014 was that the material terms were as follows:

15.1 He would be paid GBP 150 000 unconditionally upfront and that the payment was immediately due. The payment on his version was to prevent him

resigning and joining a competitor recently established by the respondent's erstwhile divisional manager for Africa.

15.2 If he remained in the employ of the respondent for 12 months, he would receive a further GPB 100 000 plus a percentage based on the performance of the Cape Town office (for example if the business grew by 20%, he would receive GPB 120 000).

15.3 The above terms were reached at the meeting and it was further agreed that Green would subsequently ensure that the terms of the agreement were reduced to writing.

[21] The applicant recorded the terms he alleged above in an email to Green on the 16 July 2014. Green did not respond to this.

[22] The respondent called two witnesses at trial. The first was Mr Nigel Green. He testified that the respondent, which he owns, has offices in 40 different companies in the world. He had come to South Africa when the person in charge of South Africa (Featherby) had resigned and he talked to managers on an individual basis. As Featherby was a popular person, he wanted to talk to individual managers about whether they stayed with the company or left. Asked what the discussions related to he described these as "..it was Mr Pennell asking for something and me coming back with something different. And on occasions he was leaving and then he was staying so it as that type of relationship."

[23] Green confirmed he saw the discussions as pertaining to a retention bonus. His version of the terms of the oral agreement (which was not pleaded) was that he agreed in principle that once the agreement was reduced to writing and signed the applicant would be entitled to payment of GBP 50 000 as a retention bonus. This would be subject to a claw-back (100 % after 8 months and 50% before 12 months). If the applicant increased the performance of the Cape Town branch over the next 12 months, he would receive a performance-based bonus (e.g if performance improved 100% he would receive another GBP 50 000 and so on). Green was adamant that until the agreement was drawn up and signed it would not be binding on the parties.

[24] It was submitted on behalf of the applicant that Green's evidence was of a poor nature. I would agree. Green did not have an independent recollection of the meeting that took place with applicant and did not recall whether it took place in Johannesburg or Cape Town. His version of the meeting was not put to the applicant in cross-examination save for that Mr Green would testify that an amount of GBP 50 000 was discussed. Nothing was put to the applicant regarding claw back conditions or a performance element to the bonus. Although it was put to the applicant during cross-examination that Green would testify he never got the 16 July 2014 email from applicant setting out the terms of the agreement, Green contradicted this in his evidence when he admitted receipt, albeit a few weeks later.

[25] It was put to Green under cross-examination that it would be highly unusual in any commercial transaction, to pay over money before the agreement under which you're paying that money is concluded. He agreed with that proposition. The cross-examination continued as follows:

"And we know that you made a part payment of this amount, on your version 50 000, on Mr Pennell's version 150 000, you made part payment of that amount in June 2014, of 20 000, is that right? ---I did.

And I must put it to you, because I'm going to argue this, that the fact that you started performing under the agreement, shows that the agreement was binding. ---I don't accept that.

So on your version you made this payment out of the kindness of your heart?....I believed that we would complete an agreement, and I was embarrassed at the fact that the lawyers had taken a long time to do something that should have been relatively straightforward…."

[26] It was submitted on behalf of the applicant that Green's version that there was no binding agreement until it was reduced to writing and signed, is undermined by the fact that he make part payment of GBP 20 000 on 30 June 2014, at the same time apologising for the delay. It was also argued that undisputed background

and surrounding facts supported applicant's version on the retention bonus agreement being the following:

26.1 At the time the alleged agreement was concluded respondent was in a crisis. Featherby had recently resigned to set up business in direct competition with the respondent. A number of employees left with him, including seven out of the eight top managers in the country (excluding only the applicant) and between 20 and 30 more junior staff.

26.2 Green stated under cross examination that it would be massively inconvenient if the applicant also quit the company with his team and that it would take him 18 months to two years to put together a Cape Town team.

26.3 The applicant was one of the top five performing managers globally and the Cape Town office was the number 1 office in the African division.

[27] It was argued on behalf of the respondent that it matters not whether the payment had to be made immediately or whether it was a delayed payment or whether it was 50 000 GBP or 150 000 GBP. Because the applicant's services were not retained due to the fact that his work permit had expired shortly after the alleged agreement was concluded, 'the very purpose of the agreement could not be achieved and the condition could not be fulfilled." The submission is premised on the legal consequences of provisions of the Immigration Act, which I have dealt with above.

[28] I am of the view that applicant was a more credible witness and given the surrounding circumstances, his evidence as to the terms of the retention bonus agreement should be accepted i.e. that the balance of GBP130 000 was unconditional and due and payable prior to the applicant's dismissal.

Notice Pay

[29] The applicant's claim for notice pay of GBP 29 461 is also primarily opposed by respondent on the basis of the impact of the Immigration Act's provisions which approach, as I have dealt with above, stands to be rejected. Notice pay was in fact tendered by the company, on the basis that the dismissal of applicant was 'a

no fault termination'. I see no reason why this should not be paid as offered. However, it was common cause before me that the applicant owed the respondent an amount of GBP 8 100. This should be deducted from the notice pay claimed.

Unfair labour practice: demotion

[30] The applicant's unfair labour practice claim is premised on the following: At a meeting of 16 July 2014, Mr Gregory Stockton informed him that he was being demoted. No prior notice of the respondent's intention to demote had been given, and he received no fair opportunity to state his case prior to the decision being taken. Furthermore, the respondent notified the applicant's entire team on 18 July 2014 of his demotion to the position of Senior Advisor. Two replacement area managers had been appointed prior to the meeting on 16 July 2014. Mr Leslie submits that the court should award a substantial solatium for the loss of applicant's right to a fair procedure which materially impacted on the applicant's reputation and good name in a tight-knit industry.

[31] For the respondent Mr Malan submitted that the applicant never returned to work and that he never rendered any services to the company as a Senior Wealth Advisor. For the purposes of the trial, at the termination of his employment (8 September 2015) applicant held the position of Area Manager and his claims for commission and in respect of notice pay have been calculated on that basis. In other words, the respondent underlines that there was no loss in earnings. The alleged demotion in fact did not take place. It would seem to me therefore that the real issue that applicant complains of is his alleged reputational damage caused by the announcement that he would not be returning to the company as Area Manager but in a lower position. On the facts before me, no demotion or lessening of status qua employee has taken place. I do not consider that the applicant has proved an unfair labour practice in terms of section 186(2)(a) of the Labour Relations Act and his claim in this respect stands to be dismissed.

[32] In all the above circumstances, I make the following order:

Order

1. The respondent is to pay the applicant the following amounts:

    1.1 The amount of GBP 21 361 in respect of notice pay;

    1.2 The amount of GBP 66 023 in respect of outstanding commission;

    1.3 The amount of GBP 130 000 in respect of the bonus agreement.

2. The calculation of the above amounts into South African Rands shall be made at time of payment;

3. The respondent shall make the payments on one and the same day within 14 calendar days of this order.

4. The respondent shall pay the costs in respect of C1009/2014.

5. The applicant shall pay the costs in respect of C330/2015

_____

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: GA Leslie instructed by Abrahams & Gross INC

Respondent: LM Malan instructed by Bowman Gilfillan Attorneys.

. 83A Presumption as to who is employee

(1) A person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present:

(a) The manner in which the person works is subject to the control or direction of another person;

(b) the person's hours of work are subject to the control or direction of another person;

(c) in the case of a person who works for an organisation, the person is a part of that organisation;

(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;

(e) the person is economically dependent on the other person for whom that person works or renders services;

(f) the person is provided with tools of trade or work equipment by the other person; or

(g) the person only works for or renders services to one person.

(2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6 (3).

(3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6 (3), any of the contracting parties may approach the CCMA for an advisory award about whether the persons involved in the arrangement are employees.