



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA148/2017

In the matter between:

WORKERSLIFE DIRECT (PTY) LTD

Appellant

and

E MALOKA

Respondent

Heard: 22 November 2018

Delivered: 12 December 2018

Summary: Specific performance – employee claiming payment of post-employment commissions in terms of a Group Scheme Broker (GSB) contract after resigning – employee contending that he had concluded both an admin contract and a GSB contract with employer and that was entitled both to the benefits of an administrative employee and to the post-termination commission – employer contending that only GSB employees entitled to post-termination and targets commission and disputed the authenticity of the GSB contract - court finding that employee was paid on terms identical to those provided for in the GSB contract and that employee GSB contract probably authentic – Labour Court’s judgment upheld and appeal dismissed with costs.

Coram: Sutherland and Jappie JJA and Murphy AJA

JUDGMENT

MURPHY AJA

- [1] This is an appeal against the judgment of the Labour Court (Barnes AJ) of 25 August 2017 in which it ordered the appellant to pay the respondent various commissions he had earned on policies he sold during his employment as well as post-employment commissions for the period stipulated in clause 5.5.1 of his alleged “GSB” contract.
- [2] The appellant sells insurance and related products. The respondent commenced working for the appellant’s predecessor in 1997. The predecessor went through various name changes and converted to a private company. The respondent’s contractual rights were ultimately transferred to the appellant in terms of section 197 of the Labour Relations Act¹ (the LRA”).
- [3] The respondent started work in the business as an administrative clerk for which he received a salary; however, he was also entitled to sell insurance products for which he received a commission. His initial contract of employment (concluded on 2 September 1997) made provision for both his salary and for the payment of commission for products sold.
- [4] The respondent alleges that a few years later, on 20 November 2000, during the restructuring of the business, he signed two contracts. The first contract (referred to by the court *a quo* as “the admin contract”) made provision for the payment of a salary in respect of the respondent’s employment as an administrative clerk. This contract, unlike the initial contract, made no provision for commission for the sale of insurance products. The alleged second contract however appointed the respondent as a sales broker and provided for the payment of commission – this contract was a Group Scheme Broker contract (“the GSB contract”). The appellant disputes the existence of this latter contract.
- [5] Clause 5.5.1 of the GSB contract provides:

‘Should the GSB leave the service of the COMPANY after five years from the date of signing this agreement or should the GSB die or retire as a result of ill

¹ Act 66 of 1995.

health (the condition to be certified by two medical practitioners that he/she is permanently unable to continue with employment as GSB), payment of the Provida commission will continue for a period equal to his term of service.'

- [6] The respondent resigned from his employment with the appellant on 13 March 2013. He did so because he was unhappy with changes to the commission arrangement proposed by the appellant. After the respondent left employment, the appellant refused to honour the obligation in Clause 5.5.1 to pay him post-employment commission.
- [7] The respondent then brought an application in terms of section 77(3) of the Basic Conditions of Employment Act² ("the BCEA") to compel specific performance. The GSB contract was annexed to the founding papers as "Annexure EM1". In its answering affidavit, the appellant admitted that it had concluded the GSB contract but that a new payment structure had been negotiated and agreed in terms of which post-employment commissions were no longer payable. The respondent denied this in his replying affidavit. The appellant then brought an interlocutory application to withdraw the admission made in its answering affidavit. In its founding affidavit in the interlocutory application, the appellant denied that it had employed the respondent as a broker and disputed the authenticity of the contract. However, in its replying affidavit in the interlocutory application, the appellant changed its version for a second time. There it stated that it did not dispute the authenticity of the contract, but contended that the contract had never been implemented and was therefore null and void. The appellant asserted that the admin contract could not co-exist with the GSB contract as this would be against company policy. It annexed the admin contract as "Annexure JJ2" to the founding affidavit in the interlocutory application.
- [8] The main application was ultimately referred to trial with the affidavits substituting as pleadings. Despite the appellant's admission on the pleadings that the GSB contract was authentic, the Labour Court, having regard to the pre-trial minute and the course of evidence at the trial, accepted that the

² Act 75 of 1997.

authenticity of the GSB contract (Annexure EM1) was the principal issue in dispute.

- [9] The respondent testified that he was asked to sign Annexure EM1 and Annexure JJ2 on 20 November 2000 by Ms Pillay, a secretary in the employ of the appellant. This was necessary because the original employer had converted to a private company and changed its name. The contracts had not been signed by the employer when presented to him. Ms Pillay witnessed his signature on both contracts. He was later provided with copies signed on behalf of the employer. The respondent did not know who had signed on behalf of the employer, but the signatures of the employer on both Annexure EM1 and Annexure JJ2 appear to the naked eye to be identical. The respondent received substantial commission while employed. In 2013 his net monthly salary under the admin contract was R7540, while his total monthly commission was approximately R38000. He also received a "target bonus" of R1565. The target bonus was paid to him monthly if he achieved applicable sales targets. It is common cause that the target bonus was provided for in the GSB contract but was not included in any contractual term in either the initial employment contract of 1997 or the admin contract.
- [10] The respondent's version that he worked both as an administrator and broker was confirmed by the testimony of his wife who had worked as a GSB at the appellant until 2010. She confirmed also that she had been paid post-employment commission in terms of Clause 5.5.1 of the standard GSB contract.
- [11] The appellant's General Manager, Mr. Jan Jooste, testified and admitted that the respondent was entitled to commission up to the date of his resignation. He said that there were two main types of employees at the appellant – administrative staff and sales contractors - GSBs. Some administrative staff members also sold policies and were entitled to commission thereon. According to Jooste, the respondent fell into this hybrid category of administrative employees. The hybrid administrative staff earned a basic salary, medical aid & provident fund benefits, plus commission, but only while in the appellant's employ. In contrast, GSBs earned commission only but were

also entitled to commission after the termination of their employment, on certain conditions. The respondent essentially claims that he was in a *sui generis* category of employee, as he had concluded both an admin contract and a GSB contract with appellant and that he was, therefore, the only employee entitled both to the benefits of an administrative employee and to the post-termination commission to which only GSBs were otherwise entitled. This, again according to Jooste, was inconsistent with prevailing practice.

- [12] The difficulty facing Jooste during his evidence was that he could not convincingly point to a contractual instrument other than the GSB contract providing for payment to the respondent of the substantial commission and target bonuses he earned during the 13 years from 2000 to 2013. The admin contract made no provision for commission; yet about 90% of the respondent's earnings were in the form of commission. He ventured that the commission was paid in terms of the initial employment contract concluded in 1997, despite the initial employment contract on the face of it having been superseded in all its other terms and conditions by the admin contract in 2000.
- [13] Although Jooste stopped short of alleging that Annexure EM1 was a forgery, he persisted with the contention that it was not authentic. When pressed in cross-examination by Mr. Kuhn, for the respondent, he explained that Annexure EM1 was not a valid contract and did not appear in the respondent's personnel file. He was not prepared to say it was a forgery because, so he said, he was not an expert on forgeries. He could also offer no explanation for why the disputed authenticity of the document was not raised at an earlier stage, for instance in response to the respondent's letter of demand which expressly placed specific reliance on Clause 5.5.1 of the GSB contract.
- [14] Two other witnesses testified on behalf of the appellant. Mr Helmut Nebur, who was employed by the appellant between 1996 and 2016, testified that the signatures on Annexure EM1 and Annexure JJ2 appeared to be his. In 2000, he was the appellant's branch manager in Pretoria where the respondent worked. He testified that he signed the admin contract but doubted that he signed the GSB contract because he was not authorised to sign GSB

contracts. This was the responsibility of Mr. Derek le Roux, the Sales and Marketing Manager. While conceding that the signature on Annexure EM1 closely resembled his, he was reluctant to accept it as his. He, in effect, alleged forgery. However, he conceded under cross-examination that his averment was based on deductive reasoning and not his recollection of what in fact had transpired. Le Roux testified that while he had no personal recollection of the conclusion of the admin contract or the GSB contract, it was unlikely that Nebur signed the GSB contract as such fell within the purview of his authority. He confirmed, most importantly, that only GSBs were entitled to a target bonus and could not explain why the respondent, if not a GSB, had in fact received target bonuses for 13 years.

[15] The reasoning of the Labour Court in rejecting the appellant's version is sound and unassailable. It correctly accepted the evidence of the respondent and his wife as clear, consistent and more probable. Their testimony was not damaged in any material respect under cross-examination. Their version moreover accords with the probabilities. First and foremost it was common cause that the respondent was paid commission and a target bonus for 13 years after 2000. The admin contract made no provision for either of these kinds of remuneration. The notion that commission was paid under the initial contract is highly implausible in view of the undisputed evidence that new contracts were concluded in 2000 as part of the necessary arrangements following the restructuring of the business. The admin contract, as appears from its terms, certainly was intended to supersede the initial contract of employment.

[16] The improbability of payment of commission having been made under the old initial contract is reinforced by the fact that while that contract may have made provision for commission, it made no provision for target bonuses. Jooste admitted that only GSBs received target bonuses. Hence, the respondent was paid as a GSB. The conclusion is therefore inescapable that the respondent was paid on terms identical to those provided for in the GSB contract. And thus Annexure EM1 was probably authentic and most likely signed by Nebur on 20 November 2000, as evident from the striking resemblance of the

signature on Annexure EM1 to that on Annexure JJ2, which Nebur admitted signing.

[17] In short, the payments made to the respondent accorded precisely with the provisions of the GSB contract. The Labour Court's conclusions that the contract was probably concluded on 20 November 2000 and Annexure EM1 was thus in fact authentic are thus correct. Moreover, the Labour Court did not err in rejecting the appellant's version as implausible and riddled with contradictions. The appellant's failure to take issue with the allegation that the respondent was a GSB in the initial correspondence, its admission that he was a GSB in the answering affidavit in the main application and its subsequent changing version all raise doubt about the credibility and reliability of its account. If the respondent was not a GSB, the appellant would have raised that earlier.

[18] In the premises, the Labour Court did not err in its conclusion that the respondent proved his claim and is entitled to the relief he seeks. The appeal must be dismissed. There is also no reason why costs should not follow the result in a case such as this.

[19] The appeal is accordingly dismissed with costs.

JR Murphy

Acting Judge of Appeal

Sutherland and Jappie JJA concur.

APPEARANCES:

FOR THE APPELLANT:

Adv P H Kirstein

Instructed by Grosskopf Attorneys

FOR THE RESPONDENT:

R Kuhn Attorney

LABOUR APPEAL COURT