

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JS 474/17

In the matter between:

JAMES McCORMACK

Applicant

and

COMMCO HOLDINGS (PTY) LTD

Respondent

Trial: 25 -26 February 2019

Argued: 15 March 2019

Judgment delivered: 29 March 2019

JUDGMENT

VAN NIEKERK J

- [1] The applicant was previously employed as the CEO of the respondent. He seeks to enforce a term of his contract of employment, which he contends entitles him to payment of a performance bonus in the sum of R 1.1 million. The respondent does not dispute the term of the contract, but contends that the applicant has failed to prove that the performance target that was a condition for payment of the bonus was met. The respondent accordingly denies that it is indebted to the applicant.
- [2] The applicant commenced employment with the respondent on 1 January 2014. In terms of his contract of employment, the applicant was entitled to payment of an annual performance bonus, provided that certain conditions were met. These are recorded in clause 3.4 of the employment contract, which establishes the mechanism by which the quantum of the applicant's performance bonus is to be calculated. That clause (with the necessary changes to reflect an agreed variation to the terms of the contract to substitute EBITDA (earnings before interest, tax, depreciation and amortization) for profit before tax (PBT), provides as follows:
- 3.4 Should the [EBITDA] in respect of any financial year not exceed 75% of the targeted [EBITDA] the applicable percentage in respect of that year will be 0% and no bonus will be payable. Should the [EBITDA] exceed 75%, but not 85%, of the targeted [EBITDA] the applicable percentage would be 50%. Should the [EBITDA] in respect of the financial year exceed 85% of the targeted [EBITDA] the applicable percentage is the same as that which the [EBITDA] for that year is of the targeted [EBITDA] for that year. By way of example, if the [EBITDA] for the year is 95% of the target [EBITDA] the applicable percentage is 95% and the annual bonus will be calculated at 95% of the basic salary for that year; if the [EBITDA] for the year is 120% of the targeted [EBITDA] the applicable percentage is 120% and the annual bonus will be 120% of the basic salary for that year.
- [3] The present dispute concerns the 2016 financial year. Any bonus to which the applicant was entitled was contingent on the threshold of 75% established by

clause 3.4 being met, to be calculated on the sliding scale referred to, and payable within three months of 30 June 2016, being the financial year end. The applicant left the respondent's employ at the end of May 2016. It was agreed between the parties that in so far as the applicant was entitled to a performance bonus for the 2016 financial year, the bonus would be reduced by 1/12th.

- [4] Given that the applicant's contract provided that he was entitled to a bonus depending on the respondent's actual EBITDA for the 2016 financial year compared with the budgeted or targeted EBITDA for the same year, the respondent contends that the applicant bears the onus to establish both the respondent's budgeted EBITDA for the 2016 financial year and the respondent's actual EBITDA for that year.
- [5] The applicant contends that the respondent bears the onus to prove that the performance target had not been met. In doing so, the applicant relies on *Schloemann v Goldstone Resources Ltd* (C 658/16) [2018] ZALCCT 40 13 December 2018) in which this court (per Steenkamp J) held that in a dispute about whether an employee voluntarily resigned or had his contract terminated at the instance of his employer, the applicant employee bore the onus to establish the terms of the contract; the respondent bore the onus to prove an agreement to terminate the employee's contract. The court referred to *Pillay v Krishna* 1946 AD 951 (at 953) where the court noted that the correct use of the word refers to the duty cast on a particular litigant in satisfying the court that he or she is entitled to succeed on his or her claim or defence, as the case may be. The nature of the defence raised by the respondent (i.e. that the condition on which the bonus became payable had not been met) is not in the nature of any special defence that may attract the onus of proof. I accept however, on the basis of the distinction often drawn between an onus of proof and an evidentiary burden, that given the negative allegation that forms the basis of the respondent's defence, it should discharge the evidentiary burden of establishing that as a matter of fact, at the relevant time, the agreed performance target had not been met, i.e. that the respondent's actual versus budgeted EBITDA did not exceed 75%. This is in

any event a matter peculiarly within the knowledge of the respondent, and given that this is the essence of the respondent's case, it should be required to discharge an evidentiary burden to establish that which it asserts. However, as I have indicated, the onus of establishing that the respondent is in breach of the employment contract by refusing to pay the applicant a performance bonus rests on the applicant.

- [6] The applicant's case was built ultimately on supposition. He testified that in his view, the actual EBITDA for the 2016 financial year was such that he was entitled to payment of a performance bonus. In the main, and in the absence of any meaningful ability to state what the actual EBITDA was at the time that bonuses for the 2016 financial year were calculated, he took issue with the 2016 management accounts, and the 2016 annual financial statements. In respect of the 2016 management accounts, in a comparison of year to date figures as at the end of the quarter in which he left the respondent's employ with those reflected at year-end, the applicant took issue particularly with the difference of the total EBITDA of R4 472 283 for the third quarter (Q3) and the total EBITDA reported for 2016, being R44 164. Further, the applicant contested the total projected income as per the management accounts, which he contended did not match the income as reflected on the respondent's VAT returns (the management accounts reflected a lesser income). The applicant also queried a rental expense, which differed from Q3 to Q4, as well as the salaries expense, which differed in the same quarters.
- [7] In relation to the 2016 financial statements, the applicant contended that the statements had not been audited and signed, and that there was an anomaly in regard to the total loss of R4 821 664 for the 2016 financial year, as opposed to the total profit of R5 004 001 for 2015. In particular, the applicant noted that the balance of 'cash and equivalents' for 2015 (R9 618 906) had increased to R10 003 889 for the 2016 financial year, whereas a total loss of R4 821 664 was reflected for the same year. Finally, the applicant contended that by reference to amounts paid to other employees as bonuses in respect of the 2016 financial

year, in his estimation, the respondent's EBITDA was at least 80% of budget, and that he thus qualified for payment of his bonus, the threshold being 75%.

- [8] Mr Muhammed Dalal gave evidence for the respondent. He is a chartered accountant and the respondent's chief financial officer. Dalal addressed himself to what the applicant had identified as anomalies in the 2016 management accounts and financial statements, and explained each in turn. He testified that the respondent's budgeted EBITDA for the 2016 financial year was R4 453 512 and that this figure included provision for salaries as an operating expense, in an amount of R13 788 550. That figure represented the sum of budgeted salaries (at R10 434 000) and a provision for bonuses (for the applicant and other members of staff) in an amount of R3 354 550. This evidence was not seriously challenged, and was supported by a schedule submitted by Dalal. Also not seriously challenged was Dalal's evidence that the applicant was aware of this figure, since he and the applicant had prepared the 2016 EBITDA budget.
- [9] Dalal further testified that the revised actual EBITDA as reflected in September 2016 was an amount of R 4 866 525.66, as opposed to an adjusted budgeted EBITDA of R7 808 062.39. On this basis, 62% of the budgeted EBITDA had been achieved, and bonuses were calculated and paid on this basis. The achievement of 62% of budget meant that in the applicant's case, the trigger threshold of 75% was not met, with the consequence that he did not qualify for a performance bonus for the 2016 financial year. Dalal testified that the schedule on which he performed his calculations reflected a total revenue for the year of R40 508 423.60 and operating expenses of R42 409 072.84, i.e. a loss of R1 900 649.24. After accounting for depreciation and amortization (R2 650 508.23 and R1 666 666.67 respectively), the respondent's EBITDA was reflected as R2 416 525.66. That figure accounted for the cost of salaries (as an operating expense) *but excluded any provision for bonuses*. After adjustments in respect of recoveries from associated entities, the total EBITDA was calculated at R4 866 525.66. The latter figure accounted for salaries (as an operating expense), but not bonuses. Given that there was no accounting in the total EBITDA for

bonuses, the budgeted amount of R3 354 550 was added to the budgeted EBITDA to calculate a revised budgeted EBITDA, the total of R7 8908 062.39 referred to above. To make available the EBITDA of R4 453 512.39 to shareholders, it was necessary to calculate what the respondent's earnings would have to be before bonuses were accounted for. That was achieved by adding the sum of R3 354 550 to the budgeted EBITDA, giving a total of R7 808 062.39. In the schedule produced by Dalal, the figure of R3 354 550 is reflected as having been added to the budgeted EBITDA of R4 453 512.39, to produce a total adjusted budgeted EBITDA of R7 808 062.39. Another way to appreciate Dalal's explanation is by reference to the respondent's budget for the 2016 financial year. That reflects a total salary expense of R13 788 550, a figure that included provision for bonuses of R 3 354 550. When the provision for bonuses is deducted from the total salaries expense, the total projected operating expenses decrease by that amount, which in turn increases the EBITDA budget by the same amount. That would raise the EBITDA budget from R4 453 512 to R7 808 062. This is consistent with the 2015 EBITDA budget and actuals, where the line item of salaries and thus the budgeted EBITDA excludes provision for bonuses.

- [10] Dalal also testified that he and other employees were paid bonuses based on an actual versus budgeted EBITDA of 62%. His interpretation of their contracts (which are cast in different terms to that of the applicant and provide for payment of a performance bonus at a trigger of 50% of annual budget target achieved), was that if the actual EBITDA was more than 50% of the budgeted figure, then employees would be paid to the extent of the relevant percentage. The applicant had proffered a different interpretation of the employees' contracts, one that aligned more closely with his own contract, but that is not relevant for present purposes, since the interpretation of those contracts or the quantum of the bonuses paid is not in issue.
- [11] Dalal gave evidence of other incarnations of the respondent's actual EBITDA for the 2016 financial year. Beside those recorded above, there was a presentation to the respondent's board in July 2016 in which an actual EBITDA of R1 732 201

was recorded. Dalal's evidence was that this figure did not account for the provision for the payment of bonuses, and that it therefore had to be reduced by R3 354 550 (the budgeted sum) so as to compare the actual and budgeted EBITDA. The last incarnation of the respondent's EBITDA for 2016 appears in the annual financial statements for 2016, signed by the auditors, reflecting a negative EBITDA of R 44 164. Since employee bonuses were calculated on the EBITDA reflected as at 30 September 2016, as provided in their contracts of employment (including that of the applicant) I need not consider the 2016 financial statements further. Dalal did not dispute under cross-examination that those statements were not relevant given that bonuses were calculated in September 2016. In re-examination, Dalal made clear that the 2016 financial statements were relevant to show what the actual EBITDA for 2016, but as I have indicated, this is not relevant for present purposes.

- [12] I have no reason to reject Dalal's evidence. He gave evidence confidently and with authority. Although the applicant's counsel was critical of the fact that source documents were not made available to the court, it was open to the applicant to compel the production of those documents. The documents that were included in the bundle (which included the budget, management accounts and reviewed financial statements) were supportive of Dalal's evidence, at least in terms of his analysis of them. As I have indicated, there is no basis on which I can reject that analysis. Dalal explained that items such as EBITDA were the subject of adjustment at various stages of the reporting process – in this case, the July 2016 presentation to the respondent's board, the September 2016 calculations for bonus purposes, the management accounts and the annual financial statements. Nothing sinister was implied in respect of any of the adjustments that Dalal effected, and as I have indicated, he was able to explain each by reference to the documents and reports concerned. The accounting practices adopted by Dalal were never challenged under cross-examination and I must also accept that the accounts have been reviewed by an independent auditor who has not qualified or otherwise called the accounts into question.

- [13] For the above reasons, I find that the respondent has discharged the evidentiary burden of establishing that the comparison of budgeted and actual EBITDA for the 2016 financial year as at 30 September 2016 did not meet the 75% threshold referred to in clause 3.3 of the applicant's contract for payment of an annual bonus. It follows that the applicant has failed to establish that the respondent breached clause 3.3 of his employment contract when it refused to pay him a performance bonus for the 2016 annual financial year. The applicant's claim accordingly stands to be dismissed.
- [14] In terms of s 162 of the LRA, the court has a broad discretion to make orders for costs according to the requirements of the law and fairness. In my view, these requirements are best satisfied by each party bearing its own costs. The court is ordinarily reluctant to make orders for costs against individual employees who pursue legitimately-felt grievances against their employers in good faith. This case is one of those. I must also take into account the conduct of the respondent, which made concessions regarding the basis on which the applicant's bonus was to be calculated late in the day, and a refusal to provide copies of documents requested, which were produced under subpoena only three weeks prior to the commencement of the trial. This is not the manner in which parties to disputes referred to this court ought to conduct themselves.

I make the following order:

1. The applicant's claim is dismissed.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. L Erasmus instructed by Kirchmanns Inc.

For the respondent: Adv. L Hollander instructed by Faber Goertz Ellis Austen Inc.

Labour Court