DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

2019/08/20
DATE SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Of interest to other Judges

CASE NO: J 1676/19

In the matter between:

CHRISTOFFEL GERHARDUS BOTHA

t/a TAX CONSULTING SA **Applicant**

and

CHRISTOPHER JAMES MGLURE

RENWICK **Respondent**

Heard: 13 August 2019

Judgment delivered: 20 August 2019

JUDGMENT

VAN NIEKERK J

[1] The applicant seeks an interim order directing the respondent to pay the sum of R297 857.38 into the trust account of the applicant's attorney of record, pending the resolution of a dispute between the parties concerning a bonus paid by the applicant to the respondent.

[2] The respondent was employed by the applicant in November 2016 in terms of a written contract of employment, which was varied by agreement in July 2017. The amended agreement, amongst other things, bound the respondent to the applicant's internal policies, codes, procedures, practices, rules and regulations. The agreement makes no express provision for the payment of bonuses; this is a matter regulated by company policy. The bonus policy makes provision for bonuses paid in respect of the first six months of the calendar year (January to June) and the last six months (July to December). In respect of each period, an employee qualifies for a bonus after certain conditions relating to the applicant's financial performance have been met, and defined performance criteria have been achieved by the individual.

[3] It is not disputed that the respondent met the applicable performance targets and qualified for a bonus for the period January to June 2019, and that he was paid a gross amount of R500 000 on 5 July 2019. (The sum claimed by the applicant represents the net amount of the bonus payment.) What is in dispute is the terms of the bonus policy. The applicant contends that the policy is cast in the form of a retention bonus and requires employees who are paid a bonus for January to June to remain employed by the applicant until 31 December of the same year, failing which the employee is obliged to repay the bonus. The respondent contends that

the bonus policy rewards employee performance, and that the terms of the policy impose no obligation to remain in the applicant's employ for any period after a bonus is declared and paid.

[4] The present dispute arose because on 16 July 2016, the respondent resigned from the applicant's employ, with immediate effect, and denied any obligation to repay his bonus.

[5] The papers disclose two versions of the bonus policy. The applicant contends that the applicable policy is one that was created and applied in June 2018. The relevant portions of the policy read as follows:

> B. Application
>
> - The bonus incentive applies to two, six month periods, namely, January to June and July to December. The bonus payments will be made in July and December respectively, as soon as numbers are finalised...
>
> C. Operating Principles
>
> ...Employment Change
>
> - In the event that the employment of any employee is terminated for reasons other than retrenchment and/or operational requirements, that employee shall be required to fully refund the bonus paid to them, to the company.
> - The manner in which the bonus shall be repaid may agreed (sic) upon at the date of termination. Where a payment plan is required, the employee shall sign an agreement to such effect.
> - The company may choose to waive its right to receive repayment of the bonus however this will be at the sole discretion of the company, is not guaranteed and should be on a case-by-case basis.
> - The terms hereof shall only be applicable to the calendar year in which the bonus is paid i.e. the bonus paid in June shall be subject to repayment in December. A December bonus paid shall only be subject to repayment before the end of that same calendar year.

[6] The applicant contends that during July 2019, the respondent, whom it says was responsible for drafting the bonus policy, circulated a different policy to employees. The relevant provisions of that version of the policy (the 'second policy') read as follows:

- any bonus received in December shall be required to be paid back to the company by the employee (inclusive of taxes), where such employees not employed by the company as at the end of February 2019. This shall include employees who have resigned before 1 March 2019 and those whose employment has been terminated by the company before 1 March 2019.
- The rationale behind the two-month addition to the calendar year is a risk identified by the company when employees invoice for work is yet to be commenced or completed, collecting the bonus, then departing with the work undone, to the detriment of the company; client handover procedures etc.
- The notice period of an employee shall not be taken into account where the resignation occurs during February 2019. For the purposes of the bonus pool, the resignation shall be considered immediate.

• Employment change

- In the event that the employment of any employee is terminated for reasons other than retrenchment and/or operational requirements, that employee shall be required to fully refund the bonus paid to them, to the company.
- The manner in which the banner shall be repaid may agreed (sic) upon at the date of termination. Where a payment plan is required, the employee shall sign an agreement to such effect.
- The company matches to waive its right to receive repayment of the bonus however this will be at the sole discretion of the company, is not guaranteed and shall be on a case-by-case basis.

[7] The immediate and obvious difference between the two policies relates to any bonus paid in respect of the July to December period (where in terms of the second

policy employees who are paid in December and resign before 1 March of the following year are required to pay back the money) and the absence in the second policy of any qualifier relating to the obligation to refund a bonus on termination of employment for reasons other than operational requirements.

[8] The applicant avers that 'the Respondent had ensured that the incorrect [second] policy be sent out which excluded an express clause which stated that the June bonus was subject to employment retention until December of that year, in order to not include the six-month retention time period.' The applicant avers further that the respondent's failure to circulate the correct policy and his circulation of an incorrect version of the policy that omitted the June retention clause was *mala fide* and a fraudulent act. Indeed, the applicant has gone so far as to lay a criminal charge of fraud against the respondent.

[9] On 20 July 2019, after the respondent's resignation, the applicant addressed the following correspondence to its employees:

> Dear Employee
>
> JULY RETENTION BONUS
>
> It has come to our attention that the bonus policy has been changed to leave uncertain the repayable nature of the July 2019 retention bonus. The following would have been communicated to you concerning the July 2019 retention bonus by your team leads –
>
> 1. the July 2019 retention bonus was implemented to motivate employees for the first six months of business, January to June, which is always been a more difficult trading period than the last six months.
> 2. The bonus is subject to the business unit achieving annual targets, otherwise it may be subject to pro rata deductions. We may add there are no indications that we will not have a successful second six-month period from July 2019 to December 2019, but hard work remains ahead.
> 3. Where an employee resigns on or before 31 December 2019, the bonus is fully repayable. The policy allows for discretion in cases of termination due to

operational requirements and management discretion, for example, where the personal circumstances.

To remedy this, we request the following –

a. please let me know if the repayable nature of the July 2019 bonus in the case of resignation was unknown to you, so we can address separately. We request honesty here, especially for new joiners who are not part of the previous banner cycle, i.e. with whom this process was not specifically discussed.
b. We will request each recipient to sign the corrected bonus policy, aligned with the June 2018 policy document.

[10] The applicant avers that the letter was immediately signed and returned by 64 employees, thus confirming the correctness of the applicant's understanding of the terms of the policy and especially, the consequences of leaving the applicant's employ prior to the December of the year in which any June bonus payment was made.

[11] The averments made by the applicant must necessarily be appreciated in the context of what the applicant contends to be the respondent's intention to emigrate to the United Kingdom. In the founding affidavit, the applicant states that on 22 July 2019, one of its employees discovered email correspondence that revealed that the respondent's wife was already in the United Kingdom, and that he had an interview scheduled there for 2 July 2019.

[12] This discovery caused the applicant to file the present application, as a matter of urgency. The respondent contends that the respondent was *mala fide* in accepting the June bonus when he had prior plans to emigrate, that he misled the applicant to believe that he had the true intention to remain in employ when in actual fact, he had for months been making plans to emigrate and terminate his employment with the applicant and further, that the incorrect policy was distributed by him to further his own personal needs and for his and personal gain.

[13] The applicant proffered as further evidence of the respondent's intention to emigrate an email on which the respondent was copied on 5 July 2019 in which

his wife requested a loan from her father to conclude a six-month lease in the United Kingdom, a letter dated 9 July 2019 confirming that the Respondent was intending to reside with a particular person 'for a period of two weeks or as his trip required' and a request by the respondent for the premature cancellation of his cell phone contract, which expires only in July 2020.

[14] The respondent does not unequivocally state that he was not planning to emigrate. He submits that the process of emigration 'is a long and delayed one, and which is not going to happen overnight.' He emphatically denies that he has any intention to emigrate 'at this stage'. He avers that both he and his wife are presently in South Africa and have not purchased any plane tickets or secured a visa or any residential lease overseas.

[15] Matters took a turn on the afternoon of 13 August 2019, after judgment had been reserved. My associate was approached by a person representing the applicant's attorneys of record who wished to draw my attention to an application for a protection order filed by the respondent in terms of s 2(1) of the Protection from Harassment Act, 2011. In the application, which was served on the applicant in the present proceedings soon after judgment in the present matter had been reserved, the respondent lays a complaint of harassment against the applicant. In the course of the application, which is made under oath, the respondent states that the applicant laid a criminal charge for reasons of malice and to 'seek revenge for my resignation.' Specifically, the respondent states the following:

> My wife and I are in the process of emigrating and it is my belief that the sole reason for Christoffel [the applicant] raising criminal charges is in an attempt to prevent my immigration. My wife departs on 3 August and I, within a week thereafter.

[16] The applicant's attorney was advised to file a supplementary affidavit should it wish to pursue the matter. Later the same afternoon, the respondent's attorney addressed a letter directly to me objecting to the submission of the copy of the application for a protection order. I caused the following directive to be issued by my associate:

1. I have been directed by the honourable Justice van Niekerk to direct the parties as follows:
    a. The judgements in the above matter will not be delivered on 15 August as originally indicated.
    b. The applicant approached the Judge's Chambers on 13 August 2019 to attempt to lodge a document relating to the proceedings, the applicant was advised that should it wish to file the papers, supplementary affidavit should be served and filed.
    c. The applicant has filed a supplementary affidavit.
    d. Despite the letter addressed to the Judge by his attorneys on 14 August 2019, the respondent is afforded an opportunity to file an answering affidavit to the applicant supplementary affidavit, by no later than close of business on 15 August 2019.
    e. The applicant may reply by no later than close of business on 16 August 2019
    f. The judgment will be delivered on a date to be advised.
    g. The parties and their representatives are reminded that it constitutes unprofessional conduct to approach a Judge in chambers in the absence of other parties to a matter under consideration and to correspond directly with the Judge kindly direct all communications to me.

[17] The parties duly filed answering and replying affidavits. I do not intend to deal with these in any degree of detail – the applicant accuses the respondent of perjury and misleading the court; the respondent complains that the supplementary affidavit constitutes inadmissible hearsay, and reiterates that at the time he provided reasons in support of the application for a protection order, he believed it to be true that he and his wife would soon leave South Africa. Contrary to this belief, he avers that he was not able to do so as planned, consequent on complications surrounding visas and the like. I do however accept that to the extent that the affidavits seek to cast aspersions on the integrity of the respondent's attorney and counsel, I accept unreservedly that there is no basis for such aspersions. I accept too that the affidavits are admissible.

[18] I deal first with the question of urgency. While the applicant can be criticised for waiting some ten court days to file the present application only to allow the respondent two court days to answer, I am satisfied that it acted with due diligence after becoming aware, on its version, of the respondent's intention to emigrate. In the answering affidavit, the respondent has not unequivocally denied that he intends to emigrate. He simply denies that that he intends to do so 'at this stage'. The respondent's statement of his intentions as recorded in his affidavit in support of the protection order he seeks against the applicant disclose that in all probability, his plans are more far advanced than the coy terms in which the answering affidavit is cast suggest, and that he plans to leave South Africa once all the necessary visa approvals have been obtained, i.e. sooner rather than later. In these circumstances, in my view, the application is urgent, especially given the state of the current opposed motion roll and non-existent prospect of the applicant obtaining the relief that it seeks in the normal course.

[19] What remains is to determine whether on the merits, the applicant is entitled to the order it seeks. The court is empowered by virtue of s 158 (1) (a) (i) of the LRA to grant urgent interim relief in respect of matters that fall within its jurisdiction. Although the applicant does not expressly invoke s 77(3) of the Basic Conditions of Employment Act or articulate in clear terms the nature of the action that it intends to bring, I will assume that the dispute is one that concerns a contract of employment, and that this court thus has jurisdiction.

[20] In so far as the applicant seeks an interim mandatory interdict, the requirements for interim relief in this court are no different to those that apply in the High Court - a clear right or a right *prima facie* established though open to some doubt, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief sought is granted, a balance of convenience in favour of granting interim relief, and the absence of any other satisfactory remedy (see *Spur Steak Ranches Ltd v Saddles Steak Ranch* 1996 (3) SA 706 (C)). In proceedings such as the present, where interim relief is sought pending the determination of a main

dispute, it is also incumbent on an applicant to demonstrate some prospects of success in the pending action.

[21] The applicant contends that it has established a clear right to the relief it seeks by reference to the fact that it concluded a contract of employment with the respondent, that the respondent was in the applicant's employ and had a duty of care, that the respondent agreed to the retention bonus terms and conditions and that he is in breach of the employment contract, together with the retention bonus acceptance letters and terms and conditions which were breached when the respondent terminated his employment less than a month after receiving the bonus. The applicant contends further that the respondent will not be prejudiced by the granting of the order as he will have the right to defend the main action and that the retention bonus will be held in trust pending the outcome of those proceedings. In particular, the applicant avers that it is fearful that the respondent will emigrate and that it will have no way in which it can safeguard and reclaim the funds to which it lays claim and that in the circumstances, it has no alternative remedy to avoid what it contends, will be the resultant commercial damage to its business.

[22] Although not precisely pleaded nor plainly foreshadowed in the present papers, the applicant's case in the main action would appear to be one of breach of contract; more specifically, that the respondent breached the terms of his employment contract (expressly incorporating the bonus policy) by refusing or failing to remain in the applicant's employ until 31 December 2019, and that he is thus liable to repay the applicant the bonus amount.

[23] In the present application, as I have indicated, the applicant seeks an order that the respondent 'make payment of the retention bonus … to be held in trust until this dispute is resolved.' What is sought seems either to be in the form of an order to interdict the dissipation of funds by the respondent pending a future determination of liability and judgment; alternatively, a claim for security for a future judgment; or possibly some combination of the two. The replying affidavit refers

variously to the purpose of the application as being the 'protection of the funds', or to ensure that the respondent 'does not squander the funds he received'.

[24] To the extent that the applicant seeks an anti-dissipation interdict (or interdict *in securitatem debiti*), the applicant must necessarily establish that the respondent is deliberately arranging his affairs to ensure that he will be without assets within South Africa when the applicant seeks to execute a judgment that it expects to secure. This is not the case made out in the founding affidavit. The applicant does not assert that the respondent has deliberately engaged in arranging his affairs in such a way as to ensure that he will be without assets or sufficient assets if the applicant ultimately succeeds in the main action. There is simply no evidence that the respondent has actually engaged in dissipating or secreting his personal assets with the intention of rendering hollow any judgment that may in future be given in favour of the applicant.

[25] The applicant appears more concerned to make out a case for a payment into trust of the entire capital sum that will form the subject of a future claim as security for a future judgment. In the absence of any evidence of dissipation, I am unaware of any basis on which relief of this nature might be sought, and I was not referred to any authority that would require the respondent to pay into trust the full quantum of the applicant's anticipated and as yet unarticulated claim simply as security to meet the terms of any judgment that the applicant might in future obtain.

[26] Even if I am wrong in coming to this conclusion, an application of the interim interdict test does not result in a different outcome. What must be weighed for that purpose is the strength of the applicant's case against the balance of convenience. In particular, what must be weighed is the applicant's asserted entitlement to be repaid the bonus amount and specifically, whether the applicant has shown that it has a clear right, although open to some doubt, that in the main action it will succeed in recovering that amount from the respondent.

[27] In regard to the requirement of a clear right or a *prima facie* right established though open to some doubt, it does not seem to me that on its own version, the applicant has cleared this hurdle. The bonus incentive policy on which the

applicant relies does not make any express reference to retention as its fundamental purpose. On the contrary, the terms on which any bonus may be achieved make clear that the bonus is driven by performance, not retention. In any future contractual claim, the applicant would be required to prove the term of the contract that it seeks to enforce The terms of the policy on which the applicant relies, as they apply to 'employment change' are vague. On the one hand, the policy provides that if the employment of an employee is terminated for reasons other than operational requirements, 'the employee shall be required to fully refund the bonus paid to them, to the company'. As the respondent's counsel submitted, a literal application of that provision would amount to a form of indentured servitude. To the extent that the provision is qualified by the words 'the terms hereof shall only be applicable to the calendar year in which the bonus is paid i.e. a bonus paid in June shall be subject to repayment in December. A December bonus paid shall only be subject to repayment before the end of that same calendar year,' this wording does not expressly and unambiguously provide that if an employee who is in receipt of a bonus payment paid in July resigns before 31 December of the same year, that employee is obliged on termination to repay the bonus in full. This interpretation was proffered only on 20 July 2019, after the respondent's resignation, when the applicant's employees were advised in plain language that 'Where an employee resigns on or before 31 December 2019, the bonus is fully repayable..'.

[28] Further, there are significant and material disputes of fact regarding the respondent's duty in relation to the drafting of the bonus scheme. The applicant avers that it was the respondent's obligation, and his alone, to draft the policy and that responsibility for its accuracy was his. Also denied is the averment that the respondent pre-empted his resignation, and that the respondent deliberately distributed an incorrect version of the policy, omitting the June retention clause. I find it hard to accept that in a business that is a sole proprietorship, in which a significant number of employees are engaged and which employs human resource expertise, that a key policy regarding the payment of performance bonuses would simply be left to a manager to devise and implement with no reference to the owner

of the business or HR manager. The fact remains that the policy is poorly drafted and does not unequivocally impose any retention requirement on an employee who has qualified for and been paid what amounts to a performance bonus. In short, the applicant's prospects of success in any claim in which it seeks to hold the respondent liable for a breach of his employment contract are not so overwhelming that the court ought now to intervene and order that the respondent put up the full value of the applicant's claim as security for judgment.

[29] Finally, in so far as costs are concerned, for the purposes of s162 of the LRA, the requirements of the law and fairness dictate that costs ought to follow the result.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk
Judge