



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2021/28086

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

6.12.2022
DATE

In the matter between:

WINGS TRAVEL MANAGEMENT (PTY) LTD

Applicant

and

EGON ZEHNDER INTERNATIONAL SA (PTY) LTD

Respondent

JUDGMENT

CRUTCHFIELD J:

[1] This application concerns the interpretation of one clause in an agreement concluded between the applicant, Wings Travel Management (Pty) Ltd, and the respondent, Egon Zehnder International SA (Pty) Ltd ('the agreement').

[2] The issue for determination is whether the relevant clause in the agreement ('the clause'), obliged the respondent to replace the candidate the respondent recommended for employment with the applicant. The latter, the applicant, contended that the clause did so oblige the respondent and that the respondent's refusal to comply constituted a repudiation of the agreement.

[3] As a result of the respondent's alleged repudiation, the applicant cancelled the agreement and sought restitution of its performance under the agreement at that stage, being the applicant's claims for payment of R1 150 000.00 (one million one hundred and fifty thousand rand), interest and costs of the application.

[4] The respondent opposed this application.

[5] The respondent denied that the clause obliged it to replace the recommended candidate and alleged that it had performed fully under the agreement. In addition, the respondent contended that restitution, claimed by the applicant, was not a competent form of relief in the circumstances of this matter.

[6] The facts relevant to the main application were largely common cause between the parties.

[7] The applicant mandated the respondent to procure a managing director for the applicant's operations in South Africa. The mandate comprised a letter written and sent on behalf of the respondent to the applicant. The letter contained the terms and conditions of the respondent's appointment for the purpose of sourcing a suitable candidate for employment by the applicant. The applicant's representatives agreed to and countersigned the letter.

[8] The respondent's professional fee to source a suitable candidate for the position was the sum of R1 250 000.00 (one million two hundred and fifty thousand rand) plus VAT. The amount of the fee was not based on or linked to the amount of the successful candidate's envisaged remuneration by the applicant.

[9] The clause provided the following:

"If the candidate departs or is asked to leave up to 12 months after commencing employment due to reasons directly linked to his/her performance in the role, he/she will be replaced at no extra cost."

[10] The applicant did not dispute that the respondent recommended a suitable candidate, one Mr Kevin Lomax ('Mr Lomax'), for the position of managing director with the applicant. The latter accepted Mr Lomax and offered him the position, which Mr Lomax accepted. The applicant and Mr Lomax concluded an employment contract in terms of which Mr Lomax would commence employment with the applicant on 10 April 2020 ('the employment contract').

[11] The national lockdown pursuant to the covid 19 pandemic ('the pandemic'), commenced on 28 March 2020. As a result, on 1 April 2020, Mr Lomax requested the applicant to release him from the employment contract. In the light of the envisaged adverse effect of the pandemic on the travel industry, the applicant agreed to do so. Mr Lomax sought to resume his employment position with his previous employer.

[12] Thereafter, the applicant approached the respondent to source an alternate candidate for its managing director position at no additional cost to the applicant, based on the clause.

[13] On the applicant's interpretation of the clause, the candidate recommended by the respondent departed within twelve months after commencing employment. Thus,

the applicant contended that the respondent was liable to replace Mr Lomax at no extra cost to the applicant.

[14] The respondent refused to do so and denied that it repudiated the agreement. The respondent submitted that the clause did not find application as the requirements of the clause were not engaged by the facts of the matter. Mr Lomax's suitability as a candidate for the position was not in dispute. Furthermore, Mr Lomax did not leave the applicant's employ due to reasons directly linked to his performance in the role, as required on the respondent's interpretation of the clause.

[15] Furthermore, the respondent contended that even if its construction of the clause was wrong, the applicant's claim for restitution was inappropriate as the applicant received value under the agreement. This because the respondent recommended a suitable candidate. In effect, the applicant received the bargain that it sought in terms of the agreement.

[16] Accordingly, the respondent argued that it met each of its obligations under the agreement and was not obliged to replace the recommended candidate.

[17] Subsequent to the hearing of the application, the respondent approached me for leave to deliver a supplementary affidavit ('the interlocutory application'). The applicant opposed the interlocutory application and I agreed to hear the parties on the issues. I heard argument on whether or not I should allow the supplementary affidavit and the applicant's answer to it and, if so, the effect of the supplementary affidavits on the application.

[18] The essence of the respondent's supplementary affidavit, and the reason the respondent submitted it was relevant to the application, was that the respondent

became aware, after the parties argued the application, that the applicant had re-employed Mr Lomax who continued in the applicant's employ.

[19] The applicant contended that the fact of Mr Lomax's employment, subsequent to completion of the cause of action in the application, was irrelevant, that I should disallow the respondent's supplementary affidavit and order the costs of the interlocutory application against the respondent.

[20] The respondent became aware on 9 March 2022, that Mr Lomax had commenced employment with the applicant on 1 February 2022 or thereabouts.

[21] One of the issues raised by the respondent was that the applicant, on 24 January 2022, when I heard the application, must have known that it had signed a fresh employment contract with Mr Lomax but elected to stay silent on the issue.

[22] The applicant's senior counsel informed me that he had no knowledge of the applicant's pending re-employment of Mr Lomax when the parties argued the application. I accepted, as did the respondent's counsel, the applicant's senior counsel's statement in that regard.

[23] This judgment deals with the issues in the application together with those in the interlocutory application, in so far as it is necessary to do so in the light of my findings in the application.

[24] I turn to deal with the application.

[25] The respondent's counsel raised three facts against the background of which he submitted the interpretive exercise should take place. These facts were that the

respondent did everything it was obliged to do in terms of the contract, expended time and resources on an exhaustive selection process and ultimately, recommended Mr Lomax to the applicant. The latter accepted Mr Lomax and concluded an employment contract with him.

[26] There was no dispute in respect of Mr Lomax's suitability for the position with the applicant. Mr Lomax was the appropriate and most suitable candidate for the job.

[27] Secondly, Mr Lomax's departure from the applicant had nothing to do with his performance in the role or any breach on the respondent's part of the agreement. The respondent did not fail to perform any of the obligations resting on it under the agreement.

[28] Lastly, Mr Lomax declining to take up the position with the applicant was the result, effectively, of a common consensus between the applicant and Mr Lomax. The respondent played no part in that common consensus or in Mr Lomax's decision to return to his previous employment. Mr Lomax's actions had nothing to do with the respondent.

[29] The respondent pointed to the drastic cost reduction exercise undertaken by the applicant pursuant to the envisaged consequences of the pandemic. The common consensus forged between the applicant and Mr Lomax, ultimately, was a commercial arrangement between the two of them pursuant to the circumstances at the time.

[30] The respondent, however, complied with its obligations in their entirety. Other than Mr Lomax's failure to take up and remain in the employment position, no fault was raised by the applicant in respect of the respondent's performance.

[31] The applicant argued that for it to insist on Mr Lomax taking up the employment position would be akin to servitude or slavery, which we do not allow. Accordingly, the applicant had no alternative but to accept Mr Lomax's election.

[32] The applicant referred, with reference to the context of the clause, to the fact that Mr Lomax did not remain in the position with the applicant. Longevity in the role was one of the applicant's requirements of the recommended candidate. The applicant referred to documentation attached to the agreement, in terms of which the respondent undertook to "find someone who will perform in the role, stay in the firm, and grow over time". In addition, the respondent undertook to "focus on the long-term success of a candidate".

[33] The clause, according to the applicant, had to be interpreted within the context of the applicant's requirements, one of which was longevity by the recommended candidate in the position of the applicant's managing director.

[34] Accordingly, the applicant submitted that in so far as Mr Lomax failed to remain in the position for which the respondent recommended him, the respondent, to that limited extent, failed to comply with its obligations.

[35] Whilst I agree with the applicant that it had to accept Mr Lomax's decision and could not hold him to the employment contract, the fact remains that Mr Lomax did not depart because he was not suitable for the position. Furthermore, Mr Lomax did not do so due to any fault on the respondent's part. Mr Lomax was, by all accounts, eminently suitable to the position. In the circumstances, the fact that Mr Lomax failed to remain in the position was not due to the respondent failing to select the correct candidate for the role.

[36] It is against the background afore-mentioned, that I consider the interpretation and appropriate meaning to be afforded to the clause.

[37] The principles relevant to the interpretation of the clause, the agreement, a contract, a statute or a court order are the same and have been articulated and referred to extensively in recent case law pursuant to *Natal Joint Municipal Pension Fund v Endumeni Municipality*.¹ I do not intend to restate those principles save as absolutely necessary hereunder.

[38] The parties agreed on the appropriate test for interpreting the clause, being the “objective process of attributing meaning to words used...”². The interpretive procedure comprises a “unitary” exercise or simultaneous consideration of the relevant text, context and purpose.³ The text and its structure however remain the starting point.⁴ The test is objective.

[39] Words must be given their ordinary grammatical meaning in the light of the ordinary rules of grammar and syntax, unless to do so would result in an absurdity, simultaneously with a consideration of the context in which the words appear and the apparent purpose to which they are directed.”

[40] A commercially sensible and business-like interpretation that avoids absurdity will always be preferred by a court.⁵

¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (‘Endumeni’) at paras 18 and 25 to 26; *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC) (‘Waymark’); *Airports Company South Africa v Big Five Duty Free (Pty) Ltd & Others* 2019 (5) SA 1 (CC) (‘Big Five’) at paras 29 and 30.

² Id.

³ *University of Johannesburg v Auckland Park Theological Seminary & Another* [2021] JDR 1151 (CC) (‘University of Johannesburg’) at para 65.

⁴ *University of Johannesburg id* at para 51.

⁵ *Endumeni* note 1 above at para 181; *Gouws NNO & Another v BBH Petroleum (Pty) Ltd* 2020 (4) SA 203 (GP) at para 32.

[41] The applicant referred in addition to *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association*⁶ to the effect that “evidence of the intention of the parties of their prior negotiations is inadmissible”.⁷

[42] According to the applicant, a consideration of the words of the clause gave rise to two distinct alternatives; firstly, the departure of the recommended candidate from the applicant’s employ within twelve months of commencing the employment, and, secondly, the recommended candidate being asked to leave the applicant’s employ due to reasons directly linked to his / her performance in the role, within twelve months of commencing the employment.

[43] The applicant argued that a commercially sound interpretation of the clause required the qualification of “up to 12 months after commencing employment” to apply to both alternatives, notwithstanding the placement of the phrase after the words “if the candidate is asked to leave”.

[44] The clause, according to the applicant, was poorly drafted and had to be redrafted or reconstructed in order to afford it a commercially sensible meaning, by reading the words “up to 12 months after commencing employment” at the end of the clause, in order that the twelve-month limitation applied to both alternatives.

[45] Hence, on the applicant’s construction of the clause, if the recommended candidate departed within twelve months of commencing employment, whatever the reason for the candidate’s departure, or the candidate was asked to leave for reasons linked to his performance in the role within twelve months of commencing employment, the respondent had to replace the candidate at no additional cost to the applicant.

⁶ *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) at paras 76 and 77.

⁷ *Id* at para 76.

[46] The second leg of the applicant's argument was that the phrase "due to reasons directly linked to his / her performance in the role" applied only to the second alternative, to the candidate being asked to leave the employment.

[47] Performance, argued the applicant, was measured and acted on by an employer. It was something within the employer's power and control. Thus, it was highly unlikely that an employee, enticed to a new employment position by the salary and prospects of the position, would depart due to concerns in respect of his / her own performance.

[48] The respondent contended that the applicant's submissions in this regard were speculative and incorrect. This was because managing director positions were highly stressful and demanding positions. It was feasible for an employee holding such a position to depart of his / her own accord voluntarily for reasons linked to performance. Ultimately, little turned on the longevity or otherwise of an employee in a managing director's role.

[49] In respect of the context of the clause, the applicant referred to the fee charged by the respondent, the applicant's requirement that the recommended candidate remain in the position for a reasonable period of time as articulated in the documents aforementioned and that performance was linked to a situation where a candidate was asked to leave by the employer, the applicant, and not related to the candidate departing voluntarily.

[50] The respondent submitted that on a grammatical consideration of the text of the clause, the qualification of "due to reasons directly related to his/her performance" applied to both alternatives raised by the clause, to the candidate departing and to the candidate being asked to leave the employment.

[51] In respect of the applicant's submission that the words "within 12 months" had to be removed from their current position in the clause and rewritten at the end of the clause, the court in *Endumeni* found that courts "... must be alert to and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. That caution would incorporate changing the syntax of the clause.

[52] On a reading of the plain text of the clause, there is no ambiguity or absurdity in the language or in the meaning conveyed by the words used.

[53] Furthermore, a consideration of the ordinary grammatical meaning and construction of the text, does not give rise to absurdity or ambiguity. In those circumstances, there is no basis for the rewriting or reconstruction of the clause, which must be considered as it stands.

[54] Accordingly, rearranging the text of the clause as proffered by the applicant, would, given the absence of ambiguity or absurdity in the text, result in this Court reconstructing the clause, in effect redrafting the parties' agreement, something courts are not permitted to do.

[55] In *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and Others*⁸ the Supreme Court of Appeal reiterated that the text and the grammatical meaning thereof remain the starting point of the interpretive exercise. A court must consider the words as they stand in the text and may not reconstruct or rewrite the text in order to give rise to a predetermined outcome of the interpretation.

⁸ *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99 (09 July 2021) ('*Capitec*') at para 51.

[56] Ultimately, what the applicant sought to achieve was to apply the words “due to reasons directly linked to his/her performance in the role” to the candidate being “asked to leave” only. That required that the words “up to 12 months after commencing employment” be moved to the end of the clause in order for the clause to provide:

“If the candidate departs or is asked to leave due to reasons directly linked to his/her performance in the role, up to 12 months after commencing employment he/she will be replaced at no extra cost.”

[57] The respondent submitted that given the prevailing context of the matter, to reconstruct the text in the manner that the applicant sought to do was artificial in that it resulted in the text stating that if the candidate departed (of his own volition) for any reason whatsoever during the twelve months after commencing employment, the respondent was obliged to replace the candidate at no cost to the employer. Stated differently, the clause had to be reconstructed in order for the applicant to achieve its preferred and predetermined outcome, something that courts⁹ caution against.

[58] The respondent demonstrated effectively with reference to the context, the language and grammar of the clause, why the applicant’s reconstruction of the clause was unreasonable and unsustainable. One such example was if the candidate departed on the last day of the twelve-month period pursuant to being head-hunted by another employer. Why, in those circumstances, and others in which the respondent had performed fully by recommending a suitable candidate and the respondent was not at fault, should the respondent be obliged to recommence the entire process of procuring an alternate suitable candidate at no cost to the employer.

[59] Hence, it makes sense that the respondent’s obligation to replace the recommended candidate applies if the candidate’s performance in the role does not meet the required standard. Accordingly, an interpretation of the clause whereby the

⁹ Id at para 50.

phrase “due to reasons directly linked to his/her performance in the role” applies to both alternatives, to the candidate departing or being asked to leave, results in a sensible and commercially sound outcome.

[60] Furthermore, on a consideration of the language and the grammar of the text in the context of the matter, the plain meaning of the text is commercially sensible. The qualification of the candidate leaving “up to 12 months after commencing employment” applies to both the candidate departing and being asked to leave. In addition, given the position of the ‘or’ between the words “if the candidate departs” and “is asked to leave”, they cannot be read disjunctively as the applicant sought to do.

[61] The two phrases “up to 12 months after commencing employment” and “due to reasons directly linked to his/her performance in the role”, both appear in the text after the words “if the candidate departs” and “is asked to leave”. Thus, the two phrases “up to 12 months after commencing employment” and “due to reasons directly linked to his/her performance in the role”, both apply to the two alternatives, to the candidate departing and to the candidate being asked to leave.

[62] As to the purpose of the clause, it functioned as a guarantee by the respondent of the respondent’s selection of the recommended candidate. The clause was a standard inclusion in all of the respondent’s agreements with its clients. The respondent guaranteed its performance in selecting the appropriate candidates in terms of the clause. In the event that the recommended candidate was not suitable to the position and left for reasons linked to his / her performance in the role, then the respondent would replace the candidate at no additional cost. In the event that the candidate did not perform in the role or there were issues related thereto, then the respondent would replace the candidate because the respondent did not select a suitable employee.

[63] As regards Mr Lomax, however, there was no averment that he was not a suitable candidate. There was no suggestion that he was not suited, eminently so, to the position. In those circumstances, the respondent's guarantee of its performance did not apply.

[64] The respondent based its fee on the extensive procedures and work undertaken by it in selecting the most suitable candidate for the role. Moreover, the respondent effectively guaranteed its work by way of the inclusion of the clause.

[65] The text of the clause, on a plain reading thereof in the context of the agreement and in the light of the purpose of the clause, is unequivocal and unambiguous. It means what it says. If a candidate departs or is asked to leave, within twelve months of commencing in the employment position, the respondent's guarantee to replace the candidate arises if the reason for either alternative is "linked to (the candidate's) performance in the role".

[66] The position of the words "up to 12 months after commencing employment" in the text renders the time limitation applicable to both alternatives without the phrase having to be moved to the end of the clause. So too does the text render the qualification regarding performance applicable to both alternatives.

[67] Given the respondent's guarantee of its performance in selecting the most suitable candidate, it makes logical and commercial sense that the guarantee incepts and applies when a recommended candidate departs the employment or is asked to leave for reasons related to performance in the role. Stated differently, in the event that the respondent selects the wrong candidate and that candidate departs or is asked to leave as a result of an inappropriate selection, being reasons linked to his performance

in the role, the respondent's guarantee applies and the respondent will replace the candidate.

[68] The respondent's interpretation of the clause arises from the text itself and it accords with the purpose of the clause being included in the agreement, being that the respondent sought to ensure and guarantee that the recommended candidate was the best candidate for the job.

[69] The text, the context and the purpose of the clause all point to the respondent's interpretation of the clause.

[70] The applicant's interpretation requires the rewriting of the clause in circumstances where a court may not do so. The applicant's stance will undermine the purpose of the clause and lead to an interpretation that is not commercially sustainable, being the respondent having to replace the candidate who departs for any reason whatsoever within the twelve-month period.

[71] In the circumstances, the applicant's interpretation cannot be upheld and an appropriate order will follow hereunder.

[72] The parties agreed at the hearing that the outcome of the interpretative exercise, if it favoured the respondent, would be dispositive of the issues regarding restitution and that the costs of the application should follow the order on the merits.

[73] In respect of the respondent's interlocutory application, that was rendered moot by my finding on the merits of the application. In the circumstances, it is appropriate that the costs of the interlocutory application be costs in the cause of the application.

[74] By reason of the aforementioned, I grant the following order:

1. The application is dismissed with costs, such costs to include the costs of the respondent's interlocutory application.

**A A CRUTCHFIELD
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 6 December 2022.

COUNSEL FOR THE APPLICANT: Mr G Kairinos SC.

INSTRUCTED BY: Biccari Bollo Mariano Inc.

COUNSEL FOR THE RESPONDENT: Mr J M Hoffman.

INSTRUCTED BY: Swartz Weil Van der Merwe Greenberg Inc.

DATE OF THE HEARING: 24 January 2022 & 6 May 2022.

DATE OF JUDGMENT: 6 December 2022.