INTHE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA60/2014

In the matter between:

RENAISSANCE BJM SECURITIES

(PROPRIETARY) LIMITED **Appellant**

and

STEVEN GRUP **Respondent**

Heard: **3 September 2015**

Delivered: 17 November 2015

Summary: Interpretation of a contractual clause – dispute whether payment to employee upon taking employment a retention or recruitment incentives – Appellant contending that money paid was subject to employee remaining in its employ and that employee forfeiting payment upon his resignation. Retention clause agreement in terms of which employer undertaking to pay an employee possessing special skills to commit his/her service for a specified period. Recruitment incentive money paid to employee to move to another employer. - Principle related to the interpretation of contract applicable to these agreements – language used in clause unambiguous and contains no condition relating to the employee remaining in the employer's employ - money paid to compensate employee for the loss suffered because of his resignation from his former employ. Labour Court's judgment upheld - Appeal dismissed with costs.

Coram: **Tlaletsi DJP, Ndlovu e*t* C J Musi JJA**

JUDGMENT

CJ MUSI JA

[1] This appeal, which is with the leave of the court *a quo* (Molahlehi J), concerns the question whether a sum of money, which was partially paid to the respondent by the appellant, was a recruitment incentive (sign-on bonus) or a retention incentive (stay-on bonus).

[2] The respondent, who was an investment banker, was employed by Investec Bank Limited (Investec). During November 2010, while in Investec's employ, he entered into negotiations with the appellant, a duly registered company, with a view to becoming employed by the appellant.

[3] It is common cause that the respondent was, at the time of the negotiations, entitled to deferred equity compensation from Investec in the form of share options. The Investec share options were part of a retention agreement that he concluded with Investec in terms of which he would be entitled to exercise a predetermined number of share options at predetermined intervals. On leaving Investec, however, he would forfeit all right and entitlement to claim or exercise such share options. The share options, at the time of the negotiations were, according to the respondent, worth in excess of USD 1 000 000 (1 million US dollars).

[4] Pursuant to further negotiations, the respondent presented proof of the value of the Investec share options where after the appellant and the respondent entered into an employment contract. The respondent commenced employment with the respondent from 1 February 2011.

[5] The parties referred to the Investec share options as the deferred equity compensation or the Old Award. The agreement between them relating to the

Investec share options was stipulated in clause 4.5 of the employment agreement and reads as follows:

> 'You have told us that you would forfeit deferred equity compensation from your current employer (the "Old Award") as a result of leaving them to join the Group. The value of the Old Award is currently estimated by you to be USD 750 000, but the precise valuation will be determined by RENCAP BJM in its absolute discretion as at the last day of your employment with your previous employer (and in making that determination RENCAP BJM shall be entitled to take into account the risk of subsequent forfeiture had you not left your current employer (the "Forfeited Value"). Provided that you provide evidence to the reasonable satisfaction of RENCAP BJM of the existence and value of the Old Award and its forfeiture (including any documentation requested by RENCAP BJM) within 30 days of the date on which your employment with RENCAP BJM actually begins, we will procure that you be paid cash of equal value to the Forfeited Value, payable in June 2011, June 2012 and June 2013.'

It is common cause that the respondent gave the necessary evidence to the appellant's satisfaction.

[6] The respondent alleged that he would not have resigned from Investec without receiving compensation for the loss of the Investec share options from the appellant. According to him, the USD 750 000 was a recruitment incentive.

[7] The appellant alleged that the inclusion of the deferred equity compensation clause in the contract was subject to the respondent remaining in its employ. According to the appellant, its agreement with the respondent, relating to the entitlement to the deferred equity compensation, was the same as that between the respondent and Investec – that by resigning from the appellant, he would not be entitled to any amount in terms of clause 4.5.

[8] Above and beyond the amount mentioned in clause 4.5, the respondent was, in terms of clause 4.3, also eligible to receive an annual discretionary bonus whilst in the employ of the appellant and he was entitled to receive a guaranteed bonus of USD 350 000 for 2011 payable on 30 June 2011. Clause 4.3 of the contract reads as follows:

'4.3 **Discretionary bonus**

4.3.1 You may, in the sole and absolute discretion of RENCAP BJM, be paid an annual bonus commensurate with your performance and the Group's overall position for the relevant calendar year on the condition that (i) you have not given notice to terminate your employment under this Agreement or any other similar arrangement with any other member of the Group with which you may be employed; and (ii) none of the events described in Clauses 8.2.2 and 8.2.3 of this Agreement have occurred and (iii) you are still actively performing duties for the Group on the date any bonus is due to be paid.

If you are subject to any disciplinary proceedings which, if found guilty of, may result in your dismissal or are subject to any disciplinary sanctions on the date any bonus is due to be paid, any decision regarding payment will be delayed until the investigation or process has been completed or in the case of a continuing disciplinary sanction reviewed by RENCAP BJM, which will then decide whether any payment should be made.

You are hereby advised and you acknowledge that if RENCAP BJM makes a bonus payment to you in respect of a particular year it shall not be obliged to make subsequent bonus payments in respect of subsequent years.

4.3.2 For year 2011 only, it is agreed that you shall receive a minimum guaranteed bonus ("General Bonus") for calendar year 2011 equal to USD 250 000 payable on 30 June 2011 on the same terms as set out in Clause 4.3.1 and subject to the Group's Long Term Incentive Policy, as set out in clause 7.3. Once paid shall be deemed to have been earned.

You will still be eligible to participate in the 2011 bonus cycle in March 2012.'

[9] On 25 June 2011, the respondent received USD 525 000, being the first instalment of the deferred equity compensation (250 000 USD) and the rest (USD 275 000) as the guaranteed bonus. The respondent was of the view that the guaranteed bonus amount was supposed to be USD 350 000 and

therefore that he received USD 75 000 less than what he was entitled to. The appellant's view was that the guaranteed bonus was subject to its Long Term Incentive Policy (LTIP) and that it was entitled to withhold the USD 75 000 in terms of that policy.[1]

[10] The dispute relating to the USD 75 000 could not be resolved and the respondent ultimately tendered his resignation on 26 September 2011 effective from 26 December 2011 as he had to give 3 months' notice in terms of the agreement.

[11] The court *a quo* identified the issues to be decided as follows:

> 'The key question to answer in this matter is whether the applicant is entitled to the payment of the deferred equity compensation after he cancelled the contract that made provision for such payment. Put in another way the question is whether the obligation to pay the deferred equity compensation survived the cancellation of the contract. The answer in my view lies in the interpretation of the contract.'

[12] The court *a quo* gave proper consideration to the arguments of both parties in interpreting the contract and concluded that clause 4.5 created an unconditional and enforceable obligation that survived the cancellation of the contract.

[13] Mr Franklin, on behalf of the appellant, submitted that the obligations created by clause 4.5 were conditional upon continued employment and that they were discharged when the employment relationship was terminated. He further submitted that the payments were intended to operate on the same basis as the Investec benefits, namely as defined cash benefits that would accrue at predetermined future dates, subject to continued employment. The payments were therefore not intended as a sign-on bonus.

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[1] The issue relating to the USD 75 000 is the subject matter of another claim. It is not necessary to expand on this issue because it is irrelevant to the issues that have to be adjudicated in this matter. See Labour Court Case number J1582/2011.

[14] Mr Malan, on behalf of the respondent, submitted that the provisions of clause 4.5 are clear and unambiguous and there is no need to import or read words into the clause.

[15] Retention agreements are essentially contracts in terms of which the employer undertakes to pay an employee (money or other consideration) for the latter's commitment or undertaking that the employer would retain his/her service for a specified period. Retention bonuses are usually paid to employees who possess special skills, knowledge, qualifications, competences or business relations that the employer would like to retain.

[16] In most cases, retention agreements are intended to provide a financial incentive to the employee to prevent him/her from voluntarily terminating the employment relationship when such employee is considered to be crucial or critical to the employer's business. Retention agreements are chiefly aimed at protecting the employer's interest against the consequences of the voluntary termination of employment by an employee during a specific period. They normally apply for a finite period of time after which they expire.

[17] Retention agreements are therefore hand-outs with handcuffs or cheques with chains. The employee is given money and in return, he/she must give up his/her freedom to leave the employ of the employer. It curtails the employee's right to jump ship even when the ship is being steered straight in the direction of an iceberg.

[18] Retention agreements curtail the freedom of the employee and should therefore be clear and unambiguous. They should clearly describe the terms and conditions under which the employee would be paid in terms of or released from the retention agreement.

[19] The employee should know what the consequences of voluntary termination would be. Voluntary termination by the employee could, depending on the terms of the agreement, result in forfeiture of the retention benefit.[2] The

[2] *Sanlam Life Insurance Limited v Veinluxivan Sibanda* unreported judgment South Gauteng High Court, case number 13667/3008 delivered on 20 August 2008.

consequences of involuntary termination of employment, before the designated date, should also be stipulated.

[20] A recruitment incentive is money (or other consideration) paid in exchange for the employee exercising his/her freedom to move to another employer. The money is therefore paid to facilitate movement and not to impede it. It may be paid on condition that the employee remains in the employ of the new employer for a specific period. This is however not a necessity. Such contracts are normally entered into in the employee's interest.

[21] Retention or recruitment agreements like any other contract should be interpreted in accordance with what was said *in Natal Joint Municipal Pension Fund v Endumeni Municipality.*[3] In *Endumeni Municipality*, the following was said:

> '[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary Schoo*l. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

[3] 2012 (4) SA 593 (SCA).

> Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[4]

[22] Mr Franklin submitted that the language used in the impugned clause lends itself to two possible meanings. On the one hand, that the money was partially paid as a sign-on bonus and on the other hand, that it was paid as a retention bonus. He submitted, as stated above, that it was paid as a retention bonus. In *Endumeni Municipality,* the following was said about the possibility of two or more meanings that may be attributed to the language used in a document:

> 'In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'[5]

[23] The language used in the impugned clause is unambiguous and contains no condition relating to the respondent remaining in the appellant's employ. The clause clearly states that the respondent would be paid "cash of equal value to the forfeited value". The money was therefore paid to compensate the respondent for the loss he suffered or would suffer as a result of resigning from Investec. The money was payable in three tranches, which were not linked to the respondent remaining in the appellant's employ.

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[4] Endumeni *supra* at para [18].
[5] At para [26].

[24] The context within which the clause should be considered is that the appellant desired the services of the respondent. Both parties were aware that the recruitment process would not succeed unless the respondent was compensated or sufficiently compensated for the loss that he would suffer on resignation form Investec. The only way in which the appellant could procure the services of the respondent was to facilitate his resignation from Investec by offering to pay him what he would forfeit on resignation. It is clear that clause 4.5 came into existence because of these considerations.

[25] The other bonuses – the discretionary bonus and the guaranteed bonus – were payable to the respondent on condition that he remained in the appellant's employ, which is not the case with the deferred equity compensation.[6] The contract does not state for how long the retention agreement would be valid. The respondent was never requested to give an undertaking – written or verbal – that he would stay in the appellant's employ for a specific period and be paid for such undertaking. Although the appellant alleged that the terms of the retention agreement were verbally explained to the respondent such terms were not set-out, at all, by the appellant in its pleadings. Mr Franklin, unsurprisingly, expressly stated that the appellant no longer relies on the assertion that the terms of the retention agreement were verbally explained to the respondent.

[26] Mr Franklin contended that the deferred equity compensation payments were intended to operate on the same basis as the Investec benefits, namely as defined cash benefits that would accrue at predetermined future dates subject to continued employment. He further submitted that respondent did not acquire additional rights to those he held at Investec. The appellant undertook similar obligations towards the respondent, on similar terms as Investec (specifically continued employment at the set future dates) in order to compensate the respondent for loss of future, contingent rights, so as to persuade him to forego those benefits and to take up employment with the appellant. He submitted that his submission is a more business like interpretation of clause 4.5.

[6] See clauses 4.3.1 and 4.3.2.

[27] The major blemish in Mr Franklin's argument is the fact that the appellant did not know the terms and conditions of the Investec scheme at the time of entering into the agreement with the respondent. As a matter of fact, Mr Franklin could not inform us on what predetermined dates any sum of money would have accrued to the respondent had he remained in Investec's employ. In short, the appellant had no clue what the agreement between Investec and the respondent entailed. To say that the appellant undertook to compensate the respondent on similar terms as the Investec agreement without knowing what the terms and conditions of the Investec agreement were is totally senseless.

[28] The appellant in an endeavour to get over this hurdle, testified that this kind of retention agreement is standard industry practice. The court *a quo* correctly gave short shrift to this argument. It pointed out, with reference to *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd*,[7] that there was no evidentiary basis for the assertion that the payment was made in terms of a retention agreement as is industry practice or custom. Mr Franklin expressly jettisoned this argument before us. This concession must be correct because the contract expressly provides that:

> 'This Agreement operates in substitution for and wholly replaces with effect from the Effective Date all terms previously agreed between RENCAP BJM and you which will be deemed to have been terminated by mutual consent… No variation or addition to this Agreement and no waiver of any provision of it will be valid unless in writing and signed by or on behalf of both parties.'[8]

[29] Mr Franklin submitted that it is unbusinesslike to unconditionally offer an employee an amount of money and thereby run the risk that the employee might only be in the employer's employ for one day and then resign. It might not be business like in retention agreements but it makes perfect sense in recruitment agreements because the prospective employee is very valuable to the new employer and the latter is prepared to take that risk. It is unfortunately the nature of the beast. The guaranteed bonus is a telling example of a

[7] 1973 (2) SA 642 (C).
[8] Clause 16.1(b) and (e).

recruitment clause. Is it business like to offer an employee upfront a guaranteed bonus of USD 350 000 payable after only four month's employment? It makes business sense if the employee it relates to is so valuable that his/her move to the new employer should be made as lucrative as possible.

[30] Clause 4.5 only regulates the hand-out but not the handcuffs. Where special mention is made of an obligation, some other obligation which would otherwise normally be implied in the circumstances is excluded: *expressio unius est exclusio alterius*. Special mention was made of the amount to be paid but no mention was made of the restriction/obligation of continued employment.[9] In my view, the court *a quo* was correct in concluding that the money was meant to be a sign-on incentive and not a stay-on incentive. Did clause 4.5 survive the termination of the contract?

[31] The termination of a contract ordinarily spells the end of the rights and obligations of the parties in terms of that contract. Where the right to performance under a cancelled contract has accrued to one party prior to rescission, the right remains unaffected by the rescission and may be enforced despite rescission.[10]

[32] Clause 9 of the agreement between the appellant and the respondent reads as follows:

> 'The termination of your employment will not affect the rights or remedies of either party against the other in respect of any prior breach of any of its provisions or the continuing obligations of either you or RNCAP BJM under any provision of this agreement expressed to have effect after your employment has terminated.'

[33] The right of the respondent to receive the sign-on incentive accrued prior to the termination of the agreement and survived its termination. His right to the money is therefore unaffected by the rescission of the agreement. The court *a quo*'s conclusion in this regard can also not be faulted.

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[9] *SA Estates & Finance Corporation Ltd v Commission for Inland Revenue* 1927 AD 230 at 236, *Barnabas Plein & Co v Sol Jacobson & Son* 1928 AD 25.

[10] *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (SCA) at 22G.

[34] There is no reason in law or equity why the costs should not follow the success.

[35] I accordingly make the following order:

The appeal is dismissed with costs.

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C J Musi JA

Tlaletsi DJP and Ndlovu JA agreed with C J Musi JA.

APPEARANCES

FOR THE APPELLANT:	Adv. Franklin SC
	Instructed by Jaffegee Roskam, Savage Attorneys
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FOR THE RESPONDENT:	Mr F. Malan
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