29-12-75

G.P.-S.59968—1970-71—2 500

J 219

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Provincial Division)
(APPELLATE Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

BRYCE PATRICK REILLY *Appellant,*

versus

SELIGSON AND CLARE LIMITED *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Jovius, B.I. & S.

Respondent's Attorney / *Prokureur vir Respondent* Mc I[illegible]

Appellant's Advocate / *Advokaat vir Appellant* P.M. Wulfsohn & D.A. Bregman.

Respondent's Advocate / *Advokaat vir Respondent* I.W. Schwartzman

Set down for hearing on / *Op die rol geplaas vir verhoor op* 16-11-1976

27 9 10 2

Coram: Holmes, Muller, de Villiers, Kotzé JJA et Joubert AJA

Wulfsohn - 9.45 - 11.00. 11.15 - 12.05. 2.45 - 3.10.

Schwartzman - 12.05 - 12.45; 2.15 - 2.45;

(W.I.D.)

C.A.V.

The Court allows the said appeal with costs, including those consequent upon the employment of two counsel, save that no costs are awarded in respect

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills taxed—Kosterekenings getakseer P.T.O.

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between -

BRYCE PATRICK RIELLY Appellant

and

SELIGSON AND CLARE LIMITED Respondent

Coram: HOLMES, MULLER, DE VILLIERS, KOTZé, JJ.A.,
et JOUBERT, A.J.A.

Heard: 18 November 1976

Delivered: 25 November 1976

J U D G M E N T

HOLMES, J.A. -

The appellant was employed by the respondent, and the parties are litigating about an incentive-bonus

/which .....

which was payable yearly in arrear. When the appellant sued for it, the respondent eventually paid a portion of it into Court, and the litigation continued in respect of the remainder, namely, R2 537,22. In respect of that amount the Witwatersrand Local Division ordered absolution from the instance; and the appellant appeals to this Court.

With that prelude I turn to an outline of the salient factors in the case -

(i) The respondent company is one of fifteen in a group named Pecks Industries Limited. The chairman of the group, including the respondent, was Mr Nathan Peck. The group employs about 1 500 persons, of whom about 400 are Europeans.

(ii) The appellant, then in his late twenties, was employed by the respondent in a managerial position, as manager of a department. There were only about 15 persons on that senior management level in the group throughout the country.

/(iii) Mr Peck .....

(iii) Mr Peck did not normally interview ~~candidates for employment: he did so~~ only when he considered the position important enough and he wished to obtain his own impression of the individual concerned before the final decision was formed.

(iv) Mr Peck did interview the appellant, who was on a short list of two applicants for this position. He wished to meet him in order to make his own assessment of him. Present at the interview were Mr Peck, the appellant, and Mr Hardaker who was the respondent's financial controller. The meeting took place in May 1973.

(v) At that interview the appellant was invited to join the company on 1 June 1973, the appointment to be ante-dated to 1 March 1973, i.e., to the beginning of the financial year. He was offered a salary of R9 000 per year, plus a bonus, and insurance and pension benefits, ~~and a motor car allowance~~. The appellant says that during the

/interview .....

interview there was a discussion about the bonus scheme. He says that he was informed that in his case it would be calculated as from 1 March 1973; that 40% of the bonus figure, calculated from unaudited results, would be paid in the following March (i.e., 1974); and that the balance of 60%, based on audited results, would thereafter be paid in twelve equal monthly instalments. He says, further, that he specifically asked whether the total bonus for the 1973/4 financial year would be paid to him if he were to leave the company after 28 February 1974; and he says that he received an affirmative assurance. The respondent's witnesses, Peck and Hardaker, who were present at this interview, do not deny this assurance: they say they do not recollect it. More about this anon.

(vi) The appellant declined the offer. In his existing position he was sales manager for a company operating throughout the Transvaal, the Orange Free State, Swaziland, Lesotho and Botswana; and he had decided that he would not leave that position unless he would

/receive .....

receive in all R14 400 per year, plus a motor car allowance of R1 800 a year. Refreshing his memory from a note which he made at that interview while Mr Peck was answering a telephone call, he calculated that, to achieve this, he would need a salary of R10 200 per year, plus the bonus and car allowance, etc.

(vii) On returning to his office, he found a message asking him to telephone to Mr Hardaker. He did this. He was informed that Mr Peck, after further consideration, had now agreed to the basic salary of R10 200. The appellant accepted this. He called at Hardaker's house that evening and was shown a photostat copy of a document bearing the outline of a letter of appointment, dated 10 May 1973. Hardaker assured him that confirmation would follow, on the company letterhead. The appellant received it on 15 May 1973. Clause 6 was as follows :

> "INCENTIVE BONUS: This will be calculated on a yearly basis payable in arrears. 40% will be payable with your March salary and will be based on unaudited results.

/The .....

The remaining 60% will be ascertained when audited results are available and will be in 12 equal amounts commencing the month after audited accounts are available. The basis of the calculation is detailed in the incentive bonus addendum to this letter."

The last sentence provides how the bonus figure is arrived at. The written addendum states, inter alia, that it is calculated "from overall Company results and the performance of your profit centre". (The latter word is used in a geographical sense).

(viii) The appellant commenced his new duties at the beginning of June 1973, the appointment being retrospective to 1 March 1973. He resigned with effect from the end of March 1974.

(ix) The appellant's subsequent endeavours to obtain [redacted] payment in respect of his bonus met with resistance. On 4 April 1974 the respondent wrote indicating that, on the unaudited results for the twelve months ended 28 February 1973, there was a bonus figure of R4 026,86; that 40% of this amounted to R1 610,74; but that the respondent was only entitled to R1 208, 05 of this, being for the

/nine-month .....

nine-month period from the beginning of June 1973 to 28 February 1974. (This was a surprising attitude because six months later the respondent admitted in its plea that it was a term of the appellant's appointment that although he was employed only at the beginning of June 1973, he would be entitled to a bonus from the beginning of March 1973; see para (xiv), infra.) The letter concluded by making it clear that the appellant, if he accepted the cheque, would thereby be acknowledging that the amount of R1 208,05 was in full and final settlement of all amounts due to him, and that no further amounts were due to him in terms of the bonus scheme.

(x) The appellant rejected this. His attorneys pointed out, in a letter to the respondent dated 10 April 1974, inter alia that it had been agreed between the parties that, although he was employed from the beginning of June 1973, nevertheless his bonus would be calculated as from 1 March 1973. In consequence, the letter continued, 40% of the admitted bonus figure calculated on unaudited results to the end of February 1974, was R1 610,74, which was demanded. With regard to the remainder of the bonus (i.e., the 60% of the

bonus figure calculated on audited results) the appellant's attorneys' letter stated that it was payable in 12 equal instalments when the audited accounts became available. These claims were rejected by the respondent's attorneys

/in a .....

in a replying letter dated 9 May 1974, which repeated the earlier conditional offer.

(xi) The appellant issued summons on 4 June 1974. At that stage he was unaware of the respondent's unaudited (and, for that matter, of the audited) results for the year ended 28 February 1974. Hence, at that stage the appellant could only claim -

(a) R1 208,05, which the respondent, in its letter to him of 4 June 1976, admitted was due to him as being 40% of the bonus figure calculated on its unaudited results, for the nine months from the beginning of June 1973 to the end of February 1974;

(b) an order directing the respondent to render an account of its unaudited results for the twelve months ended 28 February 1974; and debate thereof; and payment of the amount due, less the aforesaid R1 208,05.

/(c) an .....

(c) an order directing the respondent to pay the balance of the bonus, finally ascertained when the audited results became available, in twelve equal instalments commencing the month after such audited results became available.

(xii) However, as the pleadings proceeded and the audited results became available, the appellant's claim crystallised into a fixed sum, as will appear.

(xiii) The respondent, on 21 June 1974, filed a notice of intention to defend. The appellant, on 25 June 1974, served notice of its intention to apply for summary judg= ment on 26 June 1974, at any rate in respect of R1 208,05. The respondent, in response thereto, paid into Court the afore= mentioned sum of R1 208,05, apparently as security under Rule 32 (3) (a), and tendered to pay costs to date.

(xiv) The respondent's plea, as amplified by further particulars, dated 4 September 1974, conceded, for the first time, that although the appellant was employed only from the

/beginning .....

beginning of June 1973, it was a term of his appointment that he would be entitled to the incentive bonus for the full financial year from 1 March 1973 to 28 February 1974. This admission is to be contrasted to the respondent's attitude in its letter of 4 April 1974 in which it stated that he was only entitled to a bonus on the unaudited results for the nine-months period from the beginning of June 1973 to 28 February 1974; see (ix) and (x), supra. No explanation is vouchsafed for this subsequent factual volte-face. The respondent accordingly conceded, for the first time, that it owed the appellant R1 610,74 by way of a bonus based on its unaudited results for such financial year.

The plea also averred an express, alternatively an implied, condition in the agreement of employment -

> "that should the Plaintiff's services with Defendant terminate after the completion of the 1973/74 financial year but prior to the completion of the 1974/75 financial year, then

/Plaintiff .....

Plaintiff would be entitled to the full amount of the agreed 1973/74 incentive bonus based on the Defendant's unaudited results plus so many of the 12 equal monthly payments based on the Defendant's audited results as corresponded with the number of months during which the Plaintiff continued to be employed by the Defendant following the end of the 1973/74 financial year at the end of February, 1974; (my italics); and that the basis of payment as set out ..... above would continue to apply, mutatis mutandis, during subsequent years of employment."

(xv) On this footing, the defendant further conceded, again for the first time, that it owed the appellant an additional R230,66 for the month of March 1974, being one-twelfth of the bonus figure in respect of audited results. In the result, the respondent conceded liability to the appellant in the total sum of R1 841,40 (i.e., R1 610,74 plus R230,66). It paid into Court R633,35 under Rule 34 (1) (a). This, together

/with .....

with the R1 208,05, previously paid (see paragraph (xiii), supra), made up the total of R1 841,40.

(xvi) For the rest, the plea averred -

> "Defendant states that the said audited results indicate that the total incen= tive bonus to which the Plaintiff would have been entitled had he been employed by Defendant for the entire 1974/75 financial year amount to R4 378,62, from which must be deducted the sum of R1 610,74 owing to Plaintiff, ... leaving a balance of R2 767,88, which would have been payable to Plaintiff had he been employed by Defendant for the 1974/75 financial year."

The reference to R2 767,88 is an error. It is common cause that the figure should be R2 537,22. Liability for this latter amount was what was in issue at the trial. The basic question was whether any portion of the 60% of the bonus figure on the audited results could accrue to the appellant after he left the respondent's employ.

/(xvii) The .....

(xvii) The appellant encountered further resistance when he sought the respondent's permission to uplift the aforesaid admittedly owing R1 841,40, on the footing that he would be entitled to persist in his claim for the balance in issue (namely R2 537,22). The footing just mentioned was not conceded by the respondent. The respondent's attorney wrote to the appellant's attorneys on 12 December 1974 -

> "If you are prepared to accept the amount paid into Court in full settlement, together with costs as tendered, you may do so and I will let you have a letter to the Registrar entitling you to uplift the monies paid into Court. I am simply not in a position to allow you to uplift the monies and thereafter proceed with the matter."

Thus the attitude of the respondent was that he was at liberty to uplift the money if he wished, but that he would have to bear the consequences of such action, whatever such consequences might be.

/(xviii) In.....

(xviii) In the result the appellant, doubtless seeking the sinews of war, sought from the Court on motion inter alia a declaration that, after uplifting the money paid in, he would be entitled to proceed with his action for the recovery of the balance of his claim. , This was strenuously opposed by the respondent. However, the Court granted the declaratory order, at any rate in regard to the R1 208,05, with costs, on 4 August 1975.

(xix) And so the parties drifted into trial in September 1975, nearly two-and-a-half years after the events to which the witnesses were to testify.

(xx) A final word about the pleadings. The appellant, in the particulars of claim annexed to his summons, relied basically on clause 6 of his letter of appointment (as to which see paragraphs (vii) supra), plus the averment that, when he was employed, it was agreed by Mr Peck and Mr Hardaker, on behalf of the respondent, that his bonus would run from 1 March 1973.

The letter, and the agreement just mentioned,

/were .....

were admitted in the plea. The respondent went on to raise the defence, for the first time, of an express, alternatively, an implied, condition to the effect that if the appellant's services terminated during the 1974/75 financial year, bonus instalments on the audited results would be payable only in respect of the months during which he continued in service after the end of the 1973/74 year; see paragraph (xiv), supra.

The appellant did not replicate to this (which means that he denied it); and at the trial he sought to counter it by evidence to the contrary effect, namely, that when he was employed, he was assured by Mr Peck and Mr Hardaker that, if he were to leave at the end of the first financial year, he would be entitled to his total bonus for that year, i.e., to both the 40% of the bonus figure calculated on unaudited results, and the 60% of the figure subsequently cal= culated on audited results, payable by instalments. This aspect was fully canvassed in the evidence, as the trial Judge held.

/THE .....

THE RATIO OF THE COURT A QUO

The learned Judge did not decide the case on the footing of clause 6 of the letter of appointment, holding that it was either silent or ambiguous as to the issue in question. He therefore turned his attention to the oral agreement testified to by the appellant, namely that Mr Peck and Mr Hardaker had assured him, in reply to his question, that if he left at the conclusion of the finan= cial year ending 28 February 1974, he would nevertheless be entitled to his full bonus (the 40% and the 60%) for that year. As to that, the learned Judge considered that such an enquiry from an applicant for a managerial post would have been disquieting to his superiors, and that, if made, it would probably have impressed itself on their minds. One gathers, too, that the learned Judge con= sidered it improbable that such an enquiry was made. Hence, on the one hand, there was the evidence of the

/appellant .....

appellant which, for the abovementioned reason, the trial Court was not prepared to accept without question. On the other hand, there was the evidence of Mr Peck and Mr Hardaker who, while not directly gainsaying the appellant's evidence, said that they had no recollection of the averred enquiry and reassurance. Furthermore, the effect of Mr Hardaker's evidence is that he had been at pains, in all other cases, to explain clause 6 on the footing of the employee continuing to remain in the employ of the respondent; and that he would not have given the appellant the contrary assurance contended for by him. The learned Judge found no reason for disbelieving them. In the result the con= clusion was arrived at that the onus of proof, resting on the appellant, was decisive; and that the proper order was one of absolution from the instance.

THE RATIO IN THIS COURT

On a consideration of the evidence, the appellant appears to be an ambitious and self-confident young man; and it would not seem improbable that he should directly make the enquiry in question to this

his superiors, who were eager to obtain his services. On the other hand, there is the fact that they do not recall it.

Furthermore, Mr Hardaker, whose duty it was to implement the incentive bonus scheme introduced in 1973, also testified in support of the respondent's plea of an express, alternatively an implied, term in the agreement of employment; see paragraph (xiv), supra). This directly related the bonus, on audited figures, to the number of months worked after 28 February 1974. He said that this was all along intended as an inducement to an employee to remain in the respondent's service,

and that he explained it thus to employees. If that were so, one wonders, in passing, why it was thought necessary to resolve, at a directors' meeting on 10 Septem= ber 1973

/".....

"..... should any employee in receipt of a bonus leave the employ of the company, any unpaid instalments are forfeited and the employee will have no claim for the balance unpaid."

However, I do not find it necessary to consider these matters further, because of the view which I hold as to the plain meaning of clause 6. I repeat it here for convenience -

"6. INCENTIVE BONUS: This will be calculated on a yearly basis payable in arrears. 40% will be payable with your March salary and will be based on unaudited results. The remaining 60% will be ascertained when audited results are available and will be in 12 equal amounts commencing the month after audited accounts are available. The basis of the calculation is detailed in the incentive bonus addendum to this letter."

If it has a plain meaning, the Court cannot vary it by reference to oral evidence. The law is definite

/on .....

on this point. That is why people have written contracts: so that he who runs may read. As was said by Watermeyer, J.A., in Union Government v. Vianini Ferro-Concrete Pipes (Pty.) Ltd., 1941 A.D. 43 at page 47 -

> "Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence."

That this is still the law in South Africa is indicated by the reliance placed on that passage by this Court in National Board (Pretoria) (Pty.) Ltd., v. Estate Swanepoel, 1975 (3) S.A. 16 (A.D.) at page 26 A.

In this Court, counsel for the appellant contended that the letter of appointment, followed by the employment

/of .....

of the appellant, constituted or was accepted by the parties as their written contract, even though the appellant himself did not sign it. Counsel for the respondent contested this submission. As to that, the principle seems to be clear. In an unreported judgment of the Transvaal Provincial Division in Union Bank of South Africa Ltd., v. Schatz in April 1940, Solomon, J., said crisply -

> "The rule is that where parties intend a document signed by only one of them to represent the contract between them no parol evidence to vary that document can be admitted."

This was quoted with approval by Fischer, J.P., in Gordon Wilson (Pty.) Ltd., v. Barkhuizen, 1947 (2) S.A. 244 (O) at page 250. See, too, Baker v. Afrikaanse Nasionale Afslaers en Agentskap Maatskappy (Eiendoms) Beperk, 1951 (3) S.A. 371 (A) at page 375 H, in which Fagan, J.A., summarised the principle thus -

/"Die .....

"Die dokument is nie deur iemand namens die Maatskappy geteken nie. Maar een of beide partye mag op ander maniere as deur hul hand= tekening te kenne gee dat hul ooreenkom op terme wat in n geskrif vervat is; en as hulle weersydse instemming met die skriftelike terme dan bewys word, is hul net soseer daaraan ge= bonde asof hul dit onderteken het."

Counsel for the respondent submitted that, on the facts, there were indications that the parties did not intend the letter of appointment to operate as a written contract. He pointed to a few respects in which the parties had departed from the recorded terms, for example, as to the date of commencement of service, the date of joining the pension scheme, the applicability of the Group Life Assurance scheme, and entertainment allowance. Consequently, submitted counsel for the respondent, the appellant's rights in the matter of the incentive bonus scheme fell to be determined, not by reference to clause

/6, but .....

6, but according to the oral agreement of the parties. Along this line of reasoning counsel supported the conclusion of the trial Judge to the effect that, on the oral evidence and the probabilities, the onus of proof resting on the appellant had not been discharged.

Now it is true that in certain relatively minor respects the letter of appointment was, by mutual consent, departed from. However, the paramount factors are that the appellant asked for and was given a written letter of appointment on the respondent's letter-head; that thereupon he resigned from his existing employment; that he was taken into the respondent's service in a managerial capacity; that the salient factor of salary remained un= changed throughout; and that clause 6 likewise remained unchanged, despite the fact that the letter of appointment was revised more than once to accommodate, for example, a change in the title of the appellant's functions. As I

/have .....

have indicated, clause 6 remained a constant. Although it was not covered by any signature by the appellant, the parties, in all the circumstances, regarded clause 6 as their written contract so far as concerns the incentive bonus scheme. And I point out that clause 6 incorporated by reference the addendum thereto headed "Profit Incentive Addendum".

Nor is this conclusion vitiated by the final clause of the letter of appointment reading -

> "General. No contract is watertight - we are not providing a letter of the law but merely a document on which we can build a mutual trust. Where exceptions to our terms arise, these will be handled on their merits by your superior."

As to that, for the reasons given above, the document, although signed only on behalf of the respondent,

/was .....

was regarded by both parties as their written contract, at any rate so far as concerns the salary and the incentive bonus. An implied term was pleaded, in the regard to clause 6, with which I shall deal later; and an oral variation was also pleaded in regard to clause 6, but evidence as to it will be inadmissible if it is at variance with the written contract.

I proceed therefore to examine clause 6 with a view to gathering the intention of the parties from the language used. And the golden rule of interpretation, in ascertaining intention as expressed, is to give the language its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument; see

Kalil v. Standard Bank of South Africa Ltd., 1967 (4) S.A. 550 (A.D.) at page 556 C - D, quoting from a well-known observation by Lord Wensleydale.

Turning now to the language of clause 6 -

1. Bonus. The gist of the meaning in The Oxford English Dictionary is that it is money given as a premium in consideration

/of .....

of offices performed or to encourage their performance. In Shelford v. Mosey, (1917) 1 K.B. 154, Lord Reading, C.J., indicated at page 158 that an agreed "bonus" is sometimes a euphemism for "addition to wages".

2. Incentive. The Oxford English Dictionary gives, as its adjectival meaning -

> Having the quality of inciting or arousing to feeling or action; provocative, exciting.

Webster's Third New International Dictionary renders it -

> (a) serving to encourage, rouse, or move to action.
>
> (b) designed to enhance or improve production, especially in industry.

I have no doubt but that (b) is the meaning appropriate in the present case, because of the context of clause 6 and of its written addendum which is headed "profit incentive

/addendum" .....

addendum" and which refers to "Company results and the performance of your profit centre".

It was contended on behalf of the respondent that in this case an additional meaning could be ascribed to "incentive", namely, an incentive to the employee not to leave the company's employ during the ensuing year. Indeed, this was the additional purpose which Mr Hardaker says he explained to employees. I rather think that the general connotation of "incentive" usually imports the notion of some rousing to action. Soule's Dictionary of English Synonyms (1969) lists, under "incentive" as a noun, words such as "stimulus", "spur", and "goad". However, assuming that the word can be applied in the sense of an inducement to refrain from resigning from the respondent's service, or an inducement to remain in the respondent's service, that is not the connotation in which it is used in the context of clause 6. The written addendum to the clause is headed -

"Profit Incentive Addendum
General Sales Manager Paper Division
Johannesburg."

/The .....

(The latter was the appellant's title and field of operation; and I stress the opening words "profit incentive".) The addendum continues -

> "This is calculated from overall Company results and the performance of your profit centre by use of the attached tabulation ....."

To sum up, in my view it is clear that the words "incentive bonus" in clause 6 mean a payment which is designed to enhance production and is calculated on the profits.

3. "calculated on a yearly basis".

I do not think there can be any doubt but that this refers to the financial year, because of the reference to "audited results" and "audited accounts". Indeed, the respondent's plea refers to "the full financial year from 1 March 1973 to 28 February 1974".

/4. "payable .....

4. "payable in arrears".

"Arrears" is a variant of "arrear"; see Van der Merwe v. Reynolds, 1972 (3) S.A. 740 (A.D.) at page 746 E. In the context of clause 6 it means that the bonus will be payable in respect of, and after the end of, the elapsed financial year, i.e., after the end of February.

5. On what date after the end of such year?

The answer is clear -

40% will be payable with the March salary. This is merely the mechanics of fixing the date.

60% will be paid by instalments commencing the month after audited accounts are available.

On a conspectus of all of the foregoing con=siderations it is in my view plain, as a matter of the ordinary meaning of language, that the "incentive bonus",

/(referred .....

(referred to in the addendum as a "profit incentive"), is payable in respect of the appellant's performance in the year in retrospect, and is not attuned to or conditional upon his remaining in the service of the company during the ensuing year.

That being the plain and ordinary meaning of clause 6, read with the addendum referred to therein, the law does not allow oral evidence to gainsay or vary it. Nor, in the circumstances, is there any warrant for the existence of an implied condition in clause 6 as pleaded by the respondent (see the second half of paragraph (xiv), supra). I would add that if the amendment to the incentive scheme resolved upon by the company on 10 Septem= ber 1973, (namely, "Further, should any employee in receipt of a bonus leave the employ of the Company, any unpaid instalments are forfeited and the employee will have no claim for the balance unpaid") had been included in clause 6 of the appellant's letter of appointment in May 1973,

/the .....

the result might have been different. But we must construe the clause as we find it.

In the result, the appeal must succeed, and the appellant is adjudged to be entitled to R2 537,22 as the balance of his bonus.

THE COSTS OF THE PROCEEDINGS IN THE COURT A QUO

Reference was made by counsel on both sides to Rule 69 (3). It applies only to proceedings in Provin= cial and Local Divisions, and not to the Appellate Division. The gist of it, insofar as it might here be relevant, is that the appended tariff of maximum fees as between party and party shall apply in certain matters, unless the court otherwise orders. Among the matters, paragraph (a) refers to any claim for a sum not exceeding R3 000. Then there is a proviso (i) to the sub-section. Insofar as here relevant, the gist of the proviso is that where

/the amount .....

the amount of the claim exceeds R3 000 but that of the judgment does not, the tariff shall apply.

In the result, where the claim (and, ex necessitate, the judgment) is less than R3 000, the court has a dis= cretion. According to proviso (i), if the claim exceeds R3 000 but the judgment does not, the tariff applies; but I do not read that as excluding the judicial discretion under section 69 (3). It seems to me that the object of proviso (i) is to inhibit intemperate claims which would otherwise have evaded the application of the tariff via paragraph (a).

The claim in the combined summons dated 4 June 1974 was for R1 208,05; and for a statement of account, debate thereof, and payment of the amount due (less the R1 208,05); and for an order that the respondent pay the balance of the bonus when the audited results became available. It was

/common .....

common cause that the total amount of the bonus, if due, exceeded R4 000. Whether one has regard to the composition of the claim, or to its monetary value, paragraph (a) of section 69 (3) would not cause the tariff to apply.

Thereafter, in its plea dated 4 September 1974 the respondent admitted liability in respect of the bonus in the sum of R1 841,40. There were payments into Court. This amount of R1 841,01 was uplifted by the appellant after his successful interlocatory opposed application for an order that he could uplift unconditionally and without prejudice to his right to continue the proceedings for the balance of his claim. That judgment was delivered on 4 August 1975. Thereupon the only claim in issue was for the balance of R2 537,22. The claim for a debate of account had by then fallen away because the respondent's trading figures were available and accepted.

/In .....

In the result, up to and including 4 August 1975 the prescribed tariff cannot apply, because the claim did not fall within Rule 69 (3) (a) or, for that matter, within paragraphs (b) to (f). Thereafter the claim was for R2 537,22 which, under paragraph (a), attracts the tariff unless the court in its discretion orders otherwise. In my view, in all the circumstances, including the history of the litigation, this is an appropriate case for ordering that the tariff under section 69 (3) does not apply.

THE COSTS OF APPEAL

(i) The record on appeal, consisting of 338 pages, includes 48 pages relating to the appellant's interlocatory application in the Court a quo for leave to uplift the amounts paid into Court; see paragraphs (xvii) and (xviii), supra. The appellant was granted the costs of those

/proceedings .....

proceedings. However, the respondent contends that the record on appeal has been needlessly burdened by the inclusion of the 48 pages relating to the application. The appellant contends that he was constrained to make that application by the respondent's thwarting tactics, and that the latter feature is relevant to the issue of costs; see (ii), infra. That may be so, but that aspect could have been mentioned from the Bar, with an undertaking to produce the interlocutory record if considered necessary. In my view it would not be fair to saddle the respondent with the costs of including those 48 pages in the record on appeal.

(ii) The appellant was represented in the Court a quo by one counsel, and in this Court by two. As regards the appeal, we were asked

/to .....

to sanction costs consequent upon the appointment of two counsel, under Appellate Division Rule 8 bis. (It is the counterpart of Rule 69 (1) which applies to Provincial and Local Divisions.) The respondent opposed. Now it must not be thought that an order under this Rule is granted lightly. On the other hand, the Rule does not require the existence of exceptional circumstances. The Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. On the one hand, the respondent pointed to the relative smallness of the amount at stake, and to what he described as the absence of complexity in the issues, despite the length of the record (290 pages, not counting those relating to

/the .....

the interlocutory application). On the other hand, I think there is force in counsel's submission to the effect that, right from the inception, the appellant has had a particularly hard row to hoe because the respondent tried to thwart him at every turn; see the history of the litigation in paragraphs (ix) to (xviii), supra. Moreover, the appellant was subjected to a gruelling cross-examination of somewhat inordinate dura= tion - a day-and-a-half, about 120 pages. And the judgment went against him. Believing, correctly as it has turned out, in the right= ness of his cause, he sought redress on appeal. Because of all that he had been through, I think he acted reasonably, as a small man against a big company, in now bringing up heavier guns to support his struggle for right

/to .....

to prevail. In all the circumstances I conclude that he is entitled to an order for costs in this Court consequent upon the employment of two counsel.

INTEREST

Counsel for the appellant, in his written heads of argument, referred to the Prescribed Rate of Interest Act, No. 55 of 1975. It came into effect on 16 July 1976: see Proclamation No. R. 126, 1976 in the Goverment Gazette of that date. He asked, via an amendment if necessary, for interest on R2 537,22 at the rate of 6% from 18 June 1974 (being the date of service of summons) to 15 July 1976; and at 11% from 16 July 1976 to date of payment. Counsel for the respondent did not advert to this, either in his written heads or in oral argument, and thus did not oppose it. Interest will therefore be

/granted .....

granted as sought.

To sum up -

1. The appeal is allowed with costs, including those consequent upon the employment of two counsel, save that no costs are awarded in respect of the inclusion in the record of the 48 pages relating to the interlocutory application.

2. The order of the Court a quo is altered to one in favour of the plaintiff for -

   (a) R2 537,22;

   (b) interest thereon -

      (i) at 6% per annum from 18 June 1974 to 15 July 1976;

      (ii) at 11% from 16 July 1976 to date of payment.

/(c) costs .....

(c) costs of suit, free of the tariff under Rule 69 (3).

G.N. HOLMES
JUDGE OF APPEAL

MULLER, J.A.)
DE VILLIERS, J.A.)
KOTZÉ, J.A.) ALL CONCUR
JOUBERT, A.J.A.)