

IN THE HIGH COURT OF SWAZILAND

Civ. Case no. 401/91

In the matter between:

Walter James Basson                                                          Plaintiff

and

L.C. Von Wissel (Pty) Ltd                                                          Defendant

CORAM:                                                                                                          S.W. SAPIRE A.C.J.

FOR THE PLAINTIFF                                                                                                  Mr. Dunseith

FOR THE DEFENDANT                                                                                                  Dr. Finne

Judgment

(19/8/96)

This is an action by the Plaintiff in which the plaintiff claims amounts said to be due to him in terms of a written contract of employment entered into by him with the Defendant. The claim relates to what is referred to in the Agreement as an "incentive bonus", and the amount thereof claimed by the plaintiff is set out in a schedule to the Summons and amounts to some R18,000.

The amount involved is not an issue at this stage.

Before the trial was called this morning, the Counsel for the parties approached me in chambers and requested that one issue arising in the case be decided before evidence

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was led. They indicated that they had agreed that in this pending action a question of law or fact which it could be convenient to decide before any evidence is led, and separately from any other question, had arisen, and that this question should be dealt with as contemplated in Rule 34.

I accordingly heard argument from Counsel this morning on the question which they require to be decided and this is the ruling I give on the issue raised.

The question is the interpretation to be given to Clause 3 of an agreement entered into by the parties, a copy of which is attached to the Amended Particulars of Claim. Clause 3 reads as follows;

"The commencing basic salary payable by the Employer to the Employee shall be E1800 per month, payable to the Employee monthly in arrears or on or before the last day of each and every month, commencing from 31st March 1989 and to - (and here the words are added in manuscript ) and to be reviewed yearly." This alteration is apparently initialled by the parties.

"In addition, during the month of December in each year while this contract of employment is in operation, provided the results of the Employer's business warrant it, and depending on the Employee's performance, the Employee will be considered for an annual merit bonus which, however, shall at all times be in the discretion of the Employer".

Suffice it to say that this merit bonus is a promise merely to consider the Employee's performance and gives rise to no contractual obligation.

But the portion of the Clause which gives rise to the dispute reads as follows:

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"Quite apart from the annual merit bonus referred to above, the Employee shall be entitled to an incentive bonus of an amount equal to fifteen percent of the net profit attributable to the butchery and abattoir sections of the Employer's business.

This incentive bonus shall be paid to the Employee annually after completion and finalisation of the audit of the Annual Financial Statements. This bonus will only be paid after completion and audit of the Financial Statements as at the end of February in each financial year provided that if this contract of employment is terminated by the Employer, giving notice to the Employee, then the incentive bonus shall be calculated up to the date of termination of employment and shall be paid to the Employee as soon as it has been established".

It is common cause that during the period that the Plaintiff was in the employ of the Defendant, and after a year of the continuation of the contract, the plaintiff, (as he was. entitled to do in accordance with its provisions,) gave six month's notice terminating the contract.

The question which has arisen is whether by terminating the agreement the Plaintiff has forfeited his entitlement to the incentive bonus which would have accrued during the financial year in which such notice was given.

For the Plaintiff, it was contended that the provisions of the Clause, firstly and foremostly, create an obligation on the part of the Defendant and a corresponding entitlement to the Plaintiff.

This would appear to be correct, having regard to the wording of the Clause. The question is, what is the nature of the obligation and what is the entitlement corresponding thereto?

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The obligation is clearly to pay an incentive bonus of an amount equal to fifteen percent of the net profit attributable to the butchery and abattoir sections. The contract is silent as to the period over which the net profit is to be calculated. The contract does not refer to annual net profit. Clearly, if the wording had been that the Employee will be entitled to an incentive bonus of an amount equal to fifteen percent of the annual net profit attributable to the butchery, there may have been room to argue that, because a whole year's net profits have to be taken into account that if the Employee didn't work for the whole year the intention of the parties was that this Clause was not to apply to a portion of a year. But as the contract reads, I cannot place this interpretation on the Clause.

I also draw attention to the words used when, later in the contract, a merit bonus is provided for. "In addition, during the month of December in each year, while this contract of employment is in operation" - the merit bonus becomes payable. The clear implication is that the merit bonus does not become payable if the employee is no longer employed in the month of December.

If it had been the intention of the parties to provide for forfeiture of the incentive bonus if notice were given during the year, one would have expected such to have been provided for, in the same way but it is not.

The interpretation contended for by the Defendant has this against it as well. On that interpretation it

is open to either party to manipulate the facts to bring the bonus either within the terms of the contract or not. The Plaintiff, or the Employee could manage the giving of notice in such a way that the end of the notice would extend beyond the period in which the bonus would become payable.

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On the other hand, the Employer could deliberately delay the finalisation of the annual statements beyond the approved time in order to deprive the Employee of his bonus. This clearly would be an inequitable and almost nonsensical interpretation to place on the Clause.

That the parties' intention, determined from the ordinary meaning of the words used was that a termination of the contract otherwise than at the end of the financial year would not have the effect of depriving the Employee of the benefit, is clear from the provision that if the Employer gave notice the incentive bonus is calculated over the period of the year up to the point of termination of the employment.

There is nothing to suggest that forfeiture should occur if the contract comes to an end for any reason other than a breach This could come about by the Employee giving notice, as was done in this case.

Illness may prevent him from continuing to work during that year, he may die, the business may close down, or any one of a number of things may happen, and there is no reason to suggest that in any of those events, that the benefit should be lost.

The only difference is that if the Employer gives notice, in order not to prejudice the Employee, the incentive bonus is to be calculated immediately on termination to avoid a delay which otherwise would occur, until such time as the financial year had come to an end and the accounts had been prepared.

It is my view that what is intended in this case is that an Employee, whose contract comes to an end during a financial year, is to be paid the incentive bonus for that portion of the year during which the contract was in force, but that the Employee is to wait until the completion and finalisation of the audit of the financial

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statements before he is entitled to be paid. The bonus is then to be paid in respect of the period up to the termination of the contract.

This is a case where distinction must be drawn between the accrual of an amount, and when the day for payment thereof arrives. The right accrues continuously while the Employee remains in employment, but the date for payment of such amounts as may have accrued only arrives once the amount has been ascertained after completion and finalisation of the audit. I rule for the contention advanced by the Plaintiff.

S.W. SAPIRE

ACTING CHIEF JUSTICE