IN THE COURT OF APPEAL OF SWAZILAND

CRIMINAL APPEAL NO.5/96

In the matter between:

L.C. VON WISSELL (PTY) LTD : APPELLANT

VS

WALTER JAMES BASSON : RESPONDENT

CORAM

: TEBBUTT J. A.

: SCHREINER J.A.

: STEYN J.A.

FOR THE RESPONDENT : MR. FLYNN

FOR THE APPELLANT : DR. FINE

JUDGMENT

The crisp issue in this appeal is whether an employee, who is entitled, in a written contract with his employer, to an incentive bonus to be paid to him annually, loses that entitlement if he lawfully resigns during the year.

On 1st March 1989 Appellant company entered into a written agreement with Respondent in which it employed Respondent as its Butchery and Abattoir Manager for a period of four years from 1st March 1989 to 28th February 1993 at a basic salary of El,800 per month, reviewable annually. Clause 3 of the agreement goes on to read as follows (as the whole of it is germane to this judgment, I set it out in extenso) :

"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.

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 PER CENTUM (15%) of the nett 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."

The agreement further provided that it could be terminated

by either party giving to the other not less than 60 days notice in writing of termination.

On 27th September 1990 Respondent gave Appellant 60 days notice of resignation effective as at 30th November 1990. Appellant refused to pay him an incentive bonus or any part of it for the financial year ending February 1991. Respondent thereupon brought a claim in the High Court for payment of the said incentive bonus, among other claims. Appellant denied that any incentive bonus had accrued to Respondent for the period 1st March to 30th November 1990, due to Respondent's having resigned as at the latter date.

When the matter came before Sapire A.C.J., the parties agreed that, in terms of Rule 34 of the High Court Rules, the Court should first decide, as a legal point, the issue whether on an interpretation of Clause 3 of the agreement any incentive bonus had accrued to Respondent during the period in question. Sapire A.C. J proceeded to do so, ruling in favour of the Respondent.

His judgment in this regard reads as follows:

"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

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the Employee is to wait until the completion and finalisation of the audit of the financial 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."

It is against that ruling that Appellant now appeals.

Although Clause 3 is silent as to the period over which the net profit of 15% is to be calculated, it is, in my opinion, clear from the wording of the Clause that the intention of the parties was that it was the annual net profit on which the 15% incentive bonus was to be calculated. The merit bonus, referred to in Clause 3 is an "annual merit bonus." As to the incentive bonus Clause 3 sets out that "quite apart from the annual merit bonus," the employee shall be entitled to an incentive bonus.

Linking the two together in this manner prima facie suggests that each bonus will be an annual one.

That prima facie impression becomes certain, in my opinion, by the terms of the next sentence viz "this incentive bonus shall be paid to the employee annually after completion and finalisation of the audit of the annual financial statements" (my emphasis). It was argued on Respondent's behalf that this sentence only sets out the time for the payment. I cannot agree. The time when the incentive bonus is payable is set out in the

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succeeding paragraph. The sentence I am presently dealing with is, in my view, clear. Its purpose is to set out, by the use of the words "be paid to the employee annually," that it is an annual incentive bonus and when the words "an incentive bonus of an amount equal to 15% of the nett profit" are linked to the completion and finalisation of the audit of the annual financial statements" (my emphasis) the purpose becomes even more clear. It is only after the finalisation of the year's statements that the incentive bonus can be calculated. In the light of these considerations an interpretation that the incentive bonus is anything other than an annual one would be untenable.

The bonus is an "incentive" one. Dictionary meanings of "incentive" tell us that it is "something that rouses or encourages a person to some action or effort" or "payment or a concession encouraging effort or work." It is a spur to the employee to work diligently and productively. As his bonus is calculated on the annual results it is obvious that the incentive for him to work diligently and

productively, so as to earn his bonus by the creation of profit, should be operative over the whole of the year in question.

The parties, however, saw fit to legislate for the position where the employer denies the employee that opportunity by giving the employee notice of termination, by including the proviso in the last paragraph of Clause 3. For the sake of

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clarity I repeat it. It reads:

"... 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 had been established."

That proviso, as I shall hereafter refer to it, seeks in the case where the employer gives the employee notice. to distinguish it from the normal position where the incentive bonus is earned by the employee working for the full year, in two respects. Firstly the profit, if any, on which the incentive bonus is to be calculated must be determined at the date of the termination of the employee's employment and not at the end of the financial year and when the audited accounts are finalised. Secondly, the amount of the bonus is to be paid to the employee immediately upon calculation of that amount. The employee did not have to wait until the accounts for that year had been finalised and audited before getting paid what was due to him upon termination of his employment by the employer.

The purpose of the proviso is obvious. It is a protection for the employee against the employer's having the benefit of his diligent work and productivity and then unscrupulously giving him notice shortly before the end of

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the year in order to avoid having to pay him an incentive bonus.

It is highly significant that no similar provision appears in-so-far-as the employer is concerned. To my mind the reason for this is obvious. The parties deliberately omitted any such provision, despite knowing full well that the employee enjoyed protection in terms of the proviso. That they did so shows, in my view, that they intended that before the employee could claim his incentive bonus he would have to work a full year and should he choose to terminate his employment before doing so, he would forfeit his right to claim his bonus.

That would also give rise, I feel, to the equitable result that the employee who gives notice during the year should not obtain the benefit of the profits earned over the entire year, during a portion of which he made no contribution thereto.

Mr. Flynn, who appeared for the Respondent, advanced two main arguments in regard to the proviso.

He submitted, firstly, that the parties did not insert a similar provision because they considered it unnecessary to do so. They considered that the employee, so Mr. Flynn argued, would be entitled to a pro rata incentive bonus even if he left his employment during the year.

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I do not think this argument is sound. Indeed the very-converse construction seems to me to be the more probable one. The intention of the parties, as gleaned from the insertion of the proviso, appears to be that no incentive bonus would normally be earned or be payable if the employee did not work for the full year and if either party terminated the contract during the year. However, to afford the employee protection against an unscrupulous termination of his employment by the employer, the proviso was inserted to cater for the termination by the employer of the employment of the employee -

and for that case alone.

Mr. Flynn's second argument was that the equities would be better served for both the employee and the employer were the employee to receive his incentive bonus, even if he resigned during the year.

The proviso, he submitted, merely fixed the time of payment of the bonus if the employer terminated the agreement. Otherwise, the time for payment remained as earlier provided for in the agreement viz after completion and finalisation of the audited annual accounts. By having to wait until then, the profit would probably be greatly different from the profit calculated at an earlier stage of the year in that annual charges such as depreciation, annual subscriptions and the like would then have to be taken into account in arriving at the profit. This would redound to the benefit of the employer. The employee would also know of this factor and realise that it

would probably affect his bonus, so Mr. Flynn argued, if he resigned during the year.

Again, I do not think this argument is sound. While it may well be that the profit may be affected by the taking into account of annual charges, the argument overlooks the fact that the employee would be deriving the benefit of profits to which he had not contributed, even assessing the bonus on a pro rata basis. Moreover, I fail to see why the employee has to have his bonus calculated at a time when no or meagre profits may have been earned when the employer gives him notice - a situation calling for a protective provision in his favour - whereas he can benefit from profits determined after a full year's training when it is he who has chosen to leave his employment and not make a full contribution to that profit. That situation, in my view, gives rise to a manifestly illogical and inequitable situation. It would also be illogical to calculate any incentive bonus for the employee when he resigns during the year on a pro rata basis of the full year's profits but to do so, when the employer terminates the contract on the period up to when such termination takes place, as set out in the proviso.

Finally, Mr. Flynn queried why a distinction should be drawn between the position where the employer gives notice and where the employee does so. I have no problem with that. In the first instance the employee cannot control the

actions of the employer who may choose to terminate his services. In the second instance, it is the employee who voluntarily chooses to leave his employment. The fact that his doing so may be prompted by circumstances such as ill-health, the effluxion of a residence permit or the like can surely be no concern of the employer. A symphathetic employer might in such circumstances choose to assist the employee but on a strict interpretation of the contract, he would not be liable to pay the employee his incentive bonus.

On my reading of the contract, on its termination by either party, no incentive bonus would normally be payable to the employee. However, where the employer does so, thereby preventing the employee from earning the bonus, an incentive bonus becomes payable on the terms set out in the proviso.

Hence its inclusion in the agreement. However, where the employee terminates his employment, his entitlement to the bonus ceases upon such termination.

It follows that the appeal succeeds, with costs. The following order is therefore made:

1. The appeal succeeds with costs.
2. The ruling made by Sapire A.C.J. is set aside and the following substituted therefor:

   A ruling is made for the contention advanced by the Defendant. The Plaintiff's claim for an incentive bonus

as provided for in Clause 3 of the agreement accordingly fails.

3. The costs in the Court a quo shall stand over for the determination by the trial Judge.

P.H. TEBBUTT J.A.

I agree:

W.H.R. SCHRIENER J.A.

I agree:

J. H STEYN J.A.

Delivered on this 7th day of October 1996