

SOUTH AFRICA / JUDGMENT

Bydawell v MRM Mining Services (Pty) Ltd t/a Runge Pincock Mining (70398/15) [2018] ZAGPPHC 322 (4 May 2018)

[2018] ZAGPPHC 322

COURT

North Gauteng High Court, Pretoria

BEFORE

MJ Teffo

CASE / FILE NUMBER

70398/15

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 70398/15

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDEGES

REVISED

In

the matter between:

SHAUN

JEFFREY

BYDAWELL Plaintiff

and

MRM

MINING SERVICES (PTY) LTD

t/a

RUNGE PINCOCK

MINING Defendant

JUDGMENT

TEFFO, J:

INTRODUCTION

- [1] The plaintiff instituted an action against the defendant seeking an order for specific performance that the defendant should grant him the XPAC 7 license ("the license") as allegedly agreed between the parties on 7 August 2014, alternatively payment of the sum of R1 000 000,00 (one million rand) as damages.
- [2] The plaintiff is a former employee of the defendant.
- [3] The defendant is a company which renders consulting services to the mining industry. The consulting services include the licensing of certain computer software known as XPAC 7. The software is used by the mining companies to plan and schedule production. It is owned by the defendant's holding company called Runge Pincock Minarco Ltd ("RPM"). The company is based in Australia and the defendant is its authorised distributor of the software programme in South Africa.

BACKGROUND

- [4] On 17 July 2014 the defendant notified the plaintiff that it was considering making his position redundant. As a result thereof it invited the plaintiff to participate in the consultation process in terms of section 189 of the Labour Relations Act, 66 of 1995 ("the LRA").
- [5] Subsequently the plaintiff and the defendant then held several meetings and exchanged letters. The meetings were held on 17, 21 and 28 July 2014, 1, 7, 13, 18 and 21 August 2014 respectively. The discussions at the meetings were recorded and the transcripts of the recordings were admitted into evidence." The parties had agreed that the transcripts are a correct reflection of what transpired at the meetings.
- [6] At all the meetings the defendant was represented by Mr Pierre Immelman ("Immelman") and the plaintiff was in person.

THE PLEADINGS

- [7] The basis of the plaintiff's claim was that he and the defendant entered into an oral agreement on 7 August 2014 in terms of which it was agreed that his services would be terminated on 30 September
2014. He alleges in his particulars of claim that the defendant agreed to grant him a permanent full unsupported license to the XPAC 7 software including all add-ons which had been valued at R1 000 000,00 (one million rand). He further alleges that it was further agreed that in the event he wanted to register the software, he would be liable for the registration fees

and would contact Immelman whenever such a need arose. Furthermore it was agreed that the license would not be withdrawn after a period of two years or such a term. It was further alleged that the defendant subsequently repudiated the agreement as it had confirmed in a meeting of 18 August 2014 that it was no longer willing to adhere to the terms of the agreement. According to the plaintiff the defendant was therefore in breach of the agreement.

[8] The defendant defended the action and denied that any binding agreement had been concluded between the parties. It denied that it had repudiated the alleged agreement. The defendant contended that in the event it is held that the plaintiff and Immelman had concluded an agreement on 7 August 2014 on the terms alleged (which it denied), it denies that Immelman had authority to conclude the agreement on its behalf.

[9] The defendant admitted that the meetings took place between the plaintiff and Immelman on the dates alleged. It pleaded that the meetings formed part of the consultation process as envisaged in section 189 of the LRA. According to the defendant during the meetings the parties sought to negotiate the terms upon which the plaintiff's employment with the defendant would terminate. Some of the proposals considered by the parties and discussed during the meeting of 7 August 2014 entailed that the plaintiff would agree to the termination of his employment, the defendant would pay him severance pay equal to one week salary for each completed year of his employment and that the defendant would grant him a license for the XPAC 7 software on an unsupported basis in terms of a license agreement, the terms of which had to be agreed between the parties.

[10] The defendant further pleaded that subsequent to the meeting of 7 August 2014, the parties failed to reach an agreement on the terms of a license for the use of the XPAC 7 software and the plaintiff did not agree to the termination of his employment.

[11] The defendant further admitted that it refuses to provide the plaintiff with a permanent unsupported XPAC 7 license or pay to him the amount claimed as damages. It denies that it is liable to grant him the license or pay any damages to him.

[12] It was further pleaded that in the event it is held that the parties had concluded a binding agreement in the terms alleged by the plaintiff (which are denied) and that the defendant had repudiated such an agreement (which is also denied), the plaintiff accepted such repudiation when during September 2014 he challenged the termination of his employment by referring an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (the "CCMA"), and in doing so, he elected not to enforce the alleged agreement. The defendant contended that the plaintiff is therefore precluded from seeking an order for specific performance.

[13] The plaintiff replicated to the defendant's plea. In the replication he specifically pleaded that an agreement was reached between the parties as described in his particulars of claim. He denied that he accepted the repudiation of the agreement unilaterally, by the defendant. He further pleaded that the defendant was estopped from denying that Immelman was not

authorised to conclude an agreement in that the defendant was represented by Immelman at the consultations in terms of section 189 of the LRA with him. During the negotiations Immelman never indicated to him that he required additional powers and/or a mandate from the defendant. Furthermore Immelman never indicated at the time of agreeing to the settlement that he was required to confirm the agreement and/or obtain an additional mandate or instruction from the defendant. The plaintiff admitted that he did refer the dispute to the CCMA and that the termination of his employment was only challenged in so far as the defendant had repudiated the agreement which repudiation he did not accept. Further that he withdrew the referral to the CCMA without any prejudice to his rights in order to launch the action.

THE

ISSUES

- [14] Whether the parties had reached a binding agreement on 7 August 2014 as alleged by the plaintiff in his particulars of claim.
- [15] Whether Immelman had authority to conclude the agreement on behalf of the defendant.
- [16] Whether the defendant is estopped from denying Immelman's authority.
- [17] Whether the plaintiff elected not to enforce the agreement by referring the unfair dismissal dispute to the CCMA and whether he can still enforce it.

THE EVIDENCE

- [18] Only the plaintiff testified in support of his case and the defendant closed its case without leading evidence.
- [19] Mr Shaun Jeffrey Bydawell (the plaintiff) testified that he worked for the defendant from the year 2000 as a Junior Mining Consultant. His work entailed consulting with the miners to assist them to do. software planning. He marketed the software for the miners. He continued working for the defendant until he was retrenched in 2014.
- [20] The price of the software the defendant marketed was always quoted in Australian dollars and it was a million rand (R1 000 000,00) in the middle of 2014. The price depended on the exchange rate.
- [21] On 17 July 2014 he was issued with a notice in terms of section 189 of the LRA. On the same day a consultation meeting took place between him and Immelman (the defendant's Operational Manager). They briefly discussed the notice he was given and he made proposals by writing letters for the subsequent meetings.
- [22] He asked Immelman if he had the authority to represent the defendant when he realised that he attended the meetings alone and he said " Yes".

[23] At a subsequent meeting on 21 July 2014 he handed a letter to Immelman wherein he responded to the section 189 notice. In the

letter he made certain proposals which included the proposal that the defendant should retain him as its independent contractor where he would use the defendant's licensed software and hardware, continue to earn an income based on the revenue he generated through consulting, training, software support, etc (para 2.1.4 of the letter).

[24] He was no longer in possession of the sound recording of the meeting of 21 July 2014.

[25] As they were discussing para 2.1.4 of letter dated 21 July 2014, the name " Mike" kept on coming out. Mike was their Regional Manager. He kept on referring to Mike's name as he thought Mike would make the ultimate decision regarding his proposals. The discussions and proposals made in his letter of 21 July 2014 were followed up in the subsequent meetings.

[26] In the defendant's letter dated 28 July 2014 reference was made to the proposals which were discussed at the meeting of 21 July 2014 in relation to the software at para 2.6. The defendant said they could promise him work.

[27] At the meeting that was held on 28 July 2014 no resolution was passed. The proposals he made in his letter dated 21 July 2018 were brushed out. The meeting only revolved around the possibility of him being employed as an independent contractor. Immelman told him that the proposals he made were not acceptable to the defendant.

[28] When he had discussions with Immelman he never had an impression that Immelman had to go to someone else to obtain a mandate before he engaged with him. Immelman also did not tell him that he was going to obtain a mandate from someone and he was under the impression that Immelman was acting on behalf of the defendant. He could not recall if there were any written proposals after 28 July 2014 and before 1 August 2014.

[29] At the meeting of 1 August 2014 there were no real discussions resolving any issues but there was a proposal that the defendant

would keep him as an employee where they would cut down his salary to a basic salary and that he would earn a commission on the work done. He handed a letter dated 1 August 2014 to Immelman wherein he responded to proposals which were made by the defendant in its letter of 28 July 2014.

[30] At paragraph C1.2 of his letter dated 1 August 2014 as an alternative to a payment of a severance pay of 4 (four) weeks per his completed years of service, he had proposed that one (1) week severance pay per his completed years of service be paid to him and that in addition thereof, the defendant should provide him with a permanent full license to the XPAC 7 scheduling software, including all its modules in perpetuity.

- [31] When asked whether the granting of the license to him as he had alluded to, would not be in competition with the defendant, he testified that that would have been the position in the past but at the time the agreement was entered into, the defendant had already told him that his skill was no longer required and that it was changing its focus from software to sales.
- [32] His proposals were discussed and Immelman said he would revert to him.
- [33] On 7 August 2014 the defendant responded to his proposals in a letter and the letter was discussed at a meeting that was held on the same day. Immelman informed him that the defendant was not prepared to pay him a severance pay of more than one week for each completed year of his continuous service. There was also a discussion about the fact that he had indicated in his letter of 1 August 2014 that he was no longer interested in continuing to work for the defendant. They further discussed the option that the defendant would grant him the XPAC 7 license. They had agreed that he would be provided with the full XPAC 7 license, with all its add-ons on an unsupported basis.
- [34] Immelman had indicated that he was going to prepare a document to be signed on the things they had agreed on and that they were going to have a final meeting on 13 August 2014. According to him they had resolved the section 189(3) negotiations. They also discussed the fact that he would be doing future work for them on a fee basis. They had discussed rates and he had also prepared a separate document.
- [35] During the course of their discussion Immelman referred him back to the defendant's proposal at paragraph 8.3 of its letter of 7 August 2014 (page 77). He referred him to paragraph 1.2 of his letter of 1 August 2014. Immelman read the proposal he made in his letter. He was asking for a permanent license. Immelman eventually said if he wanted the license, he would get him the unsupported license. He informed him that if he wanted a supported license, he would have to pay for the maintenance. He was under the impression that Immelman was going to prepare something in writing. Immelman also wanted him to do the training on a new package which was on the market at the time.
- [36] On 13 August 2014 he received a letter dated 11 August 2014 from the defendant. Paragraph 2 of the letter reads:

"I confirm that you have agreed that your employment with the company will terminate due to the company's operational requirements, that you will be paid severance pay equal to one week for each completed year of service, and that you will be granted a full unsupported XPAC 7 license, (inclusive of all XPAC components) for scheduling use as per the license agreement."

They never discussed the issue of the license agreement in the meetings held prior to 13 August 2014. The letter incorrectly stated that he was employed for 12 years at the time. He was in fact with the defendant for 14 (fourteen) years.

Paragraph 3.9 of the letter reads:

"The terms on which you will be granted the license to utilize the XPAC 7 software will be set out in the Licensing Agreement that you will need to sign in support of this."

He testified that the license agreement was a standard type agreement and at the time thereof, he did not have a copy of the license

agreement.

Paragraph 3.10 of the letter reads:

"This will include a limitation of use allowing you to utilize the software for your own personal usage only, or for the provision of consulting services to customers of RPM where requested by RPM, or where you provide any XPAC services which are invoiced through RPM. For the avoidance of doubt this license may not be used for any commercial purpose other than as specified above."

The above paragraph limits him from doing private work. It only allows him to use the license for the work that related to the defendant

only.

[37] The limitation was never discussed with Immelman. As he proposed in paragraph C1.2 of his letter of 1 August 2014, he had requested a permanent full license to the XPAC 7 scheduling software which included all its modules in perpetuity. He had requested the software

which would allow him to use it to generate income for himself as a private contractor.

[38] He understood that the letter of 11 August 2014 was a final product of the previous discussions they had. He pointed out to Immelman that paragraph 3.10 of the letter of 11 August 2014 did not correspond with what was discussed at their meeting of 7 August

2014. Immelman informed him that it had to be included otherwise he was not going to be provided with the license. He did not accept the limitation. He also informed Immelman that his years of service with the defendant were not correct. Immelman requested him to sign the letter and he refused.

[39] The meeting did not end well. He was upset and told Immelman to rectify his years of service. Immelman told him to provide proof. He informed Immelman that he would furnish him with a copy of the contract he signed in May 2000 and not 2002 as alluded to by the defendant. He left the meeting without signing the document.

[40] At some stage he provided Immelman with a copy of proof of his service. The same day he wrote to Immelman where he responded to the letter from him dated 11 August 2014. He also referred to Immelman's letter dated 7 August 2014. At paragraph 4.3 of his letter he said the following:

" I accept your proposal that my employment is terminated on the basis that I be paid severance pay equal to one week for each completed year of service, calculated from my date of engagement on 1 May 2000. In addition, the company will provide me with a permanent, full, unrestricted license to the XPAC 7 scheduling software including all its modules in perpetuity on an unsupported basis. In this respect, I request the company to supply me with the following:

4.3.1 A full breakdown of the final retrenchment package, including my full salary for the last month that I am still in the employ of the company (August), salary in lieu . of notice month (September) and all payment in lieu of accrued leave.

4. 3 .2 A detailed proposal as to what the granting of a license for the XPAC 7 scheduling software will entail."

[41] Immelman acknowledged receipt of his letter but he never received any reply thereto.

[42] He wrote another letter dated 18 August 2014 . He felt that the defendant terminated his contract of employment prematurely while the negotiations were still going on. He was invited to meetings where the terms of the license agreement were discussed. He had not seen the license agreement yet. He only saw the restrictions. At paragraph 2 of the letter he stated that he gave the proposals to the defendant and the defendant reverted to him. It had accepted the first two proposals in their letter of 7 August 2014 and said it was still going to consider the third. The defendant had invited him to provide it with the proposed terms of the license in relation to the third proposal (letter from the defendant dated 7 August 2014 paragraph 7.3). He understood this to refer to the License Agreement and this according to him related to the Standard Agreement. The terms of the license he proposed were discussed at the meeting of 7 August 2014. The discussion revolved around paragraph C1.2 of his letter dated 1 August 2014.

[43] At paragraph 2.5 of his letter of 18 August 2014 he disagreed with the limitation referred to above and the conditions he referred to in the letter related to the actual license conditions.

[44] At their meeting of 18 August 2014 (transcribed record on pages 127-

134) Immelman referred him to the letter he wrote on 1 August 2014. He asked him why he was not happy with paragraph 3.10 (the limitations) because they had accepted the proposal he made at paragraph C1.2 of his letter of 1 August 2014. He told Immelman that they were still negotiating when Immelman said they had accepted his proposal. Immelman referred him to the terms of the licence agreement which became part of the discussions long after the letter of 1 August 2014. He also informed Immelman that the defendant's acceptance related to his original proposal without conditions.

[45] Subsequently he received a letter from Immelman dated 21 August 2014. The letter was not in line with the agreement that was reached on 7 August 2014.

[46] He referred the matter to the CCMA because he wanted it to enforce the agreement that was reached about the software. He was not disputing his dismissal.

- [47] Under cross-examination he testified that at the time of the trial he was employed by Phoenis Mine Planning and that he was the Managing Director. He further testified that the company also did software consultancy for the mining industry, feasibility and various other studies and built modules for the mines. He denied that there was some overlapping between what the company he worked for did and the defendant because his understanding was that the defendant was no longer involved in consulting. They only focussed on sales. He conceded that Phoenis used the XPAC 7 software at the time. According to his evidence Phoenis had 3 (three) licenses which they bought from the defendant on an unsupported basis.
- [48] When asked what he would do with the license in the event the court orders that it be granted to him, he testified that he would resign from Phoenis and do private work. He further testified that he was not a shareholder of Phoenis. Mr Perks held 100% shares in Phoenis.
- [49] He conceded that there were about 5 (five) companies in South Africa that used the XPAC 7 software with its modules. All these companies used the software with the license from the defendant. They had to sign an agreement with the defendant. He was not involved in the granting of the license to Phoenis in 2014 as he was still working for the defendant.
- [50] He admitted that when the defendant sold the license, it still remained its intellectual property and that the defendant only granted the use of the license under specific circumstances. He further admitted that the defendant always required all persons it gave permission to use the license to enter into a license agreement. He admitted that there was a standard license agreement. The standard license agreement was a product of the Australian company. The Australian company was the owner of the software. It had subsidiaries in other parts of the world.
- [51] He was referred to the software license and the maintenance agreement on pages 135 to 146 of the bundle of documents. He admitted that clause 2 thereof places a restriction that the licensee may use the license for internal purposes only and that there were various limitations on the agreement which were aimed at protecting the defendant's intellectual property. He testified that when he was negotiating with Immelman he was under the impression that they were negotiating a license agreement that was suitable to the terms he was asking for. He agreed that he would have had to sign a license agreement but not a standard license agreement.
- [52] He admitted that he and Immelman still needed to negotiate the terms of the license agreement that he would sign. He conceded that the negotiations broke down before they could negotiate the terms of the license agreement.

[53] He was asked on what terms he requests the court to order the defendant to grant him the XPAC 7 license. He testified that on the terms agreed to in the meetings he had with Immelman that the defendant would grant him an unrestricted license in perpetuity to enable him to continue to consult and make an income for himself. According to him the license would not be subject to the standard

agreement that the others use. In relation to the license restrictions referred to, he would not be subject to the whole of clause 2 of the license agreement. He wanted to be an individual user and not an internal user. According to him certain aspects of the

standard license agreement were not suitable to him. He wanted a specific license to be prepared for him. He and Immelman never discussed which parts of the standard license agreement should have been included and excluded in the agreement. They had not reached an agreement regarding what the terms of the license agreement would be.

[54] On 7 August 2014 the defendant agreed to grant him the license and a severance package but they had not agreed on the amount that was going to be paid to him as severance pay. They had also not reached agreement on his annual and unpaid leave.

[55] He admitted that on 13 August 2014 there was still uncertainty about what his severance package was going to be.

[56] When told that he had pleaded in his particulars of claim that on 7 August 2014, he and the defendant had reached an agreement, he denied this and testified that they had not reached a final agreement and that a subsequent meeting was scheduled to take place on 13 August

2014. He testified that the purpose of the meeting of 13 August 2014 was to discuss the license agreement and the conditions thereof. He conceded that the issue of the license agreement and the conditions had to be cleared up before they could have a final agreement. He reiterated that as at 7 August 2014 he was awarded a license but the terms thereof were still to be negotiated.

[57] He conceded that on the letter of 17 July 2014 the issue of the license was not mentioned.

[58] He denied that Immelman told him that every deal that was to be struck was not his but that it was something that Mike had to decide. When asked what he understood when Immelman kept on saying he should make proposals and that he would take them to Mike, he testified that he assumed that that was for discussion purposes.

[59] He was referred to the transcribed record of the conversation he had with Immelman on page 52 of the bundle of documents and told that it cannot be correct that when Immelman kept on saying he was taking his proposals to Mike and that Mike had to make a call, that was for discussion purposes as he had alluded to. It was put to him that he knew fully well that Mike Evans was the one to make a final decision regarding the proposals. Immelman kept on saying, he would take them to him. When asked to show where in the transcription did Immelman say he was mandated to finalise and make deals, he testified that the

statement did not appear in the transcriptions and that he asked him about that aspect before the conversations could be recorded. He conceded that what he was saying conflicted with what was recorded.

- [60] It was put to him that when Immelman said he was taking his proposals to Mike, it was expected of him to challenge him and tell him that he had to deal with him because he said was mandated to do so. His reply to this was that he assumed that Immelman was still mandated to conclude the deal. When asked why he did not ask Immelman why he had to take some of the proposals and decisions to Mike if that was his assumption, he testified that he assumed that Immelman would discuss their conversation with his superiors. He conceded that Mr Evans and Mr Matthews were the only two directors of the defendant in 2014. Mr Matthews was based in Australia and Mr Evans was the most senior person in the defendant at the time.
- [61] He conceded that the issue of the license was pertinently raised for the first time in his letter of 1 August 2014 and that his initial proposal was a permanent full license. He denied that he did not specify what he meant by a full license. He disagreed that during his conversation with Immelman when he said they had reached a common ground on one of the proposed options, he meant that they were paving a way forward to other options that followed. He reiterated that according to him they had agreed on the license and were still to discuss its terms and conditions. He admitted that at the meeting of 7 August 2014 he was invited to make proposals on the terms and conditions of the license. They had not discussed the proposals at that meeting.
- [62] The terms and conditions of the license were included in the letter of 7 August 2014. He felt that there was no point of discussing them because they were already put in the letter. Negotiations collapsed before they could discuss them.
- [63] He admitted that his letter to the defendant dated 13 August 2014 indicated his state of mind after the meeting of 7 August 2014 and that the letter did not state anywhere on it that he confirmed that the parties had concluded a final agreement. In fact the conclusion in the letter was that he hoped that they could reach an amicable solution.
- [64] When referred to his letter of 18 August 2014 and told that it was not consistent with his statement that on 7 August 2014 the parties had reached an agreement, he testified that the only consultation at the time in his mind related to the terms of the license and not the license which according to him was resolved in the previous meeting. He reiterated that the defendant acted prematurely because he would not sign for the conditions before they were negotiated.
- [65] He admitted that in his letter dated 18 August 2014 he stated that the parties have not reached agreement as there were two mistakes on the document that was given to him to sign which related to his completed years of service with the defendant and the terms of the license agreement and that he concluded the letter with the words:

" I again express my wish that we can reach an amicable agreement so that this matter can be wrapped up as soon as possible."

[66] He admitted what was put to him when he was referred to the transcribed record of the meeting he held with Immelman on 18 August

2014 from pages 127 of the bundle of documents and told that at that meeting he was at odds with Immelman regarding whether the offer of one week severance pay per completed year of service was accepted or not and the fact that the defendant in addition thereof would provide him with a permanent license to the XPAC 7 scheduling software, including its modules in perpetuity (para 1.2 of his letter on page 73), the fact that Immelman had said the defendant stated that they had accepted the offer and he was saying it did not' the fact that the defendant did not terminate his service before he received the letter but said he should look at the letter and sign it if he agreed but he did not sign it.

[67] He admitted that it would be harmful to use the license for another company but reiterated that he was prepared to agree to a license that he could use for his purpose while not in the employ of another company.

[68] He conceded that he and the defendant could not agree on retrenchment and he referred the matter to the CCMA as an unfair dismissal

dispute. When it was put to him that he did not mention in the motivation for the alleged procedural unfairness of his dismissal at the CCMA the fact that an agreement was reached on 7 August 2014 about the termination of his employment in exchange for payment of one week severance pay and the license, he testified that he was not disputing that the parties had reached an agreement on the fact that he would get a license. When asked why he said that to the CCMA, he testified that he told the CCMA that he wanted to enforce the agreement in respect of the license that he was awarded because at that time he was still negotiating the terms. He testified that he did not mention to the CCMA that he was awarded a license because he was told that the CCMA did not enforce contracts but dealt with unfair dismissal disputes.

[69] When told that all his letters indicate that on his own version he accepted that no binding agreement was reached between the parties, he testified that the agreement was not reached only as far as the licensing conditions had been discussed. He was asked whether he thought anyone can have a license without conditions on it. He responded that he never intended not to sign the license agreement but he wanted certain conditions to be changed slightly.

THE LAW

[70] In *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013

(5) SA 1 (SCA) said:

"The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole, and, whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded."

[71] Whether or not the parties intended that a final and binding agreement was concluded is a matter of fact which must be determined

objectively in the light of the parties' contemporaneous statements and. conduct, the terms of the agreement and the surrounding

circumstances. These surrounding circumstances include the parties' subsequent conduct and, in particular, whether they acted in a manner which indicates that they considered that they had already concluded a final and binding agreement - this is so because their subsequent conduct may be probative of their common intention at the time they made (or did not make) the contract (*Unica Iron and Steel (Pty) Ltd v Mirhandani* 2016 (2) SA 307 (SCA) at para [21] page 313-314).

EVALUATION OF THE EVIDENCE AND APPLICATION OF THE LAW TO THE FACTS

[72] The onus rests on the plaintiff to prove the contract he alleges. I will limit my analysis to the agreement he alleges was concluded in respect of the license. The plaintiff testified that at a meeting of 7 August 2014 an agreement was reached that he would be provided with the full XPAC 7 license, with all its add-ons on an unsupported basis. He conceded under cross-examination that the defendant granted licenses on a standard license agreement. He also conceded that when the defendant sold the license, the license remained its intellectual property and that it only granted the use of the license under specific circumstances. After being shown the software license and the maintenance agreement on pages 135 to 146 of the bundle of documents, he conceded that there were restrictions on the license agreement that the licensee may use the license for internal purposes only and that there were various other limitations on the agreement which were aimed at protecting the defendant's intellectual property.

[73] When the plaintiff was asked on what terms he requests the court to order the defendant to grant him the license, he replied that on the terms agreed to at the meetings he had with Immelman that he would be granted an unrestricted license in perpetuity.

[74] In the transcribed record of the meeting he held with Immelman on 7 August 2014 (pages 90 to 110) no mention was made that he would be granted an unrestricted license. The words "unrestricted license" do not feature in the discussions. The words do not also appear in the plaintiff's proposals in his letter of 1 August 2014 (paragraph C1.2 on page 73 of the bundle of documents and paragraph 8.3 of the defendant's letter of 7 August 2014) (page 77 bundle).

[75] Paragraph C1.2 of the plaintiff's letter dated 1 August 2014 reads:

"As an alternative, I propose that one week severance pay per completed year of service be paid, and in addition, that the company provides me with a permanent full license to the XPAC 7 scheduling software, including all its modules in perpetuity ... "

[76] Paragraph 8 of the defendant's letter dated 7 August 2014 reads:

"The company is also desirous to conclude an amicable agreement in terms of which your employment with the company will either be amended or terminated. We therefore invite you to attend a further meeting on 13 August 2014 to discuss the three proposals detailed in your letter and this response thereto, namely:-

8.3 the option of your employment terminating, you being paid severance pay equal to one week for each completed year of service, and you being granted a XPAC 7 license on an unsupported basis."

[77] The plaintiff's further evidence was that he was under the impression that he and Immelman were negotiating a license agreement that was suitable to the terms he was asking for. According to him he would not have agreed to sign a standard license agreement. He wanted a specific license to be

prepared for him.

[78] From the version of the plaintiff all the companies that bought the license from the defendant signed the standard license agreement. The standard license agreement had restrictions which protected the defendant's intellectual property. These companies bought the license on an unsupported basis. He alleges that he was granted the license on an unsupported basis. He does not allege that he was granted a license that was different from the ones the defendant sold to the other companies. From his own evidence there was no way he could have been granted an unrestricted license different from what the defendant sold to the other companies. On the basis of this evidence the plaintiff had agreed to a different license. In my view the plaintiff has no right to the delivery to him of an unrestricted license.

[79] In the face of the above evidence the plaintiff denied under cross examination that on 7 August 2014 a final agreement was reached between him and the defendant as alleged in his particulars of claim. He testified that a subsequent meeting was scheduled to take place on 13 August 2014 where the license agreement and its conditions were going to be discussed. After conceding that the issue of the license agreement and the conditions had to be cleared up before they could have a final agreement, he still maintained that on 7 August 2014 he was awarded a license but the terms thereof were still be negotiated.

[80] The plaintiff's further evidence was that at the meeting of 18 August 2014 when Immelman asked him why he was not happy with paragraph 3.10 of his letter of 11 August 2014 and told him that the defendant accepted the proposals contained in paragraph C1.2 of his letter of 1 August 2014, he denied this and told Immelman that they were still negotiating. In the main the plaintiff's evidence is characterised by inconsistencies and confusion. I conclude under

the circumstances that the plaintiff's evidence does not make out a prima facie case regarding the conclusion of the alleged agreement between the parties for the defendant to answer.

[81] It is my considered view under the circumstances that there is no sufficient evidence before the court upon which it could find for the plaintiff.

[82] Consequently I grant an order for absolution from the instance with costs.

MJ TEFFO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION; PRETORIA

APPEARANCES

For the plaintiff

M Snyman

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Fasken Martineau Inc as Dewar inc c/o Savage Jooste Attorneys

Date of judgment 4 may 2018

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