

SOUTH AFRICA / JUDGMENT

Pasha v Pandora Jewellery South Africa (Pty) Ltd (C91-2022) [2024]

ZALCCT 13 (19 February 2024)

[2024] ZALCCT 13

COURT

Labour Court Cape Town

BEFORE

R G Lagrange

CASE / FILE NUMBER

C91-2022

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**THE LABOUR COURT OF
SOUTH AFRICA
AT CAPE TOWN**
**Not
Reportable
case
no: c 91/2022**

In the matter between:

MMATLAWA NTEBOGENG
NADINE PASHA
Applicant
And
PANDORA JEWELLERY
SOUTH AFRICA (PTY) LTD
Respondent

Heard:

12 February
2024

Delivered:

(This judgment was handed down electronically by emailing a copy to the parties. The 19th February 2024 is deemed to be the date of delivery of this judgment).
Summary: (Claim
for unpaid bonus commission – in limine objection that
bonus commission scrapped and no longer a contractual entitlement –
pre-condition for such amendment being
made not proven – Costs)
IN LIMINE

RULING

LAGRANGE J

Introduction

[1] The applicant, Ms N Phasha ('Phasha') claims she was due payment of a bonus commission from the respondent ('Pandora') for the month of November 2021, amounting to R 44,000. This was based on the store in which she worked in the V&A Waterfront achieving 525,5 % of the stipulated sales target. Phasha was paid a bonus commission of R 3,000 instead and is claiming the balance of R 41,000 she says is due to her. Pandora contends the 525,5% target was

plainly an error, which it was entitled to correct, but in any event denies it was contractually obliged to pay any bonus commission.

[2] At the commencement of the trial proceedings, Pandora raised an in limine issue, which had been pleaded as part of its defence, but not raised as a matter to be determined before the trial could start. It claims that on 3 July 2021, a new performance incentive scheme was agreed to by Phasha, which stipulated that it replaced all previous commission structures in her contract of employment, which included the bonus commission scheme. Accordingly, it argued there was no contractual basis for her claim to the bonus commission for November

2021. Phasha claimed it was necessary to lead oral evidence to determine this preliminary issue. After hearing oral argument from the parties, the court agreed to hear oral evidence before determining this preliminary issue.

The evidence

[3] Following the ruling that oral evidence could be led on the in limine point, Phasha gave evidence. Pandora led no witness of its own. Only the evidence having a bearing on the preliminary objection will be mentioned. Phasha testified on the factual basis for her claim to payment of bonus commission, and her claim was challenged under cross-examination, with regard to both the contractual entitlement to such a commission and whether, if she had one, she was entitled to a payment of R 44,000. It was argued by Pandora that she made significant concessions regarding whether or not her claim was based on a genuine error in setting the target sale figure.

[4] Be that as it may, at this stage it is not necessary to deal with the question of how the sales target was set for November 2021 or whether it was correct. Accordingly, the merits of the in limine point have no bearing on the merits of Phasha's claim to the bonus commission in the event such a bonus was payable for November

2021. In this ruling the court is only concerned with the merits of the in limine objection.

[5] It was agreed in the pre-trial minute that:

5.1 Phasha was employed by Pandora in terms of a written contract of employment as a Pandora sales assistant.

5.2 Initially, aside from her salary, Phasha was entitled to earn a monthly commission based on the achievement of over 50% of the sales budget.

5.3 Phasha was also entitled to receive a bonus commission monthly in arrears, calculated at R 1,000.00 for every 10% the sales target was exceeded.

5.4 Pandora claimed that the abovementioned commission payments were amended in writing on 1 July 2021. According to Pandora, the effect of the amendment was to replace the 50 % commission with a new formula and the R 1,000.00 bonus commission was done away with.

[6] Pandora handed up a previously undiscovered signed contract at the commencement of proceedings. This was a contract concluded

between Phasha and Scandinavian Brand House ('SBH') on 1 February 2017 in terms of which Phasha was employed as distribution

administrator ('the SBH contract').

[7] Under clause 11 of the contract dealing with remuneration was a provision for a monthly commission. It was expressly stipulated in that provision that the employer could amend the commission structure or rates on four weeks' notice to the employee, viz:

"The employer has the right to re-evaluate and amend the commission structure, or rates applicable thereunder, at any stage at its

discretion, provided that the employee will be given not less than 4 (four) weeks' notice of such intention."

[8] In essence the employee was entitled to a bonus based on the extent to which 50 % of the monthly sales budget was exceeded. Thus, if sales achieved were 80 % of the target, she was entitled to a bonus of 30 % of her monthly salary (i.e., 80 % - 50 % - 30 %). No other commission was provided for in this contract. In particular, no provision was made for payment of the R1,000 bonus commission for every 10 % of the sales target achieved.

[9] Phasha testified that the SBH contract was concluded when SBH was the distribution centre for all the Pandora store franchises.

Around the middle of 2018, Pandora absorbed all the Pandora outlets and the distribution operation under SBH was closed. At the time, Phasha was working for SBH in Johannesburg and, following her retrenchment she was employed as a sales consultant for Pandora working in its V&A store in Cape Town. She said she signed a contract when she was appointed as a sales assistant but never received a copy of it.

[10] Phasha alluded to a sample of a sales manager contract due to commence on 1 November 2020. That contract provided both for the 50 % commission and the 10 % bonus commission as described above, which Phasha claims was also in the contract she signed, but never received.

[11] On 19 May 2019, Phasha the parties signed an amendment to her contract, in terms of which she was appointed as the store manager of the V&A store. The amending document stated that:

“All terms and conditions of the original signed employment contract are still applicable and remain valid during employment with Pandora Jewellery South Africa (Pty) Ltd.”

[12] Phasha claimed that the 50 % plus commission scheme remained in the contract and, in addition, she became eligible for the bonus commission of R 1,000 for every 10 % of sales above the monthly sales target. She agreed that on 3 July 2021, she signed a new performance incentive scheme for stores. She testified that this scheme amended the previous 50 % scheme by breaking up the 50 % figure, so that it was comprised not by a single sales target metric but contained a few additional indicators such as hourly performance or units sold per transaction, so those other targets also had to be achieved, before she became eligible for the bonus.

[13] The document she signed was entitled “Acknowledgment and Acceptance of New Performance Incentive Scheme for Pandora Jewellery South Africa”. After setting out the revised formulation for the 50 % scheme, the following proviso appears:

“I understand that this new performance incentive scheme overrides and replaces all previously agreed to commission structures as

communicated in my Employment Contract/s.”

[14] Phasha testified that the new 50 % structure was only finalised after about six months of discussions as staff did not understand it when it was first tabled by management. She maintained that, despite the claim that it overrode all previously agreed commission structures, it only changed the formulation of the 50 % scheme. She maintained that the bonus commission entitlement of R 1,000 for every 10 % of the sales target achieved remained intact. There is no dispute, that she continued to receive a payment based on the bonus commission formulation after signing the new performance incentive scheme in July 2021, but Pandora contends that it was no longer a contractual obligation but was a discretionary payment by the company. Phasha testified that staff simply continued to receive it, and there was no communication of any kind from the company that the payment was now made as a discretionary one.

- [15] Phasha conceded under cross-examination that she could not point to a signed version of a contract in terms of which she was entitled to the 10% bonus commission but maintained that it was part of her contract and had not been terminated by the amending agreement she signed on 3 July 2021.

Evaluation

- [16] Both parties agreed that Phasha was employed in terms of a written contract. There was no dispute about whether it was valid on account of not being signed. Phasha's claim that she did sign one containing the same provisions setting out the 50 % commission and 10 % bonus commission that appear in the unsigned sales manager contract, was not disputed. All that was disputed was that she could not produce a signed version of it. Moreover, in any event, Pandora agreed she had been entitled to the 10% bonus commission. Pandora's pleaded defence to her claim rests solely on the argument that her entitlement to the bonus commission was brought to an end by the 3 July 2021 document she signed, which confined her contractual commission entitlements to the reworked 50 % commission. Its argument is based on the validity of that document.

- [17] It is true that Phasha's own interpretation of that amending document is neither here nor there as to how it should be properly

understood. What was not disputed is that Pandora continued to pay the 10 % bonus commission after the amending document was signed. It was Phasha's uncontested evidence that the amending document was preceded by about six months of interaction between staff and management because staff did not understand what the proposal entailed. According to her it was concerned with the reformulation of how the 50 % bonus formulation was to work going forward. It was not put to her that management had also proposed that the 10 % bonus commission would be done away with. After the amending document was signed on 3 July 2021 management

continued to pay the 10 % bonus commission on the same basis as before, without any attempt to preface the continuation of the

payment with an explanation that it only continued to do so as a gesture of goodwill.

- [18] Before the court can interpret the provision that the amending agreement replaced all previously agreed commission structures, Pandora needed to prove that the pre-condition for such an amendment contained in the contract of employment was complied with (see the extract at paragraph 7 above). It was not suggested to Phasha, under cross-examination, that Pandora had given four weeks' notice of its intention to do away with the bonus commission in addition to amending the 50 % commission structure. Further, no evidence was led that this pre-condition for amending the bonus commission structure had been complied with regarding the bonus commission. In the circumstances, Pandora has not proven that it notified employees not only of the intended changes to the 50 % commission but also of its intention to eliminate the 10 % bonus commission, as part of the proposed

amendment of the commission structure. Accordingly, it has not established that a pre-condition for effecting such a change to the contract was met.

- [19] In the circumstances, I am satisfied that the purported scrapping of the bonus commission did not comply with the contractual stipulation for making such an amendment. Thus to the extent that the amending agreement should be read as applying to the bonus commission, Pandora has not established that such a change was lawfully effected in terms of the employment contract. Accordingly, I am not persuaded that the bonus commission was no longer legally enforceable after the amending agreement was signed. In the light of this, the in limine objection must fail.

Costs

- [20] Phasha argued that Pandora should pay the wasted costs arising from having to deal with the in limine point at trial. She argues that Pandora's late filing of its answering statement and its dilatoriness in concluding a pre-trial minute, which she claims necessitated a pre-trial meeting being enrolled before the court, warranted an adverse cost order. I believe that any costs relating to the necessity of enrolling the matter for a pre-trial meeting before the court should have been raised with the court which dealt with it and dealt with the condonation of the late filing of the answering statement. I note also that the factual and legal basis for the in limine point was pleaded by Pandora. However, the consequence of raising the point, is that the trial proceedings were adjourned, when they should have been concluded. Had the trial simply proceeded or if the point had been enrolled as an interlocutory matter, no adjournment would have been necessary to determine the in limine point. Pandora was not prevented from raising the point as part of its defence during the trial. In consequence, instead of the entire matter being disposed of in one day as the parties envisaged, it will have to be enrolled for another day. In law and fairness, Phasha should not have to bear the costs of the first day.

Order

- [1] The Respondent's in limine objection is dismissed.
- [2] The Respondent must pay the Applicant's costs of attendance and representation at the hearing on 12 February 2022.
- [3] In the event the Applicant still wishes to proceed with her claim she must request the Registrar in writing to re-enrol the matter on the trial roll for one day.

R G Lagrange

Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: FH Cronje from Cronjes Incorporated Attorneys

For the Respondent: T Du Preez

Instructed by:

Van Der Spuy and Partners

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Prepared on 9 October 2026 · Esheria