

SOUTH AFRICA / JUDGMENT

Perie v Uramin Incorporated in British Columbia T/A Areva Resources Southern Africa (28154/2011) [2013] ZAGPJHC 320 (11 December 2013)

[2013] ZAGPJHC 320

COURT

South Gauteng High Court, Johannesburg

BEFORE

K Satchwell

CASE / FILE NUMBER

28154/2011

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IN

THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC

OF SOUTH AFRICA)

Case

number: 28154/2011

DATE:

11 DECEMBER 2013

In

the matter between:

PERIE,

CAROLYN.....Plaintiff

And

URAMIN

INCORPORATED IN BRITISH COLUMBIA

t/a AREVA

RESOURCES SOUTHERN

AFRICA.....Defendant

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. Plaintiff was an employee of defendant. She brings a claim for specific performance based upon contract and not upon an unfair labour practice. She avers that, when it employed her, defendant agreed to compensate her for certain benefits accruing to her from her previous employers which she would lose upon departure. She relies upon a partly written and partly oral agreement. She claims that defendant failed to compensate her for the loss of those benefits. Defendant disputes the claim averring that the written contract of employment is decisive of her claims and that she was financially compensated for the loss of her share options.
2. Plaintiff was employed by BHP Billiton Limited ('BHPB') as Project Manager dealing with human resources matters during which time she participated in certain BHPB incentive schemes for senior executives. There is some disagreement over the number of share options awarded to her by BHP but it is common cause that these share options would only vest at future dates and that she would forfeit all rights to these options if she left the employment of BHPB before the dates when the share options would vest.
3. She was approached by a recruitment agency ("Blackie") with a view to taking up employment as Human Resources Manager for defendant which was then without either HR capacity or executive incentive plans such as share options or allocations. There were negotiations during November and December 2007 and a written agreement ('the document') was concluded in December 2007. This contract made no reference to any benefits accruing to plaintiff from her previous employer.
4. She commenced employment with defendant in February 2008 prior to the vesting date of the BHPB share options with the result that these were forfeited by herself. Plaintiff avers these benefits were dealt with in the oral portion of the employment agreement which provided for compensation for the loss of value of the BHP share options ("the oral terms"). No share scheme was implemented by defendant whilst plaintiff was in its employ. During May 2011 plaintiff was retrenched and concluded a written retrenchment agreement ('the retrenchment contract') which, defendant contends settled the claims now made by plaintiff but which plaintiff responds was subject to amendment which reserved to her the right to pursue her claims in respect of compensation for the shares.

THE EMPLOYMENT AGREEMENT**The Written Document**

5. The written document[1] consists in an offer made on 7 December 2007 by J. Macpherson, then Managing Director of defendant, and accepted by plaintiff on the same date. The document, which is in letter format, purports to set out “the basic terms and conditions for the position” of ‘Human Resources Manager’. Thirteen bullet points are set out as the “basic terms” .

6. Relevant to this litigation are the third and sixth bullet points:

“You will receive a sign on bonus of ZAR 500 000. The first ZAR 300 000 will be paid on engagement, the balance on the first anniversary of the date of engagement.”

“You will be granted options in accordance with company practice in the event that Areva completes an IPO. This is currently estimated for the first half of 2008.”

7. This agreement makes no reference to and is silent with regard to compensation in respect of any benefits which had or which might accrue to plaintiff from her previous employer which she would forfeit on

departure from that employment. Those form the subject matter of the disputed verbal portion of the agreement.

8. The first point of departure in understanding the complete employment agreement are the words used in the written document[2]. Counsel for both parties have advanced a number of arguments in respect of this document.

9. The document purports to be “basic” terms and conditions and anticipates a further “formal service agreement” which, it is common cause, was never prepared nor signed. I am unpersuaded by the argument that this document is no more than a basic or preliminary precursor to a more detailed employment agreement which would set out all terms including those agreed verbally pertaining to compensation by defendant to plaintiff for loss of her BHPB share options. The thirteen bullets in the document provide for issues ranging from annual salary to relocation costs to notice periods[3]. It is difficult to conceive what other issues pertaining to employment were reserved for the less basic and more expansive

document counsel contends was still to be prepared. The only issue which it is claimed has been omitted

is the disputed compensation for forfeited BHPB share options.

10. It is common cause that the Areva Group, of which defendant is a part, is 80% owned by the French Government. Neither Areva nor defendant was, at the time of concluding the agreement, listed and capable of offering share options or such benefits to any employee. The written document provides for the anticipated eventuality that Areva would “complete an IPO” which was, at time of writing, “estimated” for the first half of 2008. “In the event” that such IPO was completed by Areva the document states that plaintiff would be “granted options in accordance with company practice”. It is clear that the document records no more than a conditional undertaking if and when Areva concluded an IPO with no more than an

estimation given for such event. The clear wording of the document does not impose any obligation upon defendant to list and/or to grant share options to the plaintiff.

11. The upshot of this brief commentary on the written document is not only to conclude that it is silent on any compensation in respect of the BHPB share options which plaintiff would forfeit on taking up employment with defendant. In addition, the document is clear that the implementation, if at all, of an Areva share incentive scheme was anticipated but not guaranteed. The offer to “grant options” could only be in “accordance with company practice” as and when the company was listed and therefore in a position to develop and implement a practice.
12. However, over and above the written document, plaintiff has pleaded “express oral terms” agreed between herself and defendant. The “defendant would compensate the plaintiff for the loss of value of her allocated BHP Billiton shares (‘Shares’) [4] in one of two ways. Either defendant would implement a new “Regional Compensation and Benefits structure” within a period of one year from commencement of her employment “to compensate her for the loss of her Shares” [5] or defendant would pay plaintiff “the cash value of her shares”. [6]
13. There are a number of difficulties in reconciling the written document and the pleadings which must be mentioned before there is any discussion of the evidence.
14. Firstly, the oral portion of an agreement cannot contradict the written portion. The reasoning for this approach has been set out in a number of authorities. [7] Of course this statement has been predicated upon the proposition that “the document was intended to provide a complete memorial” of the agreement between the parties. I understand that plaintiff maintains that it is not such a complete memorial whilst defendant contends that it is.
15. On the one hand, plaintiff’s case is that there were express oral terms in the complete employment agreement to the effect that “the defendant would compensate the plaintiff for the loss of value of her allocated BHPB shares” by “implementing a new Regional Compensation and Benefits Structure (which would include the development of an AREVA Long Term Incentive Plan Scheme) within a period of one year from the commencement the plaintiff’s employment.” On the other hand, the written document records no such agreement and instead offers no more than a conditional grant of share options – perhaps in the first half of 2008. Defendant contends that this conditional offer is the “exclusive embodiment” of the transaction and that nothing more remains to be added.
16. The particulars of claim [8] assert a firm agreement to introduce and implement a named new benefits structure whereas the written document gives no such undertaking. Yet the oral terms as pleaded go further than this. Paragraph 8.1 of the particulars of claim has an “either...or” component. The oral agreement was that defendant would either implement the new benefits structure or that defendant would pay “the cash value of her shares” to

plaintiff. In that sense, I find that the particulars do not contradict the written document. In the event that there is no IPO as anticipated for in the written document then defendant was to make payment of the cash value of the forfeited shares.

17. Secondly, the reference to the proposed IPO and the anticipated grant of share options is premised upon nothing more than “company practice”. The possible grant is not premised upon past employment with BHPB as a named previous employer and the identified share options allotted during 2005, 2006 and 2007 which were now to be forfeited. Not only does the document makes no mention that the grant of options, if and when there was an IPO, would be linked to plaintiff’s previous employment benefits. It also makes no mention of cash payments if there was no IPO – in respect of compensation for the forfeited BHPB shares or the non-grant of Areva shares. The silence is deafening.
18. It was argued that the terms of this written document are clear and unambiguous in that the document regulates the remuneration and benefits structure of defendant and that there is no need to resort to contextual evidence in this regard. I agree.
19. However, I take the view that it is necessary to examine the evidence as to any oral terms not because this gives context to the written document but because these terms are pleaded as additional to the written document.

The Oral Terms

20. Plaintiff herself gave evidence on the “express oral terms” agreed between herself and defendant[9]. David Dragone (‘Dragone’) who was Head of HR (Mining) at defendant at the time testified on behalf of defendant.
21. There was some evidence as to plaintiff’s employment with BHPB and her reasons for being open to the offer of employment from defendant. I do not find this relevant to the issues which I am asked to decide. After all, everyone negotiates in their own particular way and settles in their own particular way[10]. At the end of the day, the issue for decision by myself is the nature of the settlement resulting in an agreement between plaintiff and defendant.
22. Plaintiff’s version is that Dragone assured her that the listing of Areva was definite but if the listing did not happen a ‘phantom scheme’[11] was possible resulting in matching of the value of plaintiff’s BHPB shares with Areva shares. Dragone’s

version is that the listing was not definite and that he informed plaintiff that she would be granted share options in the event that Areva did complete an IPO as confirmed in the written document.

23. Plaintiff’s version is that it was agreed that she would be compensated for her forfeited shares on the basis of an independent valuation which she obtained. Dragone says that he received Plaintiff’s valuation of R 1.3 million which led to further negotiations resulting in the agreement to pay the sign on bonus of R 500 000 in two tranches[12].

24. The chronology is neither lengthy nor complicated.
25. Four candidates were interviewed by Macpherson for the position in HR at defendant early in November. One was the plaintiff. By 28th November Macpherson invited plaintiff to call him to discuss any concerns she had concerning a document which he sent her at that time.
26. Plaintiff had participated at BHPB in a Group Incentive Scheme ('GIS'), Short Term Incentive ('STIP') and Long Term Incentive ('LTIP'). She had acquired performance and deferred share options in 2005, 2006 and 2007. She knew that the shares had not vested and that they would be lost to her on termination of her employment with BHPB. In addition, she was accustomed to received bonus awards, the STI, of not less than 40% of her annual salary which awards were calculated on performance over the period July to July and were paid out in September. She knew that she could not receive any bonus from BHPB in September 2008 in respect of her work over the period July 2007 to January 2008 and so this STI would also be forfeited by her move to defendant.
27. On 28th November she responded to Macpherson with a "few questions"[13]. The first asked for details on the annual bonus offer; the second asked whether "the value of her shares at BHPB [would] be considered when awarding shares for the listing in 2008"; the third asked for detail on healthcare cover; the fourth concerned relocation costs and the fifth asked about executive

accommodation.

28. Macpherson replied by email the next day[14] by inserting his answers against her questions:

Q

- "Will the value of my shares at BHPB be considered when awarding shares for the listing in 2008?"

A - "The scheme is obviously not yet defined, but I am sure that it will be based on our own guidelines and will not take into account any previous schemes that you have enjoyed."

29. On 30th November 2007 Dragone wrote an encouraging email to plaintiff[15]. She emailed him on 3rd December with "the following additional queries". She posed questions about the annual bonus, company contributions to medical aid, details on issue of shares on listing to compare the value with her BHPB shares and the company contribution to retirement funding. Dragone forwarded plaintiff's questions to Macpherson on the same day suggesting Macpherson respond to the queries but "I'll call her to explain the point 3". The communication was therefore:

Q - "Could I please have more detail on how the share issuing on listing will work as I need to make a fair value assessment on that versus my BHPB share options"

A - [Iain Macpherson] David will call you to discuss how this is evolving."

30. On 4th December Dragone emailed Macpherson advising that “In terms of welcome bonus to compensate her stock I think we should give her around 300,000 she will get back to me with the figure of her plan. ... we can not increase the base but a welcome bonus is ok to me you?.” Macpherson responded that he was in agreement with the proposal Later that evening Dragone emailed Macpherson advising that he had “asked her the amount of her stocks”. A document was apparently attached indicating this value because Dragone’s email went on to comment “ you can see it is huge of course we can not give her a welcome bonus of 1,3M ZAR... I think the max we can do if you agree is ZAR 300 000 when she signs and 200,000 in one year. It does not compensate her current level of stock but compensate a part..what do you think?”[16]
31. These emails were not copied to plaintiff and were exchanged within defendant only.
32. The recruitment consultant emailed plaintiff on 7th December setting out the defendant’s offer “as discussed with you earlier”. That offer reported on the “welcome/sign on bonus” in two tranches and advised that “You will also participate in the Areva share option scheme but as this is yet to be defined and the company is as yet unlisted any further comment is not possible”.[17]
33. Plaintiff testified that she was prepared to “come across” from BHPB to defendant and once she had designed the defendant’s remuneration and benefits scheme for Sub-Saharan Africa there were indications of “matching shares”. She and Dragone had numerous phone calls. She sent him values of her BHPB shares. He was, she said, not interested in the numbers.
34. She discussed this issue of shares with her boss, the HR director at BHPB and he prepared a manuscript comparison of the pros and cons at both BHPB and defendant including queries such as “how will the share issuing work on listing. What if the share listing does not happen.”[18]. This document was emailed to Dragone who passed it on to Macpherson.
35. One of the questions she raised with Dragone was whether a phantom scheme would be designed if the Areva listing did not take place. His response was that she was needed to design for Sub-Saharan Africa. She said that he told her “for him [the listing] would definitely happen. If it did not then [we would] put a phantom scheme in place.”.
36. Plaintiff testified there was no incentive for her to leave BHPB if she would sustain the loss of her share options. She made this very clear to Dragone and she says that his response was that Areva would be putting a scheme in place and her “shares would be matched”, that they would do “like for like”. Her understanding was that her BHPB shares were evaluated and then if there was a listing “then my shares would be matched” and if there was no listing then “my shares would be matched with phantom shares”.
37. Plaintiff was adamant that the ‘welcome/sign on bonus’ was not to compensate her for her BHPB stock but was to compensate for her “walking away” from eight months of STI – i.e. July to February – at BHPB as she said was discussed with Dragone.

38. As far as the written document is concerned, plaintiff took the view that “this is hardly an employment contract” and reflects the absence of an HR department at defendant. She did not need to point out to Macpherson that this document had omitted this important term about compensation for forfeited shares “because I had conversations with Dragone”.
39. Dragone gave evidence that he explained to plaintiff that she would receive “a welcome bonus to compensate for the past”. Plaintiff asked him about new stock options and he told her that Areva was about to be listed and then a share plan for South Africa would be put in place but no details could be given because the IPO was not ready.
40. He recalled that plaintiff was “pushing” “to make up the package”. He says he refused to increase her base salary but were prepared to compromise on her stock and pay the welcome bonus to “compensate for stock options” with the result that “she didn’t leave anything behind”.
41. On this evidence (over and above the written document itself) I can find that there were plenty of questions and answers and negotiating on both sides. This all resulted in the written document. I cannot find that plaintiff has shown, on the probabilities, that there were additional express oral terms agreed as

part of the total employment agreement.

42. Firstly, it would be surprising if plaintiff had not been concerned about the forfeiture of her stock options (due to mature over a period of years in the future – 2010, 2011, 2012). The manuscript comparison of the two employment positions and her queries about arrangements for compensation for these BHPB shares are to be expected. There is everything to show that she raised this issue because she wanted compensation. But there is nothing to

show that any such compensation was agreed would take place as a result of the listing of Areva failing which a phantom

incentive scheme would be instituted or a cash payment made. There is not one word recorded from Dragone which gives any indication of his assent to her claims.

43. Secondly, in response to her earliest queries, Macpherson indicated to her that he was “sure” that the scheme “will not take into account any previous schemes that you have enjoyed.” There is no indication that plaintiff ever reported on or queried Macpherson’s view with Dragone. She apparently never sought clarity as between Macpherson (the managing director and the person to whom she would report) and Dragone (head of HR). When she received the written document from Macpherson, she apparently did not seek to clarify whether he and Dragone had the same understanding. It is unlikely that anyone would sign this written document emanating from Macpherson without ensuring that the commitment she avers was made by Dragone was the same commitment tendered by Macpherson. All this suggests that there was no contradiction between the views and undertakings of the managing director and the HR director and that Dragone had not entered into the verbal

agreement as alleged.

44. Thirdly, it was submitted that the exchange of emails between Dragone and Macpherson regarding the welcome bonus had not been sent to plaintiff who was therefore unaware of his mental reservation concerning the compensation of BHPB shares.

This submission ignores the very clear denial by Dragone that he ever agreed to compensate plaintiff for her BHPB shares

through the proposed Areva listing or a phantom share scheme or a cash payment in the event these options did not materialize.

The authorities cited in support of this argument are not of assistance since there must be an apparent agreement in

relation to which there is a mental reservation[19]. Here this is no agreement on this topic. It is not a case of the parties apparently agreeing on compensation through a share scheme and the one party deciding by himself to effect that compensation through the welcome bonus. There was neither contradictory “external manifestation” on the part of Dragone nor “mental reservation”. Dragone disputes any offer of compensation for BHPB shares through an Areva scheme. He says that he never acceded to this request. There is no suggestion that Dragone had a mental reservation in respect of the written or any other agreement. He says that he attempted to accommodate her concerns by introducing the “sign on” or “welcome” bonus. Certainly, these emails confirm his version.

45. Fourth, if the sign on or welcome bonus was compensation for plaintiff’s STI bonus expected from BHPB for the period July 2007 to January 2008, then it, too must have been verbally agreed and entirely out of the blue. The STI bonus was never raised by her in any of her emails. In none of the negotiations is there any reference to her expected STI bonus, and no reference to the calculations offered at trial that

the R 500 000 was in respect of this bonus. There is no record that this was ever mentioned by her before signing the written document. There is however, evidence to support Dragone’s version as to the basis upon which the sign on bonus was arrived at and calculated.

46. Fifth, much evidence was tendered by plaintiff as to her actions subsequent to conclusion of the written document in December 2007. There are principled difficulties in relying thereon. Subsequent conduct is hardly of assistance in understanding the prior context which gave rise to the written agreement itself.

Ex post facto conduct should only play a role where the written document is ambiguous or unclear and where there is insufficient contextual evidence prior to the document. In any event, subsequent conduct of one party alone cannot alter what went before the written document or the apparent objective meaning of that document. However, I deal with the following three series of events upon which plaintiff partially relied in her evidence because I am of the view that it does not assist her cause.

47. She arranged in March 2008 for payment of a sign on bonus for an executive recruited from Anglo Platinum to compensate him for the shares which he had forfeited. That this was spelt out indicates that he was not reliant upon or expecting to be compensated through the Areva share scheme still to implemented upon listing in the first half of 2008 and that she did not expect him to be compensated in this manner. That this was recorded in writing indicates that she knew that such matters should be so recorded and that she was professional enough to so record the arrangement. But she did not, three months earlier, ensure that this was done for herself. In any event, I cannot find that all executives receive compensation for share options which they may forfeit on leaving a previous employer – the reasons for concluding contracts are different and have different content.
48. Plaintiff relied upon her approaches in October 2008, the valuation of her BHPB shares by Icelly in December 2008, her correspondence with Dragone on this valuation, further correspondence in May 2010, her notation on her evaluation of January 2011. It was argued that this conduct subsequent to her taking up employment with defendant supports her version. It certainly supports her concern over the failure by Areva to list during the expected first half of 2008 which had not taken place. She gave evidence that she understood she had taken a risk in hoping for the Areva listing but the risk materialized in the sense that she was now working for an employer who was not going public and was not in a position to grant the anticipated share options. Interestingly, she writes on 7 May 2010[20] “As you know I was brought across from BHP on a like for like basis, i.e. I would in addition to my salary and other benefits also receive bonus shares and share options as I had left behind at BHP”. This wording suggests that the “like for like” was that not only the basic package should be roughly the same but that defendant was to implement an executive incentive scheme as she had previously enjoyed at BHPB. There is no mention of an outstanding match or compensation to be paid over. She writes “Since the company has not listed I have yet to receive the bonus shares and share options (or compensation of similar value)”. She asked for Dragone’s “thoughts as to how this matter would be resolved”. His response five days later was to remind her that “to put in place such a program we need to be listed” which indicates that, from his point of view, the Areva scheme was the only vehicle for any share options to be forthcoming. Interestingly, plaintiff makes no reference in her initial email or in response that they had agreed prior to the written document being concluded that the alternative to the Areva share structure would be the introduction of a ‘phantom’ share scheme. She was silent in this regard.
49. Reliance was placed upon the absence of any real or useful response from Dragone and his failure to terminate her approaches by clearly stating that there never had been and never would be any compensation for her BHPB shares .

It was argued that this was not only poor human resources management but also indicative that there was no disagreement .

It was argued that defendant cannot point out when or where plaintiff was told there would be no compensation as claimed by her. This argument, to my mind, misses the point. It is not for defendant to prove a negative. It is for plaintiff to show that there was an express oral agreement over and above the written document to which the parties had committed themselves. Furthermore, no court could assume that silence in response to proposals or demands indicates acceptance or agreement especially when a written contract had been concluded. The absence of a categorical denial by Dragone in answer to plaintiff's emails and approaches from October 2008 onwards may indicate that plaintiff never spelt out that she believed that the two of them had agreed, over and above the written document, that she would be granted shares by Areva to match her BHPB shares alternatively that a phantom share scheme would be created. Accordingly, Dragone responded as he did because there was no clear averment of any agreement which he had to confront head on. Dragone's responses may indicate that Dragone was careless with staff, too busy to focus, was impatient of her continuing approaches (as Barbaglia said he had become). Dragone's evidence was that he had no particular recollection of receipt of some documents or his responses thereto and that he was simply not interested in what he considered to be a nonissue which had been resolved months and years before when the written document was concluded.

Conclusion

50. I am satisfied that the written document covers all the essentials of the contract of employment between the parties. This document purports to regulate the issue of grant of share options going forward. This document is silent on any compensation for share options awarded by BHPB.
51. Insofar as the contextual evidence prior to conclusion of the written document is concerned, there is nothing to support the version of plaintiff that she and Dragone reached a verbal agreement that she would be compensated for her BHPB shares either through the proposed Areva scheme or through a phantom scheme or through cash payments if the Areva scheme did not materialize. There is, however, support for Dragone's version that the sign on bonus was introduced to cover plaintiff's insistence that she was not prepared to simply abandon the value in her BHPB shares.
52. It is inexplicable that plaintiff would be so concerned about her BHPB share options that she would raise this several times in her emails prior to concluding the written document and then fail to require the written document to record the verbal agreement which she says she and Dragone had reached in this regard. It is even more improbable that she would not take such an elementary step when Macpherson, author of the written document, had already expressed a view contrary to that which she contends was accepted by Dragone. Her reliance upon her amendment to the retrenchment agreement as well as the documentation in respect of de Jonckheerre indicates the importance she attaches to the written recordal of the obligations of a contracting party. It is highly unlikely that her concern for compensation for the BHPB share options would go unrecorded if an agreement was

reached which was solely verbal.

53. There is nothing to support plaintiff's version that the sign on bonus was in respect of her STI bonus expected from BHPB for the period July 2007 to January 2008. The STI bonus was never raised by her in any of her emails. In none of the negotiations is there any reference to her expected STI bonus, and no reference to

the calculations offered at trial that the R 500 000 was in respect of this bonus. There is no record that

this was ever mentioned by her before signing the written document. There is however, evidence to support

Dragone's version as to the basis upon which the sign on bonus was arrived at and calculated.

54. The clear wording of the written document imposes no obligation upon the defendant to introduce and implement a structure which would include the development of an AREVA Long Term Incentive Plan Scheme within a period of one year from the commencement of plaintiff's employment either to provide plaintiff with a package at defendant comparable to that which she had enjoyed at BHPB or to compensate her for the loss of the value of her BHPB share options.

I have already discussed the conditional nature of any grant of shares and the absence of an obligation to ensure the scheme was introduced. Therefore the claim as pleaded in paragraph 8.1.1 of the particulars of claim must fail.

55. The contextual evidence adduced by plaintiff on events prior to conclusion of the written document and her "accepting the offer of employment" in December 2007[21] do not support the averment that defendant would pay to plaintiff the cash value of her BHPB shares or introduce a phantom scheme to compensate therefore. For the reasons I have set out above I find that plaintiff has failed to discharge the onus upon her of proving that defendant agreed to pay her the cash value of her BHPB shares or to introduce the phantom scheme to provide compensation and

has failed so to do as alleged in paragraphs 8.1.2 and 9.2 of the particulars of claim. That claim must therefore also fail.

THE RETRENCHMENT AGREEMENT

56. Defendant raised a special plea that the Settlement Agreement signed in May 2011 dealing with the retrenchment of plaintiff from defendant's employ constituted "full and final settlement of all claims whatsoever which either party may have" and "constitutes the entire agreement between the parties"[22]. Accordingly, defendant has pleaded that "the plaintiff's present cause of action has been settled by agreement".

57. In plaintiff's plea to defendant's counterclaim, it was pleaded that the settlement agreement deleted certain

clauses in that agreement and that the agreement “reserved the plaintiff’s rights in respect of her claim for losses relating to shares and the long term incentive plan”.[23]

58. Evidence was heard from plaintiff and Enrico Barbaglia (“Barbaglia”) on the conclusion of this agreement. The dispute was whether or not Barbaglia accepted, on behalf of the defendant, the amendments and insertions made by plaintiff to the settlement agreement.
59. By reason of the view I have taken in respect of the employment agreement, it is not necessary for me to decide the issue of the retrenchment settlement agreement.
60. Although this was raised as a special plea and the balance of the defendant’s plea was set out “in the event of this court finding that the plaintiff’s present cause of action has not been settled by agreement”[24] , I am satisfied that it is advisable to have determined the main issues raised in the particulars of claim and in respect of which the plaintiff bears the onus.

QUANTUM AND COUNTERCLAIM

61. Evidence was led by a remuneration consultant, McGorian, on the appropriate manner of calculating the value of plaintiff’s financial loss based upon share options. By reason of my finding on the alleged oral terms of the employment agreement, I do not need to make any finding on these calculations.
62. Defendant brought a counterclaim for repayment of certain monies paid over as part of the retrenchment package. I view this counterclaim as having been brought in terrorem to end the litigation. By reason of my finding on the alleged oral terms of the employment agreement, I do not need to make any finding on this counterclaim.

VIDEO EVIDENCE

63. I heard an interlocutory application early on in this trial in respect of hearing evidence by video from France (Dragone) and Dubai (Barbaglia). I made my ruling at the time so that there would be no delays in the conduct of the trial.
64. The evidence was heard at the offices of attorneys Webber Wentzel.
65. I have still to give reasons for my ruling on this interlocutory application. Unfortunately, I have been engaged without break in civil trials, opposed motion court or appeals since this trial concluded. I

have also researched, written and handed down some six or so reserved judgments in the interim. I

had thought this judgment would not be ready before the end of the court term and would have to be dealt with during the recess. Fortunately, a weekend has made it possible to produce this judgment.

66. The reasons for the ruling on video evidence will be handed down in the first term of the new court year after the administrative recess.

ORDER

An order is made as follows:

‘Plaintiff’s claim is dismissed with costs.’

Dated at Johannesburg on this day the 9th of December 2013.

K.SATCHWELL

Counsel for Plaintiff: Adv. N.J. Graves SC

Counsel for Defendants: Adv F.A. Boda

Attorneys for Plaintiff: Glyn Marais Incorporated

Attorneys for Defendants: Webber Wentzel

Date of hearing: 4th November 2013

Date of Judgment: 11th December 2013

[1] Annexure A at page 10 of the pleadings.

[2]As has been stated in a long line of judgments from *Union Government v Smith* 1935 AD 232 to *Ekurhuleni Metro Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 SCA and then *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593.

[3] The first bullet deals with annual salary, the second with an annual bonus scheme, the third with a “sign on bonus”, the fourth with the number of days paid annual holiday, the fifth with entitlement to private health cover, the sixth with share options, the seventh with insurance cover, the eighth with geographical base and travel, ninth with interim accommodation, the tenth with relocation costs, the eleventh with business expenses, the twelfth with reporting, the thirteenth with notice period.

[4] Paragraph 8.1 of the Particulars of Claim.

[5] Paragraph 8.1.1 of the Particulars of Claim.

[6] Paragraph 8.1.2 of the Particulars of Claim.

[7] See *Avis v Verseput* 1943 AD 331; *Johnston v Leal* 1980(3) sA 927 AD; *KPMG v Securefin Ltd* 2009 (4) 399 SCA. The parol evidence rule prescribes that “the writing is regarded as the exclusive embodiment or memorial of the transaction

and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting,

altering, adding to or varying the written contract. In Johnston supra was stated “The extrinsic evidence is excluded because it relates to matters which, by reason of the reduction of the contract to writing and its integration in a single memorial, have become legally immaterial or irrelevant” . In Securefin supra the court confirmed “ the parol evidence rule remains part of our law... If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning”.

[8] At paragraph 8.1.1

[9] The terms pleaded in the particulars of claim (at paragraph 8.1) were that “the defendant would compensate the plaintiff for the loss of value of her allocated BHP Billiton shares (‘Shares’) in one of two ways. Either defendant would implement a new “Regional Compensation and Benefits structure” within a period of one year from commencement of her employment “to compensate her for the loss of her Shares” [9] or defendant would pay plaintiff “the cash value of her shares”.

[10] Apologies to Tolstoy.

[11] Such a phantom scheme could be implemented where there was no listing but a company creates a mechanism whereby a notional share scheme is as introduced for the benefit of employees.

[12] Defendant’s plea (apart from the special plea) is essentially a denial.

[13] Page 39 of Trial Bundle.

[14] Page 39 of Trial Bundle.

[15] Page 38 of Trial Bundle.

[16] Page 43 of Trial Bundle

[17] Pages 49 and 50 of Trial Bundle.

[18] Pages 56 and 57 of Trial Bundle.

[19] Irvin and Johnson(SA) v Kaplan 1940 CPD; Smith v Hughes

(1871) LR 6 QB 597.

[20] Page 186 of Trial Bundle.

[21] As pleaded in paragraph 6 of the particulars of claim.

[22] See paragraphs 1 to 3 of Defendants Plea.

[23] Paragraph 2.2 of Plaintiff’s plea.

[24] Paragraph 4 of Special Plea.

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