

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Case No. 08/13667

Date:20/08/2008

In the matter between:

SANLAM LIFE INSURANCE LIMITED

Applicant

and

VENLUXIVAN SIBANDA

Respondent

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MEYER J:

[1] The applicant claims the repayment of a 'retention bonus' paid to the respondent, who was previously employed by the applicant in the position of Marketing Manager of its Employee Benefits Institutional Channel ("SEB").

[2] The retention bonus was paid in terms of a written retention bonus agreement in order to retain the respondent's services for the period 1 April 2006 to 31 March 2009 [clause 2.2]. The respondent was obliged, in terms of clause

2.3 thereof, to repay the retention bonus to the applicant should he leave the applicant's employment within the stipulated period '*...either due to resignation from Sanlam or due to any dismissal from employment with Sanlam for any reason...*' Clause 2.7 thereof further stipulates '[f]or the sake of clarity' that there shall be no obligation to repay the retention bonus should the respondent's employment with the applicant '*...terminate because of death, disability or retrenchment.*'

[3] The respondent's employment with the applicant terminated on 31 December 2007. The issue is whether his employment terminated '*because of ... retrenchment.*' It is common cause that the intention of the parties was that the reference to '*retrenchment*' in the retention bonus agreement was a reference to a termination of an employee's services pursuant to section 189 of the Labour Relations Act 66 of 1995, which is a dismissal by an employer '*based on the employer's operational requirements.*'

[4] On 9 July 2007, and in order to comply with its obligations under s 189(3) of the Labour Relations Act 66 of 1995 ("the Act"), the applicant *inter alia* provided the respondent with a written letter wherein it was proposed that SEB be closed, and it was contemplated that all its seven employees, including the applicant, would be affected thereby. By letter dated 30 July 2007, the respondent was informed of the final decision to close SEB. Retrenchments

were contemplated and the applicant proposed the following in both letters dated 9 and 30 July 2007 to avoid or minimize retrenchments:

- *The Company will try to redeploy affected employees elsewhere in the company where practically possible. The Company proposes a structured redeployment process, for a period of one month from the date of finalisation of this consultation process, whereby the individuals will engage in one-on-one meetings with Human Resources to explore vacancies within the company, and the process for applying for this vacancies. These attempts at redeployment will be throughout Sanlam.*
- *If any employees are nearing retirement, they may opt for voluntary early retirement, subject to the rules of the pension fund.*
- *If any affected employees would prefer to opt for a retrenchment and not participate in the redeployment process, they may apply to do so without any prejudice to their rights in terms of severance pay. Likewise if employees find alternative employment outside of the company, they can negotiate with the Company and apply to leave earlier than would be required in terms of their contracts, also without prejudice to their rights in respect of severance pay. Employees should communicate this to Nick Byrne who will make the necessary arrangements.'*

A 'time-line' for the process was proposed in the letter of 9 July 2007, and the following 'final time-line' for the process was set out in the letter of 30 July 2007:

- *Consultation over the various aspects as set out in this letter, through meetings, e-mails and / or telephonic consultations: from 9<sup>th</sup> July 2007 to 20<sup>th</sup> July 2007.*
- *Finalisation of consultation process and adjustments / amendments: 20<sup>th</sup> July 2007 to 30<sup>th</sup> July 2007.*
- *Redeployment process, individual sessions with Nick Byrne in this regard, applications for alternative positions within the company: 23<sup>rd</sup> July 2007 to 31<sup>st</sup> August 2007.*
- *For employees who are not redeployed, the Company proposes further individual consultations on any assistance that the company can offer to mitigate the adverse effects of a retrenchment and it is proposed that this occur during the proposed contractual notice month of September 2007.*
- *The proposed termination date for employees who are retrenched would be the 31<sup>st</sup> October 2007.*

[5] The consequence of the closure of SEB on the continued employment of the affected employees in terms of the process embarked upon by the applicant was retrenchment. Redeployment was a mere possibility through which retrenchment might be avoided, but the redeployment process was consensual and required the identification of suitable alternative positions, the application for such positions by the affected employees, and the success of such applications.

[6] The applicant in its founding affidavit states that *[d]uring the course of deliberations after the letter of 9 July 2007, the respondent was offered the following positions in the applicant's business: ... Marketing Executive for Sanlam Investment Management ... Marketing Executive for Coris ...* ' The respondent admits that an offer of alternative employment as a Marketing Executive in Sanlam Investment Management Services was made to him. Such offer, according to the respondent did not meet his expectations ' *... in terms of job content and structure.*' In paragraph 17.2 of his answering affidavit, the respondent states: *'Although there were various meetings and discussion regarding the possibility of a position in CORIS, I deny that an offer of alternative employment in CORIS was made to me. I was requested by Robert Roux to explore the possibility of an alternative position in CORIS. I explored the possibility and could not find any suitable alternative position in that company which were reasonably comparable to my position in Sanlam Employee Benefits Institutional Channel.'* The applicant's reply is this: *'It is significant that the respondent admits that a substantial effort was made to accommodate him in the Coris section of the applicant's business. I respectfully submit that the fact that a formal offer did not eventuate does not advance the enquiry in this application.'*

[7] It is clear that the applicant tried to redeploy the respondent elsewhere in its company in accordance with the process of which the respondent was notified in the letters dated 9 July and 31 July 2007. The respondent opted for retrenchment and did not wish to accept the alternative offer of employment. By

letter dated 14 December 2007, the applicant *inter alia* advised the respondent as follows:

*'You chose however not to accept the alternative offered to you, and in these circumstances, because we cannot force you to accept the offer, we are entitled, in law, to still retrench you (because we have no option) but without severance pay.'* [emphasis added]

[8] The termination date for employees who were retrenched was the 31<sup>st</sup> October 2007 in terms of the applicant's '*final time-line*' for the process. By agreement between the parties, the termination date of the respondent's employment was extended from 31 October 2007 to 31 December 2007 in order for the respondent to facilitate a smooth handover of the clients he was dealing with.

[9] By letter dated 21 December 2007, the respondent's attorney referred the applicant to clause 2.7 of the retention bonus agreement and the applicant was advised that the respondent would not repay the retention bonus since he was retrenched. By letter dated 31 December 2007, the applicant *inter alia* notified the respondent as follows:

*'We hereby notify you that we are abandoning the retrenchment exercise, with regard to you, completely. As you are aware, we have a position in the company which is suitable namely the Executive Sales role which Armien Tyer offered to you. This will be at the same remuneration, terms and conditions of your current*

*role. We believe this position will provide you with job satisfaction and tremendous challenge. We are accordingly transferring you to that position with effect from 1 January 2008, and look forward to your continued employment in the Sanlam Group.*

*The letter sent to you regarding your termination of services on the basis of retrenchment is accordingly withdrawn.*

*Please report to Miles Mafojane on 7 January 2008 at 09h00.'* [emphasis added]

[10] Again this letter underscores the fact that the respondent's employment was terminated '*because of ... retrenchment.*' Such also appears from a letter dated 2 January 2008, wherein the applicant's Head of Human Resources *inter alia* advised the respondent:

*'Whilst it is unfortunate that my e-mail and telephone conversation took place on the last day of your notice period, you were still an employee at that time, and we were accordingly able to convert the process from a retrenchment to a transfer.*

[emphasis added]

[11] Clause 21 of the respondent's employment contract with the applicant provides that '*[t]he company reserves the right to transfer an employee according to operational needs.*' The applicant, however, never exercised such right before it was too late. Its unilateral attempt at reinstating the respondent on the 31<sup>st</sup> December 2007 was legally ineffectual without the consent of the respondent.

[12] By letter dated 8 January 2007, the respondent's attorney advised the applicant that its unilateral action was of no legal consequence, that the applicant's services terminated because he was retrenched, and that the respondent '*...will therefore not adhere to a purported instruction to report for duty – he has been retrenched.*' By letter dated 9 January 2008, the applicant *inter alia* advised the respondent that if he does not return to work by not later than 14 January 2008, the applicant '*...will reluctantly have to take appropriate disciplinary steps.*' The applicant held 'a disciplinary enquiry' on 24 January 2008 in the absence of the respondent, and the applicant 'dismissed' him on the 25<sup>th</sup> January 2008. Adv Wagener, who acted for the applicant, informed me at the commencement of the proceedings that the applicant was not relying on such 'dismissal'.

[13] Adv Wagener relied on SA Transport and Allied Workers Union v Old Mutual Life Assurance Co (SA) Ltd (2005) 26 ILJ 293 LC in support of his submission that an election on the part of an employee to '*retire*' or to be '*retrenched*' is akin to a resignation on his part. I disagree with such general proposition or that the case referred to supports such proposition, but its facts are in any event distinguishable from the facts of the present matter.

[14] In support of the applicant's contention that the respondent left its employment due to resignation, Adv Wagener submitted that no formal notice of



retrenchment or dismissal was given to the respondent prior to his departure on 31 December 2007. This submission is factually incorrect. The applicant, in its notice dated 31 July 2007, announced a decision to close SEB and to retrench the seven affected employees. In terms of that notice, their employment was to terminate on the 31<sup>st</sup> October 2007. Early retirement and redeployment were mere possibilities to avoid their retrenchments. The respondent was not redeployed, because he did not wish to accept the alternative offer of employment. The applicant's own correspondence to which I have referred made it clear that the applicant accordingly retrenched the respondent.

[15] In paragraph 47 of the founding affidavit it is stated that *'[i]nsofar as it is found that the applicant was not entitled to withdraw its consent to the termination of the respondent's services, the termination of his services remains to be categorized as a termination by mutual consent.'* The only agreement reached between the applicant and the respondent was for his termination date to be extended from 31 October 2007 until 31 October 2007. The respondent's employment was therefore not, in my view, terminated *'by mutual consent'*. But even if I am wrong in this view, then the applicant is still not entitled to repayment of the retention bonus since clause 2.3 of the retention bonus agreement does not require repayment in the event of a termination *'by mutual consent'*.

[16] In the result the applicant's application is dismissed with costs.

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P.A. MEYER  
JUDGE OF THE HIGH COURT