IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
23/5/2012
DATE SIGNATURE

CASE NO: 13091/2010

DATE: 25/5/2012

IN THE MATTER BETWEEN

TSWANE TELEDATA (PTY) LTD PLAINTIFF

AND

DUANE KREYVELDT DEFENDANT

JUDGMENT

KOLLAPEN, J

[1] This is an action in which the plaintiff seeks payment of the sum of R230 833,33 from the defendant together with interest and cost arising out of an employment relationship between the parties.

Background

[2] The defendant was the owner of a telecommunications business known as Logitel (Pty) Ltd and which business operated from Middelburg in the Mpumalanga province.

[3] In 2005 the plaintiff company purchased the assets and goodwill of the business owned by the defendant and commenced running the business in its own name. The defendant was, however, appointed as managing director of the business and was responsible for the day to day control and management of the business.

[4] It appears that the defendant also held some shares in the plaintiff company. The plaintiff had approximately eleven other similar telecommunication businesses across the country and its head office was located in Pretoria.

[5] At the time the plaintiff effectively took control of the business in Middelburg it owed the defendant approximately R1 million in respect of the purchase consideration of Logitel and the parties agreed that this amount would be paid over twenty four months by the plaintiff to the defendant at the rate of R41 666,00 per month. The parties appear to describe this as a salary that the defendant would be entitled to in return for his services over the period of twenty four months and it appears that no separate provision was made for the payment of a separate salary and that the amount of R41 666,00 incorporated both the payment in respect of the outstanding purchase consideration as well as the salary.

[6] Upon the expiration of the twenty four month period and after the R1 million was paid by the plaintiff to the defendant the parties agreed that the defendant would continue to remain in the employment of the plaintiff.

[7] The terms and conditions of this new employment arrangement appear to be in dispute. The plaintiff's stance is that it agreed to the continued employment of the defendant as manager of the Middelburg branch of its business at a salary of R41 666,00 per month while the defendant contends that in addition to the monthly salary of R41 666,00 per month it was agreed between himself and Mr Bothma representing the plaintiff that the defendant could purchase a vehicle at company cost and that the instalments in respect of such vehicle would form part of his package.

[8] The defendant in March 2007 purchased a Mercedes Benz E200 and entered into an installment sale agreement with Daimler Chrysler Financial Services (Pty) Ltd. The defendant then took steps to put in place a debit order from the plaintiff's banking account in respect of the monthly instalments for the vehicle. The defendant's stance is that the plaintiff agreed to the purchase of the vehicle, agreed to pay the instalments and that he, the defendant, was accordingly entitled to authorise the debit order against the banking account of the plaintiff.

[9] It is common cause that a total amount of R230 883,83 was debited against the plaintiff's account in respect of the instalments for the motor vehicle purchased by

the defendant. 0f this amount R190 266,98 was debited during the period of the defendant's employ with the plaintiff namely March 2007 to November 2008 while a further amount of R40 616,85 was debited against the plaintiff's account in respect of the period November 2008 to March 2009 when the defendant was no longer employed by the plaintiff.

[10] The defendant accepts liability for the payment of the amount of R40 616,85 as these were payments made by the plaintiff after the termination of the employment arrangement between the defendant and the plaintiff.

[11] The relationship between the plaintiff and the defendant began to deteriorate in 2008 and by September 2008 the parties had in principle reached an agreement to terminate their relationship with each other. Arising out of this in principle agreement auditors acting on behalf of the plaintiff prepared an agreement that would purport to resolve the dispute between the parties and the plaintiff and the defendant entered into such an agreement on 10 November 2008. The agreement is entered into between Danie Bothma, the plaintiff and the defendant. The preamble to the agreement indicates as follows: "And whereas the parties wish to resolve all outstanding issues between them;" Paragraph 10 of the written agreement provides as follows:

> "10. Bothma and Kreyveldt respectfully hereby indemnify each other from further prosecution by each other, or by any of their known associates, and/or any other identity (*sic*) that they are involved in

or have an interest in, with regards to any and/or claim relating to Tswane Teledata or any of the entities where they were associated with each other."

Paragraph 12 of the agreement provides as follows:

12. This agreement constitutes a full and final settlement of all disputes between the parties. All parties to this agreement acknowledge that this agreement is for the use between these parties exclusively and is thus confidential."

[12] The plaintiff's case is that after the agreement was entered into and the employment arrangement of the defendant was terminated it discovered the existence of the debit orders activated against its account in respect of the motor vehicle purchased by the plaintiff. Its position was that the defendant was not authorised to pay for his private vehicle from the funds of the company which he controlled by virtue of his position as managing director and that it, the plaintiff was accordingly entitled to claim the refund of all such monies paid which in its view were not authorised and were paid illegally.

[13] The defendant in opposing the relief claimed by the plaintiff has raised two defences:

(a) It has filed a special plea in which it takes the stance that the plaintiff is precluded from seeking the relief it does in these proceedings on account

of the written agreement of settlement entered into between the parties. It argues that the written agreement constituted a full and final settlement of all disputes between the parties and to that extent the plaintiff is precluded from seeking payment in these proceedings as the dispute that would have existed in respect of the motor vehicle would have been incorporated and included in the settlement agreement of 10 November 2008 entered into between the parties.

(b) On the merits it contends that the terms and conditions of the employment agreement entered into between the plaintiff and the defendant were such that the defendant was entitled to receive a monthly allowance in respect of the motor vehicle which he purchased and had the authority and the consent of the plaintiff to activate the relevant debit order against the plaintiff's banking account for the payment of such monthly instalments.

The special plea

[14] While it is so that the written agreement of settlement purports to resolve all outstanding issues between the parties and purports to constitute a full and final settlement of all disputes between the parties the plaintiff's stance is that at the time the agreement was entered into it was unaware of any dispute with regard to a motor vehicle. Indeed its stance is that it was unaware that the defendant had effected payments for his private motor vehicle from the company's banking account. On that basis it contends that whatever the agreement may purport to say

or do it cannot be interpreted as constituting a settlement of a dispute that it, the plaintiff, was unaware of.

[15] In R H Christie *The Law of Contract in South Africa* 6th edition 2011 at p473 the learned author in dealing with a compromise indicates as follows:

> "If there is no dispute there can be no compromise. ... The *onus* is on the party alleging that a compromise has been effected, and because compromise is a form of novation and involves the waiver of existing rights (or claimed rights) it must be as clearly and unambiguously proved as any other waiver or novation."

[16] The plaintiff also relies on the *dicta* in *Be Bop A Lula Manufacturing and Printing CC v Kingtex Marketing (Pty) Ltd* 2006 6 SA 379 (C) where at p386 the following is said:

> "In this regard it must be borne in mind that compromise are to be strictly interpreted in that they exclude anything which was probably not contemplated by the parties at the time they reached the compromise."

[17] It is clear on the facts of the present matter and on the evidence submitted that the agreement of settlement was prepared by the plaintiff's auditor and that the plaintiff and the defendant had very limited input into the contents and scope of the agreement themselves.

[18] From the evidence of both the plaintiff and the defendant there does not appear to be any indication that the issue of the motor vehicle was specifically discussed and resolved and that the parties reached an agreement that it would be one of the matters dealt with in their written agreement.

[19] That being the case it can hardly be contended that the plaintiff, whose stance remained that it was unaware of the purchase of the motor vehicle, could have entered into an agreement where the vehicle is not specifically mentioned and where the plaintiff is then taken to have agreed to the settlement of a dispute that it was not aware of.

[20] Even if the plaintiff was aware of the purchase of the vehicle, the language of the settlement agreement is such that it would be difficult to sustain an argument that the agreement which made no reference to the vehicle resolved the issue with regard to the motor vehicle.

[21] For these reasons the settlement agreement, while it dealt decisively with some of the issues in dispute between the parties, could hardly be said simply on account of its expansive wording to have included the settlement of a dispute in respect of the motor vehicle.

[22] For these reasons the special plea cannot be sustained and should be dismissed.

The merits

[23] Two witnesses testified in this trial, Mr Bothma on behalf of the plaintiff and the defendant on his own behalf.

[24] The issue in dispute between the parties relevant to these proceedings is essentially whether the employment agreement entered into between the plaintiff and defendant would have included the benefit of a motor vehicle for which the defendant would have been entitled to activate a debit order against the plaintiff's banking account.

[25] This is a classic case where the respective versions of the plaintiff and defendant, both single witnesses in their own cause, stand starkly in contrast to each other. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 1 SA 11 (SCA) the court provided the following guidance in dealing with versions that on the face of it were irreconcilable:

> "To come to a conclusion on the disputed issues the court must make findings on (a) the credibility of the various factual witnesses, (b) their reliability, and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression of the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as (i) the witness' candour and demeanour in witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or

with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v), on (i) the opportunities he had to experience and observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised, probabilities prevail."

[26] If one has regard to the testimony of Mr Bothma as well as Mr Kreyveldt then in my view from the perspective of their credibility as well as their reliability there is not much criticism that could be levelled against either of them. The court had the opportunity to observe both witnesses during examination and cross-examination and both of them appeared to answer all questions put to them honestly, frankly and to the best of their ability. There was no attempt to

exaggerate any matter and the court's overall impression of both witnesses was that they testified honestly and reliably. Their candour, demeanour and the manner in which they presented their respective versions cannot be open to any substantive criticism to suggest that either of them were not credible or reliable in their testimony.

[27] That being the case the court is compelled to look at the probabilities with regard to the respective versions presented.

[28] From the perspective of the defendant's version the defendant's stance was that following the agreement arrived at between itself and the plaintiff it activated the necessary debit order from the banking account of the plaintiff and that the debit order operated for the full duration of the defendant's employ with the plaintiff.

[29] The plaintiff through both Mr Bothma and the auditor of the plaintiff had full regular and ongoing access to all the financial records held by the defendant at the Middelburg branch of the plaintiff's business as well as the banking accounts of the branch that the defendant was responsible for managing.

[30] The plaintiff had unlimited and unhindered access to the bank accounts both physically and via the internet and was able to observe all movements on the banking account.

[31] On this basis the defendant contends that there was no attempt on its part to disguise any of the payments that it did make and that if indeed it was effecting unlawful or unauthorised payments then on the probabilities it would not have reflected such payments as openly and as blatantly as it did as the consequence thereof would have been for the plaintiff to have picked it up immediately and have terminated it.

[32] Accordingly it is strongly arguable that the manner in which the payments were effected in an open and transparent manner to which the plaintiff had access supports the defendant's version indeed that such an agreement was arrived at.

[33] In addition the employment arrangement that originally endured for twenty four months had come to an end and according to the undisputed evidence of the parties the business was doing well. On the probabilities it can hardly be said to be improbable that the new employment arrangement that would include the vehicle allowance would have been unlikely. Given that the business was doing well, given that the plaintiff was reasonably happy with the defendant's performance and that his salary for the preceding twenty four months remained unchanged, it is not inconceivable in my view that the defendant would have been entitled to higher remuneration and that the plaintiff would have agreed to that given both its satisfaction with the defendant's performance as well as the relatively good performance of the business that the defendant was managing.

[34] These are the probabilities that favour the defendant's version of events. From the perspective of the plaintiff while his evidence was that he had access to the bank account of the business in Middelburg he had eleven other businesses throughout the country and would hardly ever peruse the details of the bank statements that would have enabled him to pick up the unauthorised payment.

[35] While this may be so it was not disputed that the plaintiff's auditor had regular access to all the financial transactions of the Middelburg branch of the plaintiff's business and that the payment for the motor vehicle would have been reflected openly in those transactions as it was on the bank statements.

[36] That being the case it is in my view improbable that the plaintiff either through his own actions or that of his accountant would not have picked up these payments and had they done so they would have been in a position to have brought them to an end.

[37] If indeed it is the plaintiff's case that the defendant acted unlawfully and without authority then it is highly unlikely and improbable that the defendant would have acted in such an open and transparent manner if it was furthering an unlawful agenda.

[38] For these reasons I am satisfied that on the probabilities the evidence proves in my view that the employment arrangement entered into between the plaintiff and

the defendant would have included the payment by the plaintiff of a motor vehicle allowance and accordingly when the defendant activated the debit order against the banking account of the plaintiff it had both the authority to do so and was entitled to do so in respect of that particular benefit.

[39] However it is also common cause in these proceedings that payments made out of the account beyond 5 November 2008 were for the defendant's account and therefore the plaintiff in my view is entitled to an order in respect of payments totaling R40 616,85. There is no dispute between the parties on this matter.

[40] The next issue is the issue of interest and costs in respect of the amount of R40 616,85. The defendant's stance is that it should not be liable for interest or for costs in that it only became aware of the detail of this amount during the course of the trial and that despite various requests made by it to the plaintiff the plaintiff failed to provide it with bank statements or any other proof of such amounts that had become due and payable.

[41] I am unable to associate myself with this stance. The defendant when it ended its employment relationship with the plaintiff would have been well aware of its own obligations with regard to the motor vehicle. It was incumbent upon the defendant at that stage to ensure that the payments due to Daimler Chrysler were in fact made and in this regard to suggest that the failure by the plaintiff to provide it with details would somehow absolve it from its liability to pay interest

in my view is not tenable. The defendant in my view should be liable for the payment of interest on the amount of R40 616.85 calculated from March 2009 to date of final payment.

Costs

[42] Defendant has been substantially successful and should be entitled to its costs, at least to the extent of the proportion of its success which is approximately 80%.

Order

[43] In all the circumstances I make the following order:

1. Subject to paragraph 2 below, the plaintiff's claim is dismissed.
2. The defendant is ordered to pay the plaintiff the sum of R40 616,85.
3. The defendant is ordered to pay interest on the aforesaid amount *a tempore morae* from 1 March 2009 until date of final payment.
4. The plaintiff is ordered to pay 80% of the defendant's costs of the action.

N KOLLAPEN
JUDGE OF THE NORTH GAUTENG HIGH COURT

13091-2010

HEARD ON: 25 APRIL 2012
FOR THE PLAINTIFF: ADV J VORSTER
INSTRUCTED BY: VAN DER MERWE ATTORNEYS
FOR THE DEFENDANT: A P BRANDMULLER
INSTRUCTED BY: BRANDMULLER ATTORNEYS