THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 385/2018

In the matter between:

ROBIN TENDAI VELA **APPELLANT**

and

EFORA ENERGY LIMITED **RESPONDENT**

Neutral citation: *Vela v Efora Energy Limited* (385/2018) [2019] ZASCA 44 (29 March 2019)

Coram: Navsa AP, Dambuza and Makgoka JJA and Davis and Eksteen AJJA

Heard: 12 March 2019

Delivered: 29 March 2019

Summary: Resignation of Chief Executive Officer – claim by company for repayment of outstanding PAYE - counter-claim by Chief Executive Officer for leave pay, bonus payment – damages consequent on loss of share options –

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Matojane J) sitting as court of first instance):

1. The appeal, save in respect of the leave pay claim, is dismissed with costs.
2. The cross appeal succeeds with costs.
3. The order of the court *a quo* is altered as follows:

   3.1 The defendant is ordered to pay an amount of R3 324 524.36 together with interest at the mora rate from 26 March 2014 to date of payment.

   3.2 The plaintiff is ordered to pay the defendant the amount of R103 661.28 as leave pay.

   3.3 Defendant's claim for R2 784 948.23 in respect of an unpaid bonus is dismissed.

   3.4 It is declared that defendant's share options in terms of plaintiff's share option scheme lapsed with effect from his date of resignation from his employment with the plaintiff, being 31 May 2013.

   3.5 The defendant is ordered to pay plaintiff's costs.

JUDGMENT

DAVIS AJA (Navsa AP, Dambuza and Makgoka JJA and Eksteen AJA concurring)

Introduction

[1] This case primarily concerns a series of claims made by the appellant, the Chief Executive Officer of the respondent, who faced with a demand for his resignation, resigned with immediate effect on 31 May 2013.

[2] The appellant's[1] case was based on three claims, namely payment of outstanding leave pay, which he alleged was due to him upon his resignation, in the amount of R 280 749.15, payment of an unpaid portion of his annual bonus in the amount of R 2 784,948.23 and a claim for damages as a result of an alleged breach by the respondent of its share incentive agreement with the appellant in the amount of R16 881, 459.30. The claim for leave pay was later reduced to R172, 786.80 and the claim for damages to R6 795,711.12. The respondent[2] had claimed reimbursement of arrear PAYE[3] which it alleged should have been deducted from the appellant's remuneration in the sum of R3 324,524.36. The appellant's claim was in response to respondent's claim.

[3] The court *a quo* upheld the respondent's claim for PAYE, dismissed the appellant's claim for leave pay together with his claim for damages but upheld his claim for the unpaid portion of his bonus.

[4] With the leave of the court *a quo*, the appellant appealed against the upholding of the respondent's claim for PAYE and the dismissal of his claims for unpaid leave and damages. The respondent cross appealed against the upholding of the appellant's claim for the bonus payment.

The factual background

[5] The appellant was originally appointed through a company, Lonsa (Pty) Ltd, as a corporate advisor to the respondent's predecessor, SA Mineral Resources Corporation Limited (Samroc). To all intents and purposes, by 2009 he had been the de facto Chief Executive Officer of Samroc. On 17 November 2010, an

[1] Respondent in the cross appeal and defendant in the court *a quo*.
[2] Appellant in the cross appeal and the plaintiff in the court *a quo* to whom I shall refer to as respondent in this judgment.
[3]PAYE stands for pay as you earn. It is a withholding tax on income payments made by an employer to an employee. Amounts withheld are treated as advance payments of income tax due. In other words, an employer is obliged to deduct tax from the monthly remuneration of an employee and to pay it over to SARS

agreement was entered into between the respondent and the appellant, whereby the latter was formally employed as the Chief Executive Officer. A similar arrangement was concluded with the financial director of SAMROC, Ms Carina de Beer, who had also been employed as an independent contractor through a corporation, Johannes de Beer Inc. This change of both the appellant and Ms de Beer's legal relationship with Samroc, had taken place when it was decided to list the respondent in the United Kingdom, on the Alternative Investment Market of the London Stock Exchange (AIM). One of the listing requirements was that both the Chief Executive Officer and the Financial Director had to be employees of the listed company. It was that decision which triggered the conclusion of contracts of employment between the appellant and Ms de Beer and the respondent, respectively.

The cases brought in substantiation of the claim and counter-claims

The PAYE claim

[6] Owing to the change of status of both the appellant and Ms de Beer from independent contractors to employees, the respondent ought to have deducted PAYE from the remuneration of both parties and paid it over to the South African Revenue Service (SARS). This did not happen. The failure to deduct PAYE created a problem for both the appellant and Ms de Beer as is evident from a lengthy exchange of emails between the two. From a compliance point of view, this also created a problem for respondent.

[7] On 24 April 2012 Ms de Beer wrote to the appellant and said the following:

'I just had a very disturbing meeting with EY [Ernest Young, the respondent's auditors]. They indicated to me that the fact that SacOil is not withholding tax from our (yours and mine) remuneration is an unlawful act and a breach of fiduciary duty. . . . Their argument is around the contracts we entered into in October 2010 for the purpose of our listing on AIM. I explained my side and confirmed that I draw a salary from the practise and the practise is also a registered tax payer.

They say that these contracts create an employer/employee relationship and hence SacOil should have deducted PAYE from the remuneration. After going through a consulting practice internally, EY wants to report this matter to IRBA as a reportable irregularity (RI) and we shall then have 30 days to respond and rectify.

It would seem that unless the auditors are willing to back off we don't have any choice but to approach SARS for a solution. The advice I received this morning was that one option is for SacOil to pay over the PAYE (3.6 m!), issue an IRP5 to both of us and we will then reopen our personal tax returns and claim the PAYE back after which we would then pay it back to SacOil.'

To this the appellant responded on the same day:

'This is a serious issue, we must resolve without delay.'

[8] On 17 May 2012 Ms de Beer wrote again to the appellant, by way of an e-mail, in which she said:

'The auditors are considering raising a liability in SacOil's accounts for the PAYE not deducted and paid. I am arguing this as I am not sure what the debit would be. It cannot be loans to the directors as we would be dead in terms of AIM and it would need to be disclosed as related party loans.'

[9] On 17 May 2012 Ms de Beer again wrote an e-mail to the appellant, saying:

'From the attached it is clear that we are not contractors but employees. This is a huge problem for me as it would just not be worth it for me to work for a net salary of R75k per month.'

[10] On the same day Ms de Beer wrote a further e-mail setting out certain proposals. This included the following:

'1. That SacOil pay the PAYE for past 14 months to SARS; I don't think it is fair that the taxes we have paid in the corporate vehicles be discarded and ignored. This will reflect a net effect that agrees with the contractual amounts we agreed to net of tax;

2. If the above is too thick to swallow we can maybe offer to forfeit 50% of or annual bonuses this year to meet the Company halfway;

3. That our packages be adjusted by 35% and we would become employees of SacOil; we can certainly motivate this as your package was not adjusted last year and your remuneration is moderate for the position that you fill at the moment; my package is currently 30% below the median for AIM companies so we can motivate an increase to align with AIM companies.'

[11] On 19 May 2012 the appellant wrote to Ms de Beer saying, inter alia;

'I must say we may be able to get PAYE paid by co if we then forfeit any bonus but may struggle just asking for increase.'

[12] On 21 May 2012 Ms de Beer again wrote to the appellant in which she referred to a conversation she had with Mr Richard Linell, then a director of the respondent:

'I met with Richard.

We need to do the following:

1. Pay the PAYE and issue IRP5's to both of us; EY would need to call it something other than loans;
2. We then claim back from SARS and pay over to SacOil;
3. We need to work out what costs we did not claim from SacOil during the time we used our own offices; a list of monthly expenses paid and not claimed as needed;
4. The amount in 3 should then justify significant increase to our gross;
5. Move the review of our contracts forward.'

[13] The next day, 22 May 2012, Ms de Beer clarified the position in a further e-mail to the appellant, saying:

'Please note that it is not SacOil paying the PAYE but you and me ultimately.'

[14] On 31 August 2012 a termination agreement was entered into between the respondent and Ms de Beer. Pursuant thereto, on 31 October 2012, a minute of a board meeting of the respondent reflected the following:

'Carina de Beer – The settlement agreement for Carina de Beer was ratified. It was further noted that the taxes paid on behalf Executive Management as a result of the company's error could no longer be claimed by the company.'

[15] On 13 December 2013 respondent paid over an amount of unpaid tax to SARS in the sum of R3 324 524.36. This was the amount of PAYE due to SARS on behalf of appellant.

[16] The appellant's counsel contended that this minute with references to tax paid on behalf of 'executive management' included both the appellant and Ms de

Beer. Counsel submitted that the minute amounted to a waiver by the respondent of its right of recovery of the tax paid and accordingly the court *a quo* erred in not finding that the respondent had waived its claim to PAYE. In further support thereof, the appellant's counsel referred to an extract from an integrated annual report of the respondent for the year 2013 that reflected a provision for impairment in the amount of R 4 695 905, which amount reflected that the respondent was unable to recover PAYE from either Ms de Beer or the appellant.

The leave pay claim

[17] The appellant claimed leave pay, which he considered to be due to him as at the date of his resignation on 31 May 2013. The claim was based on his payslip, which recorded that he was entitled to 32.5 days leave. By the time the matter was argued before the court *a quo,* the appellant only claimed 20 days of leave pay because he accepted that he could not prove that the respondent's Board had permitted him to accumulate leave pay from prior leave periods. In his claim, he relied on s 20 of the Basic Conditions of Employment Act 75 of 1997, which reads thus:

> (1) In this Chapter, 'annual leave cycle' means the period of 12 months' employment with the same employer immediately following-
>
> (a) an employee's commencement of employment; or
>
> (b) the completion of that employee's prior leave cycle.'

[18] On the basis of this provision, the appellant claimed that he was entitled to 20 days leave. At an average daily remuneration of R 8 638.44 he claimed an amount of R 172,786.80.

Share option and damages claim

[19] The appellant made two further related claims, namely a share option claim, and a damages claim. The share options claim was based on a share option scheme of the respondent of 29 August 2008. The following clauses of the share option scheme were referred to by the appellant's counsel as relevant to these claims. Clause 5.1.4 reads:

'5.1.4 If any Participant ceases to be an employee / non-executive director of the Company (as the case may be):

5.1.4.1 for any reason approved by the Directors from time to time, then any of the Options that may become exercisable on or after the date of termination or subsequently become exercisable by the affected Participant, as the case may be, will continue to be exercisable as follows after date of termination of his/her employment or appointment; or

5.1.4.2 for any reason not approved by the Directors from time to time (including without being limited to summary dismissal, proven dishonestly, fraudulent or grossly negligent conduct), then all of the Options that may become exercisable on or after the date of termination will lapse immediately on the date of termination and may not be exercised by the Participant thereafter.'

Clause 5.5 reads as follows:

'Termination of Employment

The provisions of 5.1.4 shall apply, unless any Participant ceases to remain in the employ of the Company for any reason not approved by the Directors from time to time, in which event, all Options then held by such Participant, as the case may be, will lapse to the extent that they have not been exercised.'

[20] The appellant's counsel submitted that, as the appellant had resigned from the respondent after all his share options had vested and furthermore that the Board had not made a decision approving his resignation. There had therefore been no forfeiture or lapse of his share options. By contrast, the respondent contended that the options that were exercisable as at 31 May 2013, lapsed when the appellant terminated his employment, not for any reason approved by the Board.

[21] In the alternative, the appellant argued that he was entitled to share options when the respondent issued a rights offer. Thus, it was submitted that the respondent had failed to comply with clause 5.3 of the rules, which provided as follows:

'[T]he Directors *shall include in the Options held by each Participant*, a further option to acquire such additional number of shares as would have been offered to

each participant in terms of such rights offer, if he/she had been the registered holder of the Shares forming the subject matter of the options previously granted to such Participant, at a price equal to the rights offer price thereof'. (Emphasis added.)

[22] According to the appellant's counsel, had the respondent recognised that the appellant's share options had not lapsed, which options included the additional rights offer options, the appellant would have exercised his options and consequently sold the shares in the period following an increase in the share price on 24 February 2014, when the price was at an all-time high of 80c per share. The appellant contended that, even if a price of an average of 65c a share was employed, he would have been entitled to damages of R6 795,711.12.

The Bonus payment claim

[23] The court *a quo* upheld the appellant's claim for a bonus. The appellant calculated that his bonus entitlement was the sum of R5 134 949, 23. He had already been paid immediately in the amount of R2.35m, with the balance to be paid when the respondent had sufficient funds. This latter amount had never been paid; hence the appellant's claim was justified.

[24] The appellant's case in this connection is best illustrated by the manner in which he pleaded his case by way of a reference to a meeting of the respondent's remuneration committee:

'On or about 01 November 2011, the [respondent's] remuneration committee and/or board of directors resolved that the [appellant] was entitled to an annual bonus for the period ending 30 September 2011 in the sum of R5 134 948, R2 500 000 of which was to be paid to the [appellant] with his November 2011 salary on or about 25 November 2011 and the balance when the [respondent] had the ability to do so.

The [respondent] had the ability to pay the balance of R2 784 948.23 by no later than January 2012.

The [respondent] has paid R2 350 000.00 to the [appellant], but the balance of R2 784 948.23, despite demand, remains unpaid.'

Evaluation

[25] I turn to evaluate the merits of the appellant's appeal and the respondent's cross-appeal respectively.

The PAYE claim

[26] In the appellant's plea he 'denies that the deduction or withholding from remuneration of employees income tax fell within the ambit of the [appellant's] duties as Chief Executive Officer.'

[27] There is no substantiation for this assertion. Manifestly, the appellant was a Chief Executive Officer in the employ of the respondent. PAYE has to be deducted from a salary of an employee.[4] There is nothing more to be said of this. The main defence raised by the appellant in respect of the unpaid PAYE was based on a waiver. The appellant pleaded that on or about October 2012 'the [respondent] represented by its board of directors elected to waive any right of recovery which it may have had against executive employees including the [appellant]. The averments that the respondent waived its right to receive the amount of tax which it paid on behalf of the appellant are the essence of the appellant's case in respect of this claim.

[28] Waiver is a question of fact. The onus rests on the party relying on a waiver to allege and prove it. *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at paras 16-17. The decision to waive a right may be express or implied. A waiver by implication is proved by conduct that is plainly inconsistent with an intention to enforce a right on which the party relies. The conduct from which it can be inferred, that a party has waived its right cannot be consistent with any other hypothesis. *Mothupi* para 19. In assessing the probabilities of the alleged act of waiver, the presumption that a party is not lightly deemed to have waived its rights must be taken carefully into account.[5] Clear evidence of waiver is thus required. *Feinstein v Niggli* 1981 (2) SA 684 (A) at 698-699.

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[4] Section 89 bis read together with Part II of the Fourth Schedule of the Income Tax Act 58 of 1962 as amended.
[5] See LTC Harms *Amler's Precedent of Pleadings* 9ed at 384.

[29] The essence of the appellant's case based on waiver turns on the minutes of the Board meeting of 30 October 2012. It is common cause that the initial minute said 'Carina de Beer – the settlement for Carina de Beer was ratified.' Then on 26 November 2012 the appellant wrote to Melinda Gouws of Fusion Corporate Secretarial Services (Pty) Limited saying 'Melinda please find attached my comments to the minutes.' What was inserted is 'it was further noted that taxes paid on behalf of the executive management as a result of the company's error could no longer be claimed by the company.'

[30] The contents of this change to the minutes, which were inserted by the appellant, were never substantiated. Tellingly, the evidence of Mr Linell, which was relied upon by the appellant's counsel, to contend that the amended minute accurately reflected the decisions taken at the meeting, extended no further than that there was an understanding that '[the appellant] and Carina were in the same situation.' When Mr Linell was asked about the fact that the appellant had not resigned nor had there been a settlement agreement as was the case with Ms de Beer, he said '[t]here was a perception of understanding, yes that they (were) in the same boat.'

[31] The appellant was confronted with a recording of the Board meeting of 30 October 2011 in respect of which it was common cause that no mention could be found of a decision that 'executive management' be dealt with in the same fashion as was Ms de Beer. Save for this amended minute, altered solely by the appellant, it was not shown, on the probabilities, to reflect a resolution adopted at the meeting, which represented a settlement agreement between the appellant and the respondent. In short, there was no evidence to justify the conclusion that there was a clear intention on the part of the respondent to waive its rights to the liability for PAYE, which was owing in respect of the appellant.

[32] It is not without significance that when the appellant was invited to listen to the recording of the Board meeting of 30 October 2012, prior to the commencement of proceedings in the court a quo, he declined the invitation. Under cross examination, he initially disputed the quality of the recording, notwithstanding that he had not listened thereto. Finally, when pressed to listen, he conceded that there

was no reference to the settlement agreement entered into between himself and the respondent. The only plausible inference to be drawn from the appellant's conduct is that he had unilaterally amended the minute to favour himself by incorrectly claiming that there was a resolution that both he and Ms de Beer did not have to pay the outstanding PAYE.

[33] The accounting entries of the respondent for the years 2013 and 2014, as well as the extensive e-mail exchanges between Ms de Beer and the appellant, referred to earlier in this judgment, are also consistent with this conclusion. In the notes to the consolidated financial statements of the respondent for the financial year ending 28 February 2014, the following entry appears:

> 'At 28 February 2013, other receivables included an amount of R4.4 million (2012: R4.4 million) relating to employee taxes recoverable from employees of the Company by virtue of their service agreements. An administrative oversight was reported and rectified in the prior year in respect of the non-payment of these taxes to SARS. A provision for impairment has been recognised against this receivable.'

[34] In the respondent's ledger for the financial year ending 28 February 2014, Ms de Beer's PAYE liability is written off. Although this correction represents a delayed response by the respondent's auditors, it is significant that the appellant's liability for PAYE remained as an impairment; that is a doubtful debt rather than a write off, itself an important difference, when compared to the accounting treatment of the amount of tax which the respondent paid on behalf of Ms de Beer. It has to be borne in mind that Ms de Beer had elected to leave the respondent's employment, while the appellant, with a lucrative overall remuneration package, chose to continue in the respondent's service.

[35] In summary, the appellant failed to prove that the respondent's conduct in dealing with the outstanding PAYE claim was consistent with an intention to waive its right of recovery as pleaded by the appellant.

Leave pay

[36] Turning to the claim for leave pay, the difficulty for the appellant is that initially he claimed for 32.5 days of leave pay on the basis of his salary slip. Not

only was there no evidence to justify a claim for 32.5 days of leave pay, but also clause 14.4 of the appellant's service contract prevented him from carrying forward unused leave, save with the permission of the Board. This clause has to be read with clause 14.1 which provided for an entitlement of 30 days leave between 1 January to 31 December. As a consequence, by the time this matter was heard before this Court, the appellant's counsel had reduced the claim and argued that the appellant was entitled to 20 days of leave, calculated from October 2012 until May 2013.

[37] There was an entry in the leave register to the effect that on 25 February 2013 the appellant, as at 25 February 2013, had taken 15 days leave. This entry however was reversed. The appellant denied that he had taken 15 days leave and further contended that during the closure of the respondent's offices, between 17 December 2012 to January 2013 when annual leave had to be taken, he had worked throughout this period:

> 'I was actually working. Simply because I was not in the office, it did not actually mean that I was not working. Specifically on the 19th of December 2012 there was a board meeting that took place in relation the Gairloch conversion and the Rangkap Novation Facility. I worked throughout that period culminating in the signature of agreements with Rangkap for the novation of their loans on the 31st of December which was the deadline. So yes, the office might have closed but certainly I was working and not on holiday.'

[38] The onus was on the appellant to prove this claim. It did not rest on the respondent to prove the contrary. This court in *Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk* 1976 (3) SA 470 (A) at 473A, in respect of proving a negative assertion, stated that:

'There is, in my opinion, no justification for the proposition that in cases such as the present case, where the plaintiff seeks to enforce a contract and the *onus* is on him to prove the terms thereof, which would involve his proving a negative, that burden is alleviated by a duty imposed on the defendant to begin and to adduce some evidence in support of his averment that the additional term relied on by him was agreed upon.'

[39] Given the evidence, the appellant only proved that he was at work on 19 and 31 December 2012. There is no evidence in terms of which the appellant proved

that he had not taken leave for the 8 days until 7 January 2013 (excluding the public holidays in this period). The appellant's own evidence with regard to working over the Christmas period and into January 2013 was not supported by any correspondence generated by him during this period, even though he was invited to show proof thereof. His assertions in regard thereto were both vague and implausible. The only evidence to which he was able to refer was a set of minutes of a Board meeting that had been held on 23 January 2013, which did not show the extend to this leave during relevant period. In summary, excluding the public holidays between 17 December 2012 to 7 January 2013, the appellant failed to show that he had not taken 8 days of leave. Thus he was entitled to 12 days of leave pay. The appellant was paid a basic salary of R195 833,93 per month. His daily remuneration was R8 638,44. This figure multiplied by 12 equals R103 661,28 which represents the amount of leave pay owing to him.

The share option agreement

[40] The entire share option scheme needs to be interpreted holistically so as to put it in the best possible light, congruent with the purpose for which it was intended. In short, it has to be interpreted purposively.

[41] The purpose of the scheme is set out in Clause 2. It provides that the scheme 'is intended as an incentive to Participants to identify themselves more closely with the activities of the Company and to promote its continued growth by giving them the opportunity of acquiring Shares through the Options and is not intended to be utilised for trading purposes.' Clause 2 further states that the scheme is 'an incentive to each of the Participants to render ongoing services to the Company, the terms and conditions attaching to Options, provided for in this Scheme have been agreed to and are recorded in this document.' In addition, clauses 5.1.4 and 5.5, which are reproduced earlier in this judgment are critical to the adjudication of this dispute.

[42] It is necessary however to commence the analysis with reference to clause 5.1.3. It provides:

'[E]ach of the participants shall have the irrevocable right and option to purchase Shares at a strike price consisting of the 15 day volume weighted average price per Share on the JSE as at the Date of Approval, exercisable, cumulatively, on or after the Date of Grant (as to 50%) and, subject to each of the relevant Participants, as the case may be, still remaining as employees/non-executive directors of the Company respectively, at the following exercise dates:

5.1.3.1 on or after the first anniversary of the Date of Grant (as to 25%); and

5.1.3.2 on or after the second anniversary of the Date of Grant (as to 25%).'

[43] In this case, it is common cause that all of the appellant's shares had become exercisable pursuant to clause 5.1.3 prior to his resignation; that is the last of his options were allocated to him on 08 July 2010. The following extract from the Integrated Annual Report of respondent for the year 2013 reflects the position regarding the options held by the appellant.

Date granted	Share price grant date R	Exercise price R	As at 29 February 2012	Vesting date	Expiry date
21 Nov 08	0.57	0.82	4 198 614	21 Nov 08	20 Nov 08
21 Nov 08	0.56	0.82	2 099 307	21 Nov 09	20 Nov 19
21 Nov 08	0.55	0.82	2 099 307	21 Nov 10	19 Nov 20
08 Jul 10	0.40	0.29	2 099 307	08 Jul 10	06 Jul 20
08 Jul 10	0.40	0.29	1 049 654	08 Jul 11	06 Jul 21
08 Jul 10	0.40	0.29	1 049 654	08 Jul 12	07 Jul 22

Thus, as the respondent set out in its plea to the appellant's counter claim, 'as at 31 May 2013 (the time of his resignation) the defendant held 12 595 843 share options which had not been exercised'. Clause 5.1.4 does not assist appellant's case. Clause 5.1.4 applies to any options 'that may become exercisable on or after the date of termination of his or her employment. In the case of the appellant as is evident from the table, read together with clause 5.1.3, the options had all been exercisable prior to his resignation date.

[44] In addition, in the case of the appellant's resignation, the directors of the respondent made no decision on whether to approve the appellant's resignation. This failure to approve his resignation meant that the options exercisable as at 31 May 2013 lapsed. The appellant's employment had terminated for a reason that had not been approved by the directors. This is the precise situation which is catered for in clause 5.5, namely that the appellant had ceased being an employee of the respondent for a reason not approved by the Directors, and therefore all options lapsed which had not been exercised by that time. The appellant's options were capable of immediate exercise prior to his resignation. Therefore, turning to clause 5.5, appellant ceased 'to remain in the employ of the Company for (a) reason not approved by the directors'. The appellant's options had not been exercised at the moment of resignation and therefore they lapsed.

[45] This conclusion obviates any necessity to examine the alternative argument which is directed at damages that the appellant alleged he had suffered. This argument was predicated on the basis that the options have not lapsed.

The Bonus claim

[46] This was the one claim which the court *a quo* upheld in favour of the appellant. It accepted that the full contractual bonus was in the amount of R5 134 978 and that he had only received R2 350 000 thereof. In short, the court *a quo* accepted the appellant's argument that he had never waived his claim to the balance of his entitlement. The respondent has appealed against this order.

[47] The appellant's case was pleaded as follows:

> 'On or about 1 November 2011, the plaintiff's remuneration committee and/or board of directors resolved that the defendant was entitled to an annual bonus for the period ending 30 September 2011 in the sum of R5 134 948.00, R2 500 000.00 of which was to be paid to the defendant with his November 2011 salary on or about 25 November 2011 and the balance when the plaintiff had the ability to do so.'

[48] The court a quo dealt with this matter on the basis of determining whether the appellant had waived his entitlement to the balance of the bonus which he now claimed. The respondent had pleaded as follows to the appellant's counter claim:

' . . .the defendant agreed to abandon his entitlement to a performance bonus calculated as stipulated in the employment contract, as supplemented, and in its stead accept a performance bonus equal to one year's basis salary being R2.35 million.'

[49] This plea was in response to based on the averment that an agreement had been reached between the appellant and respondent by which the former would accept a bonus of R2.35 million instead of the amount which he claimed. It is on the basis of this averment, that this claim must be determined.

[50] The appellant's and respondent's plea necessitates an examination of the respondent's conduct prior to this date. By January 2012 the appellant claimed that the respondent was financially capable of paying the balance owing to him. On 1 November 2011, the remuneration committee of the respondent met. Of relevance is the following extract from the minutes of this meeting:

> 'It was agreed that the committee would request a revised proposal from RV regarding his own bonus as well as the rest of the management team as included in the pack.'

[51] On 3 November 2011 a further meeting of the remuneration committee took place at which the appellant was present. The issue of the appellant's bonus was discussed as is reflected in the minutes of this meeting:

> 'RV would not be receiving an increase in this basic salary. In terms of his proposed bonus; he agreed to stand down from his contractually entitled bonus as calculated in terms of the increase in market capitalisation of the company and to accept a bonus equal to one year's basic salary being R2.35m. It was agreed that RV would give a proposal to the Remuneration Committee on how the shortfall may be made up and RV compensated in future for the reduction in entitlement either by way of options or issue of shares.
>
> RV agreed to his bonus being approved as a bonus equal to one years' basic salary RV's bonus is to be paid in cash at the end of November 2011.'

[52] The minutes of this meeting were formally recorded at a subsequent meeting of the remuneration committee of 16 February 2012 where the appellant was again present.

[53] Counsel for the appellant contended that both the appellant and Mr Linell had testified that the contents of this minute were not reflective of that which had been decided at this meeting. Unfortunately this submission does not accurately reflect the evidence contained in the record. All that the appellant said in this regard was that it was not a formal meeting and a discussion took place as to whether he could accept a deferment of payment and 'look into a makeup in future time for my bonus'. Mr Linell claimed he had no independent recollection of the contents of this meeting. At best for the appellant's case was a passage from Mr Linell's testimony that as the respondent had been 'cash strapped', it had to defer payment of the balance of the bonus. But on its own this is insufficient to justify the claim.

[54] In further support of the respondent's version that the appellant had accepted payment of R2.35 million, with an envisaged discussion of a structuring of a total remuneration to arrive at a mutually beneficial conclusion, is an invoice dated 25 November 2011 which Lomsa (Pty) Ltd, the company which had employed the appellant prior to the conclusion of his employment contract with the respondent had generated in respect of the appellant's bonus. The entry is 'Robin Vela – Annual Bonus 2011' in the amount of R2.35 million plus VAT. I should add that in order for this envisaged restructuring of future remuneration to materialise as an enforceable obligation, there would have to be a continued relationship.

[55] There was no indication in this invoice that the amount of R2.35 million was but a part-payment for the amount claimed by the appellant. This invoice is consistent with the respondent's contention that the appellant had agreed to his bonus payment being equal to one year's salary which was paid in November 2011. It is also consistent with the minutes of 3 November 2011.

[56] The respondent was overwhelmingly successful in this litigation. The appellant is ordered to pay R3 324 524,36 in respect of PAYE. His claims for a bonus payment of R2 784 948,23 together with claim for damages of R6 795

711,12 were unsuccessful. His only success was for leave pay in the amount of R103 661,28. For these reasons the appellant should pay the respondent's costs both in respect of this appeal and before the court a quo.

[57] In the result, the following order is made:

1 The appeal, save in respect of the leave pay claim, is dismissed with costs.

2 The cross appeal succeeds with costs.

3 The order of the court *a quo* is altered as follows:

3.1 The defendant is ordered to pay an amount of R3 324 524.36 together with interest at the mora rate from 26 March 2014 to date of payment.

3.2 The plaintiff is ordered to pay the defendant the amount of R103 661.28 as leave pay.

3.3 Defendant's claim for R2 784 948.23 in respect of an unpaid bonus is dismissed.

3.4 It is declared that the defendant's share options in terms of plaintiff's share option scheme lapsed with effect from his date of resignation from his employment with the plaintiff, being 31 May 2013.

3.5 The defendant is ordered to pay plaintiff's costs.

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D DAVIS

ACTING JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	CE Watt-Pringle SC Instructed by: Webber Wentzel, Johannesburg Lovius Block Attorneys, Bloemfontein
For the Respondent:	IP Green SC Instructed by: Norton Rose Fulbright SA Inc., Sandton Webbers Attorneys, Bloemfontein