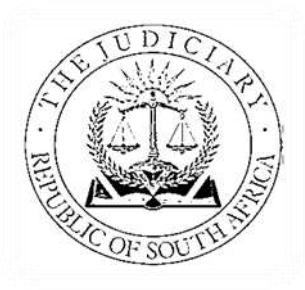

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA131/2017

In the matter between:

SOLIDARITY OBO SCHOLTZ M **Appellant**

and

GIJIMA HOLDINGS (PTY) LTD **Respondent**

Heard: **06 November 2018**

Delivered: **26 February 2019**

Summary: Claim for unlawful deduction – the employer and the employee concluding an Employee Loyalty Incentive Scheme Agreement (the ELISA) in terms of which the employee would remain in the employ of the employer for a period of 12 months following the payment of a retention bonus – employer notifying the employee of the termination of the ELISA – employee urging the employer to pay the bonus- the employer complying with the request by effecting payment of the bonus– thereafter the employee resigning – the employer deducting the retention bonus paid to employee-

Held that:

The purpose of the ELISA is to pay the retention bonus in advance of the services to be rendered by an employee in order to incentivise or encourage such an employee to remain in employment for the retention period as specified in the agreement – further, there can be no question that the ELISA is a reciprocal contract. Properly construed Clause 7.1 of the ELISA makes it plain that where a beneficiary terminates his/her

employment with the employer, after the effective date and before the expiry of the retention period of 12 months, he/she shall repay the full amount of bonus received.

Held further that - it was difficult to discern, in the context of a bilateral contract in issue, that there could be performance without any counter-performance. The two were inextricably linked. The employer performed in terms of the ELISA thus employee had to reciprocate by tendering his counter-performance. This meant that he had to continue rendering his services to the employer for a period of at least 12 months following the payment of the retention bonus.

Labour Court's judgment upheld and appeal dismissed with costs.

Coram: Phatshoane ADJP, Sutherland JA and Kathree-Setiloane AJA

JUDGMENT

PHATSHOANE ADJP

[1] Solidarity, a trade union acting on behalf of Mr Mornè Scholtz, the appellant, instituted proceedings in the Labour Court claiming payment in the amount of R115 448.99 together with interest, less tax and other statutory deductions. It contended that Gijima Holdings (Pty) Ltd, the respondent, unlawfully deducted the aforesaid sum from the last salary payable to Mr Scholtz. On 18 November 2016, the Labour Court (*per* Molahlehi J) dismissed the claim with costs. This appeal lies against that decision with leave of the Labour Court.

[2] Mr Scholtz commenced employment with the respondent as a programmer on 01 June 2004. On 18 September 2012 he concluded an agreement with the respondent styled an Employee Loyalty Incentive Scheme Agreement (ELISA) also referred to as the "Retention Bonus." Clause 3 of the ELISA captures the recital as follows:

> 'The company is committed to managing the continuity of its workforce by means of *inter alia*, the grant of a Retention Bonus to beneficiaries of choice to retain the services of the said beneficiaries and subsequently protect its market position within the Information Technology Industry vis-à-vis its main competitors. The company has elected to grant such benefit to the beneficiary and the beneficiary has accepted the said grant on the basis as morefully

> stipulated in this agreement. The investment made by the company shall be realised through the continued rendering of specific services by the beneficiary for the specific period(s) and according to the specific terms and conditions contained in this agreement and in the annexure hereto.'

[3] Clause 5.1 of the ELISA stipulates that the retention bonus is equal to 50% of the beneficiary's annual guaranteed salary as at the effective date and as contained in annexure A to the agreement. The respondent undertook to pay Mr Scholtz a retention bonus in September of each year of the contractual period with the first payment being due and payable in September 2012 and the final payment in September 2015.

[4] The ELISA would remain valid for a period of 36 months from the effective date unless terminated in accordance with its terms. It does not have a termination clause. However, Clause 8.2 thereof provides that "*…any deletion or cancellation of this agreement shall only be of effect when reduced to writing, signed by both the company and the beneficiary and added hereto as an addendum."* More pertinently, Clause 7 encapsulates certain conditions precedent to the termination of the scheme. It stipulates in part:

> 'In the event of termination of this agreement, the following conditions shall prevail:
>
> 7.1 Where the beneficiary terminates its employ with the company after the effective date and before the expiry of the initial period of 12(twelve) months, (the "initial Period"), the beneficiary shall repay the full amount received by the beneficiary in terms of A.5.1 of annexure A;
>
> 7.1.2 Where the beneficiary terminates its employ with the company during 12 (twelve) month period subsequent to the initial period, the beneficiary shall forfeit the amount reserved for such subsequent period and no pro-rata payment of the amount shall apply; and…'

[5] Apparent from Clause 7 above is that a beneficiary of the scheme, having received a benefit in advance, before the commencement of the relevant retention cycle, would be required to remain in the employ of the respondent for a period of 12 months in respect of each retention bonus already paid.

[6] Mr Scholtz received his first retention bonus in the amount of R36 590.40 on 18 September 2012, the effective date. He further received a retention bonus in the amount of R73 180.80 at the end of September 2013.

[7] In a letter dated 18 June 2014 all beneficiaries of the scheme, including Mr Scholtz, were notified by the respondent that the scheme was terminated and that any associated agreements, that may have arisen as a result of their participation in the scheme, were equally terminated. On that same date, Mr Scholtz and one of his colleagues met Ms Julia De Vries, the Human Resource Business Partner of the respondent, to express their dissatisfaction with regard to the cancellation of the scheme. They were aggrieved by the short notice received and that they would forfeit the bonus at the end of September 2014. Ms De Vries informed them that the matter would be escalated to the Executive Committee of the respondent.

[8] Subsequent to discussions by the Executive Committee a further letter dated 20 June 2014, couched in similar terms as the previous letter of 18 June 2014, was directed to the employees of the respondent. The relevant part reads:

> '…We hereby advise you that the current Employee Loyalty Incentive Scheme is hereby terminated and that any associated agreements that may have arisen as a result of your participation within the scheme is equally terminated. *The payment to the value of R109 771.20 that was payable to you in September will be paid to you as part of September 2014 payroll*.' (My emphasis)

[9] At the end of September 2014, as advised in the aforesaid letter of 20 June 2014, Mr Scholtz duly received his third and final retention bonus in the amount of R109 771.20. Following this, at the end of October 2014, he tendered his resignation from the services of the respondent, with his last day of work being on 28 November 2014.

[10] Mr Scholtz's remuneration for November 2014 was R66 812.99 and his leave pay R52 207.08. The respondent deducted its retention bonus in the amount of R109 771.20 from this salary package or terminal benefits and therefore did not receive any payment. Although Mr Scholtz's claim is for the payment of

the amount of R115 448.99 he conceded during the trial that the amount deducted from his terminal benefits was the retention bonus in the amount of R109 771.20.

[11] The respondent, on the one hand, contended that it was entitled to effect the deduction in terms of Clauses 7.1 and 7.1.2 of the ELISA because Mr Scholtz was bound to remain in its employ for a period of 12 months following the payment of the retention bonus. Solidarity and Mr Scholtz, on the other, argued that the deduction ought not to have been made because on 20 June 2014 the respondent unilaterally cancelled the ELISA and Mr Scholtz was consequently no longer bound by its terms.

[12] On 15 April 2015 Solidarity and Mr Scholtz proceeded to demand payment of the amount of R115 448.99 from the respondent. When this was not forthcoming, they filed a Statement of Case with the Labour Court on 13 May 2015 claiming payment of the amount in question.

[13] The Labour Court found that the respondent's termination of the ELISA without Mr Scholtz's consent amounted to breach of the contract. It explored the options available to an innocent party faced with the breach. It observed that he or she could either accept the breach and sue for breach of contract or institute a delictual claim for damages or reject the breach and hold the offending employer to the contract by demanding specific performance. Alternatively, the innocent party may persuade the offending party to comply with the agreement. The Court remarked that the latter option appeared to have been what had transpired in this case. It found that the respondent acceded to Mr Scholtz and the other employees' plea that it complies with the terms of the scheme by paying them their retention bonuses at the end of September 2014. The Labour Court took the view that the respondent complied with the terms of the scheme and that Solidarity and Mr Scholtz were not entitled to claim specific performance.

[14] The Labour Court concluded that the respondent was justified in deducting the retention bonus from Mr Scholtz's salary following his untimely resignation. This did not offend against s34 of the BCEA because s34(1)

allows an employer to make a deduction from the salary of an employee by agreement. The Labour Court furthermore accepted the respondent's contention that the deduction in issue did not constitute "loss or damage" suffered by the respondent as envisaged in s34(2) of the BCEA. As already alluded to, the Labour Court dismissed the claim by Solidarity and Mr Scholtz with costs.

[15] Solidarity and Mr Scholtz contended, before us, that the ELISA was unilaterally terminated by the respondent. They argued that the Labour Court failed to attach sufficient weight to the contents of the respondent's notices of termination of the ELISA as contained in its letters of 18 and 20 June 2014. Therefore, the Labour Court erred in holding that the deduction of R109 771.20 was based on an agreement. They also argued that Mr Scholtz was, in any event, not bound by the ELISA with effect from 30 June 2014 because he accepted the respondent's cancellation of the agreement.

[16] Solidarity and Mr Scholtz's further argument focussed primarily on s34 of the BCEA. They contended that their claim is not one of specific performance or delictual damages but has its origin in s34 read with s 77(3) of the BCEA. They argued that the respondent did not specify in its pleadings whether it relied on s34(1)(a) or s34(1)(b) of the BCEA in effecting the deduction and neither did the Labour Court identify a section in the BCEA justifying the deduction. They furthermore contended that the Labour Court failed to appreciate that the respondent ought to have sued Mr Scholtz for breach of contract or instituted a delictual claim for damages. Lastly, it was contended, assuming that the respondent was entitled to make the deductions, that it could not have deducted more than a quarter of Mr Scholtz's remuneration as this is precluded by s34(2)(d) of the BCEA.

[17] The key issue arising for determination is whether the respondent was entitled to deduct its retention bonus in the amount of R109 771.20 from Mr Scholtz's terminal remuneration following his resignation from its service before the expiry of the 12 months' period as set out in the ELISA.

[18] Solidarity and Mr Scholtz gave various versions, during the trial, pertaining to their entitlement to retain the bonus following Mr Scholtz's resignation, which were not supported by the case they made out in their papers. For instance, Mr Scholtz testified that the payment of the retention bonus was a compromise reached in light of the abrupt termination of the ELISA by the respondent. As his evidence progressed he intimated that it had never been said by the respondent that this was a compromise. He also indicated that the respondent cancelled the ELISA and he accepted the repudiation by signing the letter of 20 June 2018. He later said that he signed the letter merely to acknowledge its receipt. When Solidarity and Mr Scholtz were asked what their course of action was they stated: "*the case is premised on an unlawful deduction which was done in November not September monies that should have been paid. The monies were paid*." This makes no sense as the deduction that was made in November 2014 was in respect of the retention bonus that was paid in September 2014.

[19] Section 34 of the BECA provides in part:

> '34 Deductions and other acts concerning remuneration
>
> (1) An employer may not make any deduction from an employee's remuneration unless-
>
> *(a)* subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or
>
> *(b)* the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.
>
> (2) A deduction in terms of subsection (1) *(a)* may be made to reimburse an employer for loss or damage only if-
>
> *(a)* the loss or damage occurred in the course of employment and was due to the fault of the employee;
>
> *(b)* the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;

(c) the total amount of the debt does not exceed the actual amount of the loss or damage; and

(d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money.'

[20] It is set out perfunctorily in the pre-trial minutes that the Labour Court has jurisdiction to hear the matter in terms of ss 34, 77(3) and 77A(e) of the BCEA. However, it was never Solidarity and Mr Scholtz's pleaded case that the deduction of the retention bonus was impermissible in terms of s34 of the BCEA nor was this framed as an issue for determination by Labour Court in the minutes of the pre-trial conference. In terms of the minutes of the pre-trial, the Labour Court was required to determine whether: (a) Mr Scholtz was entitled to the payment of the retention bonus; (b) the respondent had failed and/or neglected to pay him his "outstanding remuneration", and (c) the payment was due and payable. In my view, Solidarity and Mr Scholtz's argument on the applicability or otherwise of s34 of the BCEA is misplaced and unsustainable. A deduction in terms of s34 of the BCEA is made to reimburse the employer for loss or damage in circumstances set out in s34(2) and finds no application here.

[21] In the main, the purpose of the Employee Loyalty Incentive Scheme Agreement (the ELISA) is to pay the retention bonus in advance of the services to be rendered by an employee in order to incentivise or encourage such an employee to remain in employment for the retention period as specified in the agreement. In *Bonfiglioli SA (Pty) Ltd v Panaino,*[1] this Court expressed the nature of a retention bonus as follows:

> 'A retention bonus, as the phrase suggests, is paid in order to retain the services of an employee for a specified period. Payment of the retention bonus is contingent upon the employee entering into an agreement with the employer to complete a specific period of service with the employer. The bonus can be paid after the expiration of the period, during the period or at

[1](2015) 36 ILJ 947 (LAC) 954E-G para 25.

> the beginning of the period, depending on the agreement between the parties. The purpose of a retention bonus is, *inter alia*, to avoid instability caused by employees, especially senior employees, who would constantly search for greener pastures; to retain institutional memory and to promote a seamless continuity of operations.'

[22] Furthermore in *Renaissance BJM Securities (Pty) Ltd v Grup,*[2] this Court held:

> 'Retention agreements are therefore hand-outs with handcuffs or cheques with chains. The employee is given money and in return, he/she must give up his/her freedom to leave the employ of the employer. It curtails the employee's right to jump ship even when the ship is being steered straight in the direction of an iceberg.'

[23] To determine whether the respondent was entitled to make a deduction in respect of the retention bonus already paid to Mr Scholtz requires the interpretation of the ELISA itself. In the oft-quoted dictum in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3] the Court held as follows with regard to the interpretation of words used in legislation or a contract:

> 'Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. … The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[24] In the case of reciprocal contracts, one party undertakes to perform specifically in exchange for a particular counter-performance by the other. In

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[2] (2016) 37 ILJ 646 (LAC) at 650-651 para 17.
[3] 2012 (4) SA 593 (SCA) at para 18.

such cases, the principle of reciprocity applies: the first party is not entitled to demand counter-performance from the other party unless the first party has himself or herself performed, or is prepared to perform, as the case may be. Whether the obligations are reciprocal depends on the terms of the contract, actual or implied. In each instance, it is basically a question of interpretation whether the obligations are so closely linked that there exists the relation that one was undertaken specifically in return for the other.[4]

[25] There can be no question in this case that the ELISA is a reciprocal contract. Properly construed Clause 7.1 of the ELISA makes it plain that where a beneficiary terminates his/her employ with the company, after the effective date and before the expiry of the retention period of 12 months, he/she shall repay the full amount received in terms of A.5.1 of the annexure A to the agreement. This much was conceded to by Mr Scholtz. He went on to say that the retention bonus was paid in terms of the ELISA which would have endured for a period of four years. In return for the payment, he had a corresponding duty to remain in employment but did not. When he realised that he had painted himself into a corner he changed his tune by saying that the ELISA was unilaterally cancelled by the employer. His epic dilemma here is that he did not accept the impugned repudiation. On the contrary, he urged the respondent to perform in terms of the accord. Regard being had to Clause 8.2 of the ELISA, its cancellation *"shall only be of effect when reduced to writing, signed by both the company and the beneficiary and added hereto as an addendum."* As to the acceptance of the repudiation, see *Lawsa 3* ed Vol 9 at 305 para 411, where the following is stated:

> 'Traditionally it is said that repudiation is only "completed" or rendered "absolute" or "definite" by its acceptance by the innocent party. Until there has been such acceptance the repudiation may be nullified or undone by the unilateral act of the innocent party (rejection of the repudiation) or the

[4] See 'Contract' Vol 9 *LAWSA* 3ed para 379 - By ADJ van Rensburg, JG Lotz & TAR van Rhijn (updated by RD Sharrock).

repudiator him-or herself (retraction of the repudiation). A repudiation is also said to lapse if it is not acted upon by the innocent party within a reasonable time.'

[26] It is difficult to discern, in the context of a bilateral contract such as the present, whether there could be performance without any counter-performance. The two are inextricably linked. The payment to Mr Scholtz of his third retention bonus at the end of September 2014 by the respondent, after it had purportedly rescinded the ELISA, was not a gift or a donation; in addition, Mr Scholtz did not produce a shred of evidence to substantiate his allegation that a compromise had been reached between the parties, which circumstance would have extinguished his obligation to counter-perform.

[27] By virtue of the fact that the respondent performed in terms of the ELISA it follows that Mr Scholtz had to reciprocate by tendering his counter-performance. This meant that he had to continue rendering his services to the respondent for a period of at least 12 months following the payment of the retention bonus. By appending his signature to the ELISA and enjoying its concomitant benefits he consented that the amount of retention bonus paid out to him could be deducted from his salary if he terminated his services precipitately, in other words, prior to the lapse of the retention period.

[28] Mr Scholtz acted in bad faith by accepting the payment of the retention bonus and a month subsequent to that tendering his resignation. If he did not wish the agreement to be binding on him, he should not have urged the respondent to pay him the bonus or, at least upon its receipt, he should have refunded the respondent. He did none of this. The Labour Court correctly found that Mr Scholtz ought to have appreciated that the consequences of accepting the payment meant that he would have to remain in the service of the respondent for a given period, failing which negative consequences would follow.

[29] Solidarity and Mr Scholtz's claim was correctly dismissed by the Labour Court. It follows that the appeal must fail. There is no reason why the costs of the appeal should not follow the result. I make the following order.

Order

1. The appeal is dismissed with costs.

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MV Phatshoane

Acting Deputy Judge President - The Labour Appeal Court

Sutherland JA and Kathree-Setiloane AJA concur in the judgment of Phatshoane ADJP

APPEARANCES:

FOR THE APPELLANT:	Mr GJ Visser (Solidarity)
	Instructed by Solidarity
FOR THE RESPONDENT:	Mr RJC Orton
	Instructed by Snyman Attorneys