REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 790/2014

In the matter between:

Janette DU TOIT **Applicant**

and

CAPE WEST COAST **Respondent**

BIOSPHERE RESERVE

Heard: 11 March; 4-6 November; 7 December 2015.
Delivered: 2 February 2016
Summary: Claim for specific performance in terms of contract of employment.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Ms Janette du Toit, was the Chief Executive Officer of the Cape West Coast Biosphere Reserve. It is a non-profit organisation tasked

with the protection of the environment on the Cape West Coast such as removing invasive alien plants. It is largely dependent on donor money.

[2] As the CEO, Ms du Toit had to raise donor funding and oversee the implementation of projects. Her contract of employment contained an incentive clause specifying that she would be paid 10% commission on all funds raised for the Biosphere:

> "4. **Remuneration**
>
> 4.1 The employee's basic remuneration is R 300 000, 00 (three hundred thousand Rand) per annum which constitutes the salary she is entitled to.
>
> 4.2 In addition to the above she shall be paid 10% (ten percent) commission on all funds raised for the employer, provided that such commission shall only be paid on government, parastatal, NGO or other similar national or international sources, where such sponsors/donors specifically provide for such payment by way of commission, administration fee or otherwise."

[3] Ms Du Toit claims that she is entitled to a management fee in terms of this clause for funds that she raised on two contracts. The first is a contract with the Department of Environmental Affairs and Agriculture (DEA) worth R 11 988 270, 26. This contract is referred to as the NRM contract. She claims a 5% project management fee – although she is entitled to 10% on her understanding of the clause – amounting to R544 813, 51. The second is the AfriSam contract worth R 2 028 388, 72. She claims 10% on the contract value for 2013, amounting to R 56 238, 38. Her full claim is thus for the amount of R 601 051, 89. It is a claim for specific performance in terms of ss 77(3) and 77A(e) of the Basic Conditions of Employment Act.[1]

[4] The Biosphere counterclaims the amount of R 56 400, 00 that it paid to Ms Du Toit in terms of the incentive clause. It claims that it was paid to her as a result of a fraudulent representation to Mr Rauch, its executive director; alternatively, on the basis of unjustified enrichment. The applicant excepted to the counterclaim. The exception was upheld on 11 March

[1] Act 75 of 1997.

2015. The Biosphere was ordered to file an amended response and counterclaim within 15 days. It did not do so.

The evidence

[5] Ms du Toit called one other witness, Dr Christo Marais, and she testified on her own behalf. The Biosphere called its chairperson, Ms Sharon February; and its financial director, Mr Wessel Rauch. The Biosphere's application for absolution from the instance was refused on 6 November 2015. I gave reasons *ex tempore.* They need not be repeated here.

[6] Dr Marais is the chief director for the natural resource management programme within the DEA. He signed the NRM contract on behalf of the Department and Ms Du Toit did so on behalf of the Biosphere. Messrs *Ackermann* and *Aggenbach* agreed that Dr Marais was an excellent and credible witness whose evidence was akin to that of an expert witness.

[7] Dr Marais confirmed that the applicant's role fitted into the oversight role provided for in the NRM contract and that her project management fee would come from project management as described under the heading "project plan and quantification of activities". He also confirmed that the NRM contract provided for the fee of the project manager under the following point:

> "NRM through Working for Water allocation will fund the salaries, contracting costs and other operational costs for project managers as well as contract teams and other staff appointed through this partnership…".

[8] Dr Marais made it clear that the Department would contract with the Biosphere; the Biosphere as the implementing agent would then be responsible for payment from the agreed budget. The DEA would not prescribe to the implementing agent how to do that. He testified that, in a letter he wrote to Ms Du Toit, he confirmed that the NRM contract made provision for her fee when he said that "therefore, from the Department's perspective as long as CWCBR implements within the conditions set out in that agreement as discussed above, staff may be remunerated utilising project funding". He also confirmed that all oversight costs must be recovered from the 21, 72% budgeted for, including "remuneration of staff

in the project where applicable according to their performance agreements".

[9] Under cross-examination Dr Marais confirmed that, whatever Ms Du Toit was entitled to, must be paid from the 21,72% budgeted for. The allowance for an administrative fee was included in the oversight component. Mr *Aggenbach* put it to him that there is no mention of a 10% fee in the NRM contract and that he had not authorised payment. He answered that the employer did not need his authorisation because it could be found under "oversight". When he was referred to clause 4.2 of the employment contract, he stated that that was provided for under the heading "operational costs".

[10] In summary, Dr Marais testified that the NRM contract provided for the payment of a project management fee to Ms Du Toit. It mandated the Biosphere to pay such a fee and she did not need written authorisation from the donor to do so.

[11] Ms Du Toit's evidence was consistent with that of Dr Marais. She testified that both the NRM and AfriSam contracts provided for the payment of a fee to her; and that there was nothing in her contract of employment stating that she needed permission from the Board for payment if the condition precedent (in clause 4.2 of her contract of employment) is fulfilled. She based her claim on the provision in her contract of employment for an "administration fee or otherwise" rather than "commission".

[12] It is undisputed that Ms Du Toit was the person responsible for overseeing the management of both projects. She testified that the Biosphere was the project manager and that she was responsible for overseeing the projects as CEO. And the chairperson, Ms February, conceded that Ms Du Toit was the project manager on both contracts.

[13] Ms February also conceded that Ms Du Toit's basic salary was paid from a combination of sources, i.e. money coming from a number of different donors. That is consistent with Ms Du Toit's testimony.

[14] Ms Du Toit was an impressive witness. Her testimony remained consistent throughout. She readily made concessions when needed. She did not overstate her case, but calmly outlined the basis of her claim, even under vigorous cross-examination.

[15] The same can unfortunately not be said for Ms February. She frequently appeared to be out of her depth and contradicted herself on a number of occasions. For example, she testified in chief that the Biosphere had only one bank account; in cross-examination she had to concede that it had several. Where her evidence contradicted that of Ms Du Toit or Dr Marais, I have no hesitation in accepting the evidence of the latter two witnesses.

[16] In any event, Ms February conceded that she was comfortable with Dr Marais's evidence that the Biosphere could pay for staff oversight from the 21,72 % budget. It is from that budget line that Ms Du Toit's project management fee was paid.and she conceded that the fee anticipated in clause 4.2 of the employment contract was provided for in the NRM contract. She also confirmed that the person who implemented the project would be the project manager; and, after some hesitation, that Ms Du Toit was the chief project manager on the NRM contract.

[17] With regard to the AfriSam contract, Ms February conceded that the relevant line item "word aangewend vrir projekbestuur", i.e. project management. And she admitted that the use of the donation for the AfriSam project was for the purposes specified in the budget.

[18] Mr Wessel Rauch, the Biosphere's financial director, made three payments to Ms Du Toit. He initially testified that he did so on condition that she obtain the Board's approval; but in cross-examination he admitted that it was only a request ("versoek"). That is consistent with Ms Du Toit's evidence that he merely suggested that she "run it by the Board"; it was not a condition for payment. (She viewed it as a matter of "use it, don't use it", as she put it). Rauch also admitted that he could not give her a legal instruction and that she had not misled him about getting permission. In fact, he said that he was negligent in making the payments without raising it with the Board. However he did not need the Board's authority to make the payments.

The counterclaim

[19] Before dealing with my conclusion on Ms Du Toit's claim, I need to consider the Biosphere's countereclaim.

[20] The counterclaim is based on an allegation of fraudulent misrepresentation by Du Toit to Rauch. But none of Rauch's evidence disclosed fraudulent representation. Nor did it prove unjustified enrichment. And in any event, the Biosphere never amended its statement of response to deal with the exception to the counterclaim. As I had held in the exception, the counterclaim did not disclose a cause of action. Mr Rauch's evidence did not change that.

[21] The counterclaim fails.

The main claim

[22] The onus rests on the applicant, Ms Du Toit, to make out her case for the payment she claims on a balance of probabilities. She had to prove the contract on which she founded her claim, including all its material terms.[2]

[23] At issue is the interpretation of three contracts. Messrs *Ackermann* and *Aggenbach* were *ad idem* that it fell upon this Court to do so.

[24] The most recent and leading case of the SCA dealing with the interpretation of contracts is that of *Natal Joint Municipal Pension Fund v Endumeni Municipality:*[3]

> "The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. 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

[2] *Da Silva v Jankowski* 1982 (3) SA 205 (A) 219 B-C.

[3] 2012 (4) SA 593 (SCA) para 18 [per Wallis JA] (footnotes omitted).

> each possibility must be weighed in the light of 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. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. 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."

The language of the provision

[25] The relevant provision in clause 4.2 of the employment contract provides for the payment of a "commission, administration fee or otherwise." It also specifies that the sponsor or donor must "specifically provide for" such payment. That provision must be interpreted in the context of the document as a whole and the circumstances attendant upon its coming into existence.

[26] I also take into account that Dr Marais – the person responsible for the NRM contract – testified that that contract specifically provided for the payment of a management fee to Ms Du Toit, and that she needed no further authorisation; and that Ms February conceded as much.

The circumstances attendant upon its coming into existence.

[27] The circumstances attendant upon both the employment contract and the two donor contracts coming into existence were the subject of much of the evidence of Ms Du Toit – who was responsible for the implementation of the contracts – and Dr Marais, the person responsible for the NRM contract.

[28] Ms Du Toit also testified why the employment contract contained this provision. As CEO, she earned less than she had done previously. But her relatively low basic salary would be supplemented by a project

management fee "or otherwise" where a donor specifically provided for it in the implementation of a specific project.

[29] This must be seen in the context of Dr Marais's evidence that specific provision was made in the NRM contract for a management fee to be paid; and Ms February's concession that the condition precedent in clause 4.2 of the employment contract had been met.

[30] The language of the employment contract, read within the context of the circumstances attendant upon its coming into existence, the language of the NRM and AfriSam contracts, and the evidence before the Court all point to the inescapable conclusion that Ms Du Toit was entitled to the payments made to her.

The context in which the provision appears

[31] Clause 4.2 of the contract of employment is an incentive clause. The context of that clause is to "top up" the CEO's basic salary and to incentivise her to obtain funding for specific projects. The NRM and AfriSam contracts were two such projects; they unlocked private sector participation to enable the Biosphere to carry out its tasks. Dr Marais was clear on this in his evidence; and, in response to Ms Du Toit's query whether she was entitled to a management fee, he stated in a contemporaneous email:

> "The way that the above [clause in the NRM contract] should be interpreted means that the Cape West Coast Biosphere Reserve (CWCBR) may not take functions (obligations) that it promised it would fulfil and outsource it to an outside party. Part of the allocation of the points for functionality during the evaluation phase to qualify bidders was based on the *Experience of Key Personnel*. Below is a verbatim extract from annexure B of the DEA-CWCBR signed agreement. This means that the services as promised will be managed by the team as presented during contract negotiations. I have to admit I cannot understand how the payment of the CEO of an institution that survives on project funding for salaries can be seen as outsourcing. This would apply to all staff whether it refers to the CEO, Conservation Manager or Conservation Field Officer. I doubt strongly whether CWCBR would be able to fund the full salaries of all the key staff from the DEA

> project as the Department's aim is to unlock other resources as well, but at least a % of their salaries can be recovered from the project funding as shown on page 8 of the project scope under "*Oversight, auditing and insurance where applicable*".

[32] Dr Marais confirmed in his testimony that the management fee is provided for under "oversight and auditing and insurance, where applicable". That component formed 21,72 % of the NRM contract value.

[33] In the context in which clause 4.2 of the contract appears and in which it must be interpreted, Ms Du Toit has proven her case on a balance of probabilities. This applies to both the NRM and the AfriSam contracts. The AfriSam budget specifically provides for "project management".

The purpose of the clause

[34] The purpose of the incentive clause 4.2 in the contract of employment was clear: the CEO was incentivised to raise funds for specific projects, and was entitled to be paid a fee if the contracts she concluded with donors provided for it. She is entitled to the fee paid to her and provided for in the NRM and AfriSam contracts.

The material known to those responsible for its production

[35] It is common cause that Dr Marais and Ms Du Toit were the two people responsible for the production of the NRM contract and most intimately acquainted with its terms. They agreed with the terms and with the fact that Ms Du Toit was entitled to a management fee to be paid from the agreed budget.

[36] In the case of the AfriSam contract, Ms Du Toit and Mr Diale were the persons most intimately acquainted with the material. And Mr Diale had no objection to her being paid a project management fee, as provided for in the contract.

A sensible meaning

[37] As Cameron JA pointed out in *Natal Joint*, "[a] sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

[38] A sensible meaning of clause 4.2 is apparent. It is an incentive clause designed to incentivise the CEO to raise funds for specific projects.

Conclusion

[39] Ms Du Toit has met the onus on her and she has shown on a balance of probabilities that she is entitled to the fee that she claims in terms of her contract of employment, read with the terms of the NRM and AfriSam contracts.

[40] In respect of the NRM contract, she is entitled to 5 % of the contract for 2013-15. The contract amount was R11 988 270, 26. Her 5 % fee comprises R 544 813, 51.

[41] In respect of the AfriSam contract she is entitled to 10% of the contract for 2013. The total contract amount was R 2 082 388, 72 and that for the 2013 period was R 562 380, 38. Her 10 % fee comprises R 56 238, 00.

Costs

[42] To the credit of Ms Du Toit, she did not pursue an order for costs. She did so, not because she is not entitled to costs, but out of concern for the Biosphere, a non-profit organisation. She remains committed to the work that it does. She did not want to be vindictive, nor did she want to see donor money being spent on legal costs unnecessarily.

Order

[43] I therefore make the following order:

43.1 The respondent's counterclaim fails.

43.2 The applicant's claim succeeds

43.3 The respondent is ordered to pay the applicant the following amounts, together with interest at the prescribed rate, within one month of the date of judgment:

43.3.1 R 544 813, 51 in respect of the NRM contract;

43.3.2 R 56 238, 00 in respect of the AfriSam contract.

43.4 There is no order as to costs.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Lourens Ackermann Instructed by Chennels Albertyn.
FIRST RESPONDENT:	Morné Aggenbach Instructed by K J Bredenkamp.