REPORTABLE

CASE NO.: SA 33/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

OLD MUTUAL LIFE ASSURANCE COMPANY (NAMIBIA) LIMITED APPELLANT

and

J P SYMINGTON
RESPONDENT

Coram: Strydom, AJA, Mtambanengwe, AJA *et* Damaseb, AJA

Heard on: 13 November 2009

Delivered on: 27 April 2010

APPEAL JUDGMENT

MTAMBANENGWE, AJA:

[1] This is an appeal against a High Court judgment (Mainga, J) whereby the following order was made:

"1. Defendant is ordered to pay plaintiff the mount of N$59 5889.00.

2. Interest on the aforesaid amount to be calculated at the rate of 20% per annum from 25 June 2004 to date of payment.

3. Costs of suit on the attorney on client scale, save the first day of the trial (20.11.07) when the matter was postponed at the instance of the plaintiff which day's costs should be borne by the plaintiff on the ordinary costs."

[2] The above order was the result of a trial action instituted by respondent on 16 May 2005. The amount in paragraph 1 of the order is what the respondent claimed as an incentive bonus he alleged in his particulars of claim to have earned during the year 2003 by virtue of appellant's incentive bonus scheme, of which respondent was a beneficiary.

[3] Henceforth in this judgment I shall refer to the parties as they appeared in the trial action, namely plaintiff and defendant.

[4] Mr JP Symington, the plaintiff, was employed by defendant as one of its senior managers in Namibia. Defendant is a company with limited liability duly registered and incorporated in accordance with the company laws applicable in Namibia. It is relevant to note that the parent company of defendant, a well known international insurance company, originally operated as a mutual society; it demutualised to become a limited liability company in or around 1999-2000, which demutualisation process affected its

subsidiaries in all countries where it operated, including Namibia. At the time the action was instituted, according to defendant's evidence, the internal auditors of defendant were in Cape Town. To what other extent its other activities might or might not have been controlled from Cape Town is not mentioned in the trial action.

[5] Plaintiff's particulars of claim otherwise read as follows:

"3. The plaintiff was employed by the defendant until the end of March 2004.

4. The plaintiff gave notice of his resignation to the defendant on 1 March 2004.

5. Subsequent to the date the plaintiff gave notice of resignation to the defendant, and with full knowledge thereof, the defendant informed the plaintiff that:

5.1 as a result of the plaintiff's achievements during the 2003 financial year, the plaintiff was entitled to an incentive bonus payment during March 2004;

5.2 the plaintiff's incentive bonus amounted to N$59,588.00 and would be awarded to the plaintiff in the form of an adjustment of the plaintiff's March remuneration package;

6. The plaintiff accepted the bonus.

7. Subsequently:

7.1 the defendant repudiated the agreement between the parties in terms of which the plaintiff would become entitled to the amount of N$59,588.00, by no later than the end of March 2004; (Emphasis supplied.)

7.2 the defendant forwarded alleged rules of the Old Mutual Generic Incentive Scheme to the plaintiff. In terms of those rules (so the defendant alleged) the plaintiff was not entitled to payment anymore. However, the rules which were forwarded to the plaintiff, was only applicable to the period 2001 (the outdated rules) and was (sic) not applicable in relation to the period 2004.

8. It was agreed that the defendant would provide its final views to the plaintiff on or before the end of June 2004.

9. On 24 June 2004, the defendant's attorney's forwarded annexure "A" hereto to the plaintiff, in which it again repudiated the agreement between the parties, by stating that:

9.1 the plaintiff is not entitled to a bonus during his resignation month. For this contention the defendant continued to rely on the outdated rules;

9.2 the previous letter forwarded by the defendant to the plaintiff confirming that the plaintiff was entitled to a bonus, was an error.

10. The plaintiff:

10.1 does not accept the repudiation of the agreement between the parties;

10.2 alleges that the defendant cannot repudiate the agreement, based on outdated rules, and alleged error, or at all.

11. Should the defendant contend that new rules were made applicable for the 2004 period (which is denied and of which the defendant has never informed the plaintiff), then and in that event the plaintiff pleads that:

11.1 the defendant is barred from relying on such rules in the circumstances of this case;

11.2 if such rule was in existence for the period 2004, any term of such rule on which the defendant endeavours to rely, which has the effect of depriving the plaintiff of his bonus, is *contra bonis mores* and unconstitutional.

WHEREFORE the plaintiff claims:

1. Payment in the amount of N$59,588.00.

Interest on the aforesaid amount calculated at the rate of 20% per annum from 25 June 2004 to date of payment.

Costs of suit.

Further and/or alternative relief."

[6] Annexure A referred to in paragraph 9 reads:

"**RE: KOOS SYMINGTON: INCENTIVE SCHEME BONUS**

We refer to the above matter and advise that our client instructed us to inform you that the matter of your client's bonus was tabled in the Old Mutual Namibia EXCO meeting, and that the EXCO has resolved as follows:

1. That Mr Koos Symington is not entitled to a bonus during his resignation month, i.e. March 2004, due to the provisions of Rule 11 of the Old Mutual Generic Incentive Scheme Rules.

2. That any letter that may have been forwarded to Mr Symington in contrast to the above rule, was erroneously.

3. That Old Mutual Namibia is not prepared to pay the bonus of N$59588 as demanded.

4. And that all or any litigation in this regard will be opposed.

Yours faithfully

LORENTZ & BONE"

The letter informing plaintiff as alleged in the particulars of claim (it was later produced as exhibit A) is dated 12 March 2004 and reads as follows:

"INCENTIVE BONUS PAYMENT: March 2004

I am pleased to inform you that, as a result of our achievements during the 2003 financial year, you will be receiving an incentive bonus payment in March 2004.

I would like to take this opportunity to thank you for the contribution you made towards these achievements.

As per the rules of the incentive scheme, your incentive bonus of N$59,588 will be awarded in the form of an adjustment to your March remuneration package.

Congratulations! Your incentive bonus is recognition of your team's achievements, the achievements of distribution and your personal contribution to these achievements. I look

forward to our continued success into the future.

Any queries regarding your incentive bonus should be addressed to myself.

Sincerely

BERTIE van der Walt

CEO Retail Business (Emphasis supplied.)

[7] In its plea, defendant admits paragraph 5 of plaintiff's particulars of claim but pleads:

> "2.3 ...that the letter addressed to the Plaintiff on or about 12 March 2004 was processed and/or generated based on information compiled and/or existing prior to the Plaintiff's resignation and was therefore forwarded to him in error." (My underlining.)

[8] For the rest, defendant's plea denies:

(i) Paragraph 6 of plaintiff's particulars of claim;

(ii) Paragraph 7.1 of plaintiff's particulars of claim and, specifically:

a) any agreement between the parties in terms of whereof the Plaintiff would be entitled to a bonus of N$59,588-00;

any agreement which was capable of repudiation by the defendant;

that the Defendant repudiated any such agreement.

(iii) That according to the applicable incentive scheme rules plaintiff was entitled to an incentive bonus.

(iv) Any knowledge of "what rules were forwarded to the plaintiff" as alleged in paragraph 7.2 of plaintiff's particulars of claim: It says in paragraphs 5.2 and 5.3 of its plea that:

a) there were rules that were applicable to the year 2001;

the rules applicable in the present instance were those for the year 2004.

Copies of both rules are annexed marked "A" and "B" respectively. I reproduce hereunder copies of part of the first page of each set of the said rules:

[9] **The 2001 Rules – Annexure "A"**

"OLD MUTUAL

GENERIC INCENTIVE SCHEME RULES

(Namibia)

The rules below will be mandatory for the 2001. However, in Instances where the previous version of the rules was silent; these rules will prevail.

DEFINED TERMS

- Old Mutual (OM Namibia) includes Old Mutual Unit Trust Namibia, as well as employees working in SA at the request of the Chief Executive Officer and who do not qualify for a bonus under the OMSA scheme.

Old Mutual plc: a company incorporated and registered under the laws of England and Wales. (OM Namibia is a directly held wholly owned subsidiary or Old Mutual plc)

Bonus payment month: is defined as the month in which payment occurs and bonus eligibility is confirmed. This will be determined annually at the discretion of the Old Mutual Executive

Management. The bonus will only vest in the bonus payment month, irrespective of the date on which the bonus is declared or published.

Year under review: is defined as the financial year (1 January – 31 December 2001).

Notice of retrenchment means that a formal written notice, reflecting the last day of work, has been issued to the employee."

The 2004 Rules - Annexure "B"

"OLD MUTUAL

Generic Short Term Incentive Scheme Rules

Below are the generic rules for the Old Mutual STI. Please not that, in addition to these rules, there may be rules that apply to your business unit scheme.

Old Mutual Generic Incentive Scheme Rules (Namibia)

The rules below will be mandatory for the year 2004.

Defined terms

- **Old Mutual (Namibia) and OMNAM:** are synonymous and are defined, for the purpose of this document, as Old Mutual Life Assurance Company (Namibia) and the operating subsidiaries of OMNAM which include OM Unit Trust.

Old Mutual plc: a company incorporated and registered under the laws of England and Wales. (OMNAM is a wholly owned subsidiary of Old Mutual plc.)

Bonus payment month: is defined as the month in which bonus payment occurs and bonus eligibility is confirmed. This will be determined annually at the discretion of the Old Mutual Executive Management. The bonus will only vest in the bonus payment month, irrespective of the date on which the bonus is declared or published.

Year under review or review period: is defined as the financial year (1 January – 31 December 2004).

Notice of retrenchment means that a formal written notice, reflecting the last day of work, has been issued to the employee."

[10] Lastly, defendant's plea to paragraph 11 of plaintiff's particulars of claim reads:

> **"8. AD PARAGRAPH 11 THEREOF**
>
> 8.1 The Defendant admits and also pleads that it relies on the rules applicable to the year 2004, which rules were known to the Plaintiff to apply. (Emphasis supplied.)
>
> 8.2 Save for the aforegoing admission, each and every further allegation contained herein is denied and the Plaintiff is put to the proof thereof.
>
> 8.3 The Defendant pleads that the Plaintiff relies on a letter forwarded to him in error in an attempt to claim an entitlement to a bonus, to which he is not entitled."

[11] Both rules say that they are mandatory for the relevant year, defined as 'the period or year under review,' being 1 January – 31 December in each case. Each set of the rules contains a clause 11 in a section under the rubric 'Special Circumstances'. In this and most other aspects these rules are similar.

[12] **Clause 11 of the Rules reads:**

> "**11**. **Resignation**
>
> - No bonus payment will be made to an employee under notice of resignation in the bonus payment month."

In each set of rules under the heading “defined terms” bonus payment month is defined as:

> “…the month in which bonus payment occurs and bonus eligibility is confirmed.” (Emphasis supplied.)

The provision goes on to specify:

> “This will be determined annually at the discretion of the Old Mutual Executive Management. The bonus will only vest in the bonus payment month, irrespective of the date on which the bonus is declared or published.”

[13] The evidence about the Rules

Phillipus Albertus van Der Walt who was, at the time of trial, defendant’s Executive Manager for Business Development and Operations, was its Chief Executive Officer in 2001. According to him, the incentive scheme was first introduced in South Africa before 2001 but 2001 is the first time Namibia took ownership of their own schemes. Before that there was what was called the “Old Mutual Group Generic Incentive Scheme Rules (Exhibit F) which was controlled from South Africa. (It is relevant to note in passing that under that scheme eligibility is provided as follows:

> “**ELIGIBILIBILITY**

9. Staff under notice of resignation or dismissal will not be eligible for a bonus.

10. On transfer to a subsidiary or associated organisation of Old Mutual, other than at the request of the Managing Director of Old Mutual, the employee will not be eligible for a bonus.

11. The bonus is restricted to:

- permanent Old Mutual employees;
- employees whose performance during the year was regarded as being competent or better by Management;
- employees who are not excluded, due to being included in another bonus system or the nature of their remuneration, at the discretion of the General Manager;
- employees who are in service, and not under notice of leaving Old Mutual on date of payment of bonus." (Underlining mine.)

That, he said, was for or applied to Namibia. Thereafter he initiated attachment to Exhibit C referred to above as annexure A to the plea. It was he who took the South African Generic Rules and customised them for Namibia (Namibianised) and sent the document to the management team by email (Exhibit C). Exhibit C reads:

"From: Van der Walt Bertie (Namibia)
Sent: Friday, August 31, 2001 1:20 PM
To: Afra Schiming-Chase; Dawie Blaauw; Josias Cloete; Koos Symington; Louis Manfred Zamuee; Marius Fuchs; Willem Koegelenberg
Subject: TEAM BONUS SCHEME (Grades 3-7)

Attached please find a first draft of the generic rules regarding a Short Term Incentive for Namibia, I have forwarded it also to experts in SA HR for their input but I believe whatever their proposals might be it will not substantially change the content."

Note that paragraph 9 of Exhibit “F” provides:

> “Staff under notice of resignation or dismissal will not be eligible for a bonus.”- the same provision as clause 11 in the 2001 and 2004 Rules.

Somewhat vague, to begin with, as to when the 2001 Generic Rules became operative, van Der Walt in cross-examination eventually said that the rules became operative “when I sent them out” adding, “that would definitely be the first time that my management team became aware of the Rules.”

He admitted that these Rules (as the email says) were sent as a draft and were “not” a final decision at that particular point in time. His further evidence on the Generic Rules was that he did not look at them when he sent Exhibit A to plaintiff.

[14] For reasons to follow I find it necessary to quote in full Exhibit B:

“2003 Namibian Short Term Incentive Rules

1. **Intent of the scheme**

   To incentivise employees of Old Mutual Namibia to achieve pre-determined financial targets and KPI’s in order to ensure business success.

2. **Period under review**

   1 January to 31 January 2003. Payout, if applicable, will be made in the bonus month as defined in the OM Namibia Generic Rules for the STI Scheme.

3. **Eligibility**

All permanent office staff employees of Old Mutual Namibia between grades 5-17 as well service staff who qualify in terms of the eligibility criteria stated in the OM Namibia Generic Rules for the STI Scheme. No person who is eligible for a sales bonus is included within this scheme.

For purposes of administration there are two main groups of employees, Senior Management (grade 5-7) and all other staff. The STI makes provision for various commutations and an appendix has been prepared detailing the commutation name and the components relating to that commutation.

4. **Basis of the Scheme**

The STI bonus payment will be dependent on at least two main components. The first being a financial target (group and/or line of business specific), and the second being individual performance measurement. Hurdle rates for the Group and the Line of Business have been set at the achievement of 90% of group and or line of business smoothed operating profit.

4.1 **Financial targets**

Group KPI's

The scheme is linked to planned targets as contained in the business plan and approved budgets as per the annexure.

Cost centre management

For all grades 8 to 17 and service staff, company financial targets as above will constitute 90% of the bonus whilst the remaining 10% will be related to individual cost centre management targets. This bonus element is formulated to kick in when the particular cost centre(s) in which the individual is employed achieves an actual to budget ratio expenses ratio

of 95% or lower. This target will either be met or not met and will not be variable in the case of greater savings to be achieved.

4.2 **Performance rating measures**

The scheme rewards individual performance based on performance ratings as set out in the table below.

Old Rating	New rating	Bonus measure
A	5.00	150.00%
A	4.75	140.00%
A	4.50	130.00%
B	4.25	125.00%
B	4.00	118.75%
B	3.75	112.50%
B	3.50	106.25%
C	3.25	100.00%
C	3.00	93.75%
C	2.75	87.50%
C	2.50	81.25%
D&E	2.49 & below	0%

It should be noted that management reserves the ultimate right to adjust performance ratings upward or downward so that the spread of performance measurement correlates with acceptable trends.

4.3 **Bonus Pools**

Bonus payments will be made out of bonus pools created for purposes of the STI, which are limited to monthly PEAR multiplied to the applicable multiple per staff member. The bonus pools so created cannot be exceeded, should the total bonus calculation exceed the relevant rated

basis. The Chief Executive Officer reserve the right to review the pools so created to ensure that the pools are in line with business unit performance pool created then the bonus payouts of all members of the pool will be adjusted on a pro and company performance as a whole.

The following bonus pools with multiples have been identified.

- Grades 5 to 7 (2x multiple)

Corporate / Group (1x multiple)

Distribution (1x multiple)

Brokers (1x multiple)

Operations (1x multiple)

Employee benefits (1x multiple)

4.4 Illustrative Bonus Payouts

The following table illustrates bonus payouts as a percentage of PEAR prior to the application of bonus multiples, applicable to all grades.

Rating	**90% of plan**	**100% of plan**	**110% of plan**
5	60%	128%	150%
4.25	50%	106%	125%
3.25	40%	85%	100%
2.49&below	0%	0%	0%

A one times multiple of PEAR is applicable for grades 8 to 16, whilst a two times multiple is applicable for grades 5 to 7.

4.5 Additional Elements

All bonuses of the executive and senior management will be subjected to

achieving Old Mutual Namibia employment equity targets. Failure to meet employment equity targets will result in bonuses being reduced by 10% for these two groups of employees. This is a persuasive element and is either achieved or not achieved with no scalability for partial achievement.

Johannes !Gawaxab
Chief Executive Officer
Old Mutual Namibia Group

Louis du Toit
Chief Financial Officer
Old Mutual Namibia Group

Peter Moyo
Deputy Managing Director
Old Mutual South Africa

Bertie van der Walt
Chief Executive Officer
Old Mutual Namibia Life Assurance "

03 September 2003"

[15] While plaintiff denied that he had seen or was aware of the existence of any Generic Rules, he accepted that this document was discussed with him and his denial that he received the email exhibit C and its attachment, the Generic Incentive Rules for 2001 is unconvincing in light of the fact that Exhibit B itself in paragraphs 2 and 3 refers to "OM Namibia Generic Rules for the STI Scheme" under which and in terms of which he, as one of defendant's senior managers, received that incentive bonus in the years 2001, 2002 and 2003. Although no Generic Rules for 2003 were produced, the undisputed evidence is that there were such Rules for each year and Mr Smuts was correct when he submitted; on behalf of the defendant, that:

"If there were no contractual basis for such a bonus, then there could be no claim at all."

Furthermore, as van der Walt testified, the Generic Rules are the framework within which the STI Scheme operated.

[16] Mr van der Walt also testified that the purpose of introducing an incentive bonus scheme was to attract and retain experienced management staff and to incentivise them to achieve pre-set targets. These targets included group targets and targets to be achieved by each person and are set at the beginning of the period or the year under review. The evidence, even of the defendant's own witnesses, clearly established that the period under review for the bonus to be paid in March 2004 was 1 January – 31 December 2003. In this regard, therefore, defendant's reliance on the 2004 Generic Rules was totally misplaced.

[17] In cross-examining plaintiff, Mr Dicks who appeared for the defendant in the trial, put to him that he as a senior manager should have known of the Generic Rules and that when he said he had made enquiries in February 2004 and was advised that he would not lose his bonus if he resigned in March he had approached the wrong person, Koegelenberg, instead of his immediate superior. Counsel was correct to a certain extent. I say to a certain extent because what is strange in this case is that, according to

their evidence, all senior managers of defendant who testified only became aware of the existence of clause 11 after plaintiff complained of being denied his bonus. The clause is contained in a basic document (the Generic Rules) designed for the sole benefit of defendant and apparently meant to penalise an employee despite the fact that such employee would have earned his bonus. Mr van der Walt who drafted the Generic Rules in 2001 and was overall Chief Executive Officer of defendant till 2003, and to whom plaintiff reported during 2003, du Toit the Chief Financial Officer of defendant who was responsible for calculation of the amount of the bonus earned by each senior manager and Koegelenberg who for a long time was in charge of the HR department where the rule were kept, all only became aware of the provision after the complaint by plaintiff; ! Gawaxab the current Chief Executive Officer of defendant, the man to whom the plaintiff reported in 2004 apparently processed plaintiff's notice of resignation according to the procedure described by du Toit. Most probably all of them would have given plaintiff the same advise as the one that Koegelenberg gave to the plaintiff.

Plaintiff's case

[18] Mr Mouton, who appeared for the plaintiff in the trial and before this Court, stated plaintiff's case as based on the letter of March 12 which he said plaintiff accepted and constituted a contract which defendant repudiated. He added:

> "It is also the case for the Plaintiff My Lord, that if the Defendant rely on the rules for the year

> 2004, then it cannot rely on such rules for the purposes of this case and also My Lord, that if they rely on such a rule, that is that during the resignation month an employee that he will not be entitled to incentive bonus, that such rule is *contra bones mores* and that such rule is unconstitutional." *(sic)*

[19] The defendant denied that the letter constituted a contract, and led evidence to substantiate that denial. Mr Mouton did not draw plaintiff's particulars of claim. Although on appeal Mr Mouton persisted in submitting that that letter constituted the contract between the parties, a proper reading of the particulars of claim and the evidence of both plaintiff and defendant shows that he misconstrued plaintiff's particulars of claim. Paragraphs 6 and 7 read with paragraph 9.2 of the particulars of claim do not allege that the letter of 12 March 2004 was an offer of the bonus to plaintiff which plaintiff accepted. The particulars of claim state in paragraph 7:

> "7. Subsequently:
>
> 7.1 the defendant repudiated the agreement between the parties in terms of which the plaintiff would become entitled to the amount of N$59,588.00, by no later than the end of March 2004;"

Paragraph 9.2 states:

> "9.2 the previous letter forwarded by the defendant to the plaintiff confirming that the plaintiff was entitled to a bonus…" (My underlining.)

Indeed the plaintiff's evidence in cross-examination, talks about accepting the bonus

offered. But “accepted” in paragraph 6 of the particulars of claim could only mean that he accepted the offer made in the letter if read out of context, of the particulars of claim as a whole and the evidence. In cross-examination plaintiff was taken to task on whether the bonus he had earned was on the basis of offer and acceptance. In the course of this evidence he admitted:

> “No you never have to write a letter to say I accept it.”

And when the court asked if he could dispute the calculations (of his bonus) he answered:

> “…I think you can dispute it you can ask the people to work it out for you and they will work it for you again. They won’t have a problem with working it out for you again.”

Counsel, further asked him:

> “But if it comes to the same amount you have to accept it.?”

And he answered:

“Then you have to accept it because then it was signed off and then it was in the final stages.”

Counsel then remarked:

> "That is indeed also my instruction the amount could be adjusted up and down after you received your letter."

To that plaintiff retorted:

> "After I received my letter the amount will not go up or down because it has been signed off by all the people and it has been justified as correct."

The evidence shows the letter was written after du Toit and !Gawaxab approved the amount as verified by the defendant's internal auditors in Cape Town.

Counsel further queried:

> "But before you receive your letter you do not even know you are getting a bonus…."

The plaintiff answered as follows:

> "I know exactly that I am going to get a bonus Sir, because there is a regular feedback to show you what your bonus is on that stage. There is feedback that shows you. You know what your targets are, your targets have been worked out, there is a formula that Mr du Toit worked out and from time to time, if I can remember correctly, from time to time at these meetings it was put on the screen and it was loaded with the latest figures and then you can see more or less what it will be. So you are aware during the year what the bonus will be.
> <u>If you are not in agreement with the amount in the letter, you can approach management to say for this reason I don't agree with it, then it will be adjusted.</u>
> "Those are my instructions," counsel commented, and plaintiff went on. ---Ja, obviously if there

> is a problem with it you can ask and another can check it for you, yes. You are free to do that."

Du Toit indeed described the procedure followed if one questioned the calculation of his bonuses. The evidence elicited by Mr Mouton himself from defendant's witnesses, is contrary to this idea of the letter being the contract in terms of which plaintiff would receive the bonus. In this regard, therefore, defendant's denial that the letter constituted an agreement is correct. And paragraph 6 of the particulars of claim must be understood in that context.

[20] The evidence showing that the letter of 12 March 2004 did not constitute the said contract and that the contractual basis for the bonus earned by the plaintiff was the Generic Rules read with the 2003 Namibia Short Term Incentive Rules was led without any objection by the defendant. In *Briscoe v Deans* 1989 (1) SA 100 WLD, Goldstone J remarked at 105B:

> "It would appear that in *Shill v Milner* the evidence was in fact led without objection, and it was on that basis, inter alia, that the case has become the *locus classicus* with regard to pleadings being impliedly amended where all issues have been canvassed during a trial, notwithstanding that they have not been properly or adequately pleaded." (My emphasis)

In the circumstances of this case, I would adopt that approach to the evidence. I conclude therefore, that the court *a quo* misdirected itself in accepting that the letter of

12 March 2004 was an offer which plaintiff accepted, and dealing with it as constituting the contract, in terms of which the bonus was to be paid. It is clear that the Court was led into this error by the submissions made by plaintiff's counsel, which, unfortunately, it uncritically accepted.

[21] Though no specific Generic Rules for 2003 were produced in evidence, van der Walt was clear in his evidence that there were Generic Rules for each year, starting from 2001. The 2003 Short Term Incentive Rules also refers to such Rules. The Rules relied on by the defendant, the 2001 and the 2004 Rules specifically refer to the period or year under review as 1 January to 31 December in each case, and the 2003 Short Term Incentive Rules, similarly say that the period under review is 1 January to 31 December 2003. The undisputed evidence is that the bonus calculations on which the letter of 12 March 2004 was based, (as the letter itself says) related to plaintiff's performance in 2003. Therefore, although the defendant's specific reliance on the 2004 and 2001 Rules and the vague evidence by van der Walt that "if there are no changes to the rules in a particular year the rules of the previous year will continue to apply by default, is misplaced. In these circumstances, it is safe to assume that there were such rules for the year 2003. This assumption finds support in the 2003 Short Term Incentive Rules and the fact that the plaintiff could hardly be heard to say that such rules pertaining to the year 2003 did not exist at all, otherwise, as Mr Smuts for the defendant submitted in paragraph 41 of his heads of argument:

> "If there were no contractual basis for such a bonus, then there could be no claim at all."

I think the fact that no one had regard to the specific Generic Rules until the rejection of plaintiff's bonus occurred is partly explainable on the fact that the 2001 Generic Rules are, as they say "a first draft" which was never finalised; van der Walt in cross-examination accepted that fact, and du Toit testified that when he conducted the workshops in 2003:

> "I don't think I would have had either these rules the Short Terms Incentive Rules or the Generic Rules with me on person, I don't think so."

The other explanation probably is that those rules were only to be found on the internet. That would explain why the information came to hand belatedly.

The court a *quo*'s judgment

[22] Mainga J upheld the letter of 12 March 2004 as constituting a contract between plaintiff and defendant. He also found defendant's reliance on clause 11 as no defence to plaintiff's claim, and quoted authority to support that defendant could not rely on the error made in sending out the letter to plaintiff because, as he said, the error or mistake was unilateral and plaintiff made no misrepresentations to the defendant.

I have already said, that in my view the finding that the letter constituted a contract between the parties was a misdirection I need not comment further on this so-called plaintiff's main cause of action. The Learned Judge *a quo* remarked that plaintiff's alternative cause of action "was slovenishly pleaded. He said:

> "The alternative cause of action is not pleaded with clarity to conclude that section 36 and 37 of the Labour Act apply and yet clause 11 of the Old Mutual Generic Incentive Scheme Rules (Namibia) besides being in total conflict with the intent and basis of the scheme, the financial (Group KPI's) and Employment equity targets it violates particularly s 37 of the Labour Act, 1992 and must probably violate the right to property, when it has the effect of depriving an employee of an already earned bonus for a spurious reason that the employee has resigned or gave notice in the month the bonus was paid."

He quoted both paragraph 11 of the particulars of claim and the plea thereto which he said "equally failed to raise a proper defence save for saying it relies on the rules applicable to the year 2004…" He went on to say that when plaintiff at the very least in paragraph 11 "states that clause 11 of the Incentive Scheme is against good morals or public policy, is illegal and enforceable… It should have occurred to the defendant that plaintiff was pleading that Clause 11 was illegal." After referring to *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA (A) where at 7I – 9A Smalberger JA said: "no good purpose is served by classifying contracts into those contrary to the common law, those against public policy and those *contra bonos mores* as the expressions are interchangeable", he concluded:

> Common sense tells me that clause 11 of the Incentive Scheme Rules in as far as it has the effect of depriving an employee his/her bonus long after he/she has worked for and earned the bonus but for the reason that he/she has resigned or gave notice in the month the bonus is paid it is inimical to the interest of the community and contrary to the

> law. It is of no consequences whether or not plaintiff knew of its existence, it is bad in law and this Court cannot sanction such a provision and defendant cannot be allowed to rely on such a provision." (My underlining)

The court went on to say: that the fact that the bonus is paid three months after was "illegal in itself (ss 36 and 37 Labour Act) and that conduct on the part of the defendant was "spurious" and called "for costs". On the strength of *Erongo Mining and Exploration Company Limited t/a Navachab Gold Mine v Mineworkers Union of Namibia* NLLP 2002 (2) NCL and *S & U Stores Ltd v Lee* 1969 1 WLR 626 (DC) he found that a bonus is part of the remuneration of an employee. In the former case Hannah J held that remuneration includes bonuses and allowances. In the latter case it was said:

> "Remuneration is not mere payment for work done, but is what a doer expects to get as the result of the work he does in so far as what he expects to get is quantified in terms of money."

[23] However, what this Court has to decide is whether or not the finding that to deprive the plaintiff of a bonus that he had earned, on the basis of Clause 11 of the Generic Rules, is inimical to the interests of the community and contrary to the law. For this determination it is necessary to accept that the Generic Rules governed the Short Term Incentive Scheme, in other words, as testified by van der Walt, the Generic Rules are the framework within which the STI Scheme operates (leaving aside the issue that no Generic Rule specifically applicable to the year 2003 were produced).

Mainga J referred to the evidence given in chief by van der Walt regarding the purpose of Clause 11 when he was asked if the goals would be achieved if a bonus was paid to a person already under notice of resignation, and he said from the company's point of view, they would not:

> "I would say no. I mean first of all, one of the purposes behind, reasons behind an incentive scheme is to attract and retain experienced management. The second purpose is to incentivise him or her to achieve pre-set company targets. Now if they resign, we have already lost on the first one, there will be nobody to incentivise for the next year. So the whole purpose is to introduce this scheme to keep the people and incentivise them to go full-out for the new targets."

He reasoned that this would only make sense if the day the plaintiff was recruited he was paid a bonus to incentivise him unlike the present case where he had already achieved the targets from 1 January to 31 December which entitled him to the bonus.

[24] In *Sasfin's* case *supra*, Smalberger JA went through a list of provisions in a deed of cession between Beukes and Sasfin and others to secure a loan, which provisions Beukes claimed to be contrary to public policy (see pp10-12 of the judgment) and concluded at pp13E-14A):

> "The effect of what I conceive to be the proper interpretation of clause 3.4 and 3.14 was to put

> Sasfin, from the time the deed of cession was executed, and at all times thereafter, in immediate and effective control of all Beukes' earnings as a specialist anaesthetist. On notice of cession to Beukes' debtors Sasfin would have been entitled to recover all Beukes' book debts. In addition, Sasfin would have been entitled to retain all amounts so recovered, irrespective of whether Beukes was indebted to it in a lessor amount, or at all. This follows from the provisions in clause 3.4 that Sasfin would be 'entitled but not obliged' to refund any amount to Beukes in excess of Beukes' actual indebtedness to Sasfin. As a result Beukes could effectively be deprived of his income and means of support for himself and his family. He would, to that extent, virtually be relegated to the position of a slave, working for the benefit of Sasfin (or, for that matter, any of the other creditors.) What is more, this situation could, in terms of clause 3.14, have continued indefinitely at the pleasure of Sasfin (or the other creditors). Beukes was powerless to bring it to the end, as clause 3.14 specifically provides that 'this cession shall be and continue to be of full force and effect until terminated by all the creditors'. Neither an absence of indebtedness, nor reasonable notice to terminate by Beukes in those circumstances would, according to the wording of clause 3.14, have sufficed to bring the deed of cession to an end. An agreement having this effect is clearly unconscionable and incompatible with the public interest and therefore contrary to public policy." (My emphasis.)

In the instant case (quite apart from the vagueness of the evidence as to which specific Generic Rules were applicable for 2003) clause 11 has the effect of depriving an employee of a bonus he has earned. The clause is irrational and unreasonable in that had plaintiff resigned in April 2004 and the bonus payment month was March he would still have received his bonus.

[25] Mr Smuts criticised the judgment of the court below. He submitted in paragraph

62 and 63 of his heads of arguments:

"62. We submit that the basis of the claim and the approach of the Court below with respect, failed to take into account the contractual nature of the Scheme itself and the overwhelming evidence that the rules forms part of the plaintiff's contract of employment with the defendant and that any entitlement to an incentive bonus must meet the requisites of the scheme and that it would then be payable in terms of the rules of the scheme. The incorrect approach of the Court in this regard is demonstrated by its statement to the effect that the Plaintiff was already entitled to a bonus at the end of the financial year in respect of which it was to be awarded, quoted above. This reasoning, we submit, negates the contractual nature of the scheme.

63. Thus, any entitlement to any payement under the scheme would need to be in terms of that very scheme. The scheme thus entitles an employee to payment in the bonus month as defined – and not upon completion of the period under review and meetings targets."

64. Once the Court found, correctly, we submit that the generic rules governed the operation of the scheme, then the exclusions and disqualifications would also apply such clause 11 which would disqualify payment of the bonus to an employee in his or her resignation month. That should be the end of the matter. This is quite apart from when a bonus under the scheme be payable.

65. The plaintiff was clearly aware that the incentive scheme bonus had certain rules and hence his enquiry made to his colleague (Mr Koegelenberg, and not his line manager and who also did not administer the scheme as was shown in evidence). The plaintiff received the incorrect advice. But that (the incorrect advice) does not form the basis for his claim. His claim is rather that a separate enforceable contract was entered into when the defendant sent its letter in error

> of 12 March 2004. This letter was explained by Mr du Toit in the context of being generated within a system prior to the processing of the plaintiff's resignation letter, as we have pointed out.
>
> 66. Once the plaintiff correctly accepted that there were scheme rules which applied to a bonus under the scheme, the claim based upon a separate enforceable agreement in the form of the letter of 12 March 2004 which was sent to him, is then exposed as being both unsound and untenable. The contractual framework was thus the scheme and its rules in order to claim a bonus in terms of that scheme. That was not the basis for the claim. Instead a separate contract is asserted." (My underlining.)

[26] It is so that the freedom to contract as expressed in the rule *pacta sunt servanda* is one of the keystones of our law and "(is) indispensable in weaving the web of rights, duties and obligations which connect members of society at all levels and in all conceivable activities to one another and gives it structure." (*Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others,* unreported judgment of this Court delivered on 2009/12/4, (paragraph [28].) In support of Clause 11 of the Generic Rules, Mr Smuts referred to what was said recently by the South African Constitutional Court (Nqcobo J) in *Barkhuizen v Napier* 2007(5) SA 323 (CC) at 348J-349A about the principle *pacta sunt servanda* being a

> "profoundly moral principle on which coherence of any society relies. It is also universally recognised legal principle."

[27] In the *Sasfin* case, *supra*, the following *caveat* was added by Smalberger, JA, at p9 B-G, namely:

> "No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public po0licy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildway* 1938 AC at 12 ([1937] 3 All ER 402 at 407B=C,
> 'the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few individual minds.'"

[28] In my opinion clause 11 of the Rules is not a clear instance which should be met with a refusal by the Court to enforce it because it is against public policy. The clause finds its application in the relationship between the parties as employer and employee and in this particular instance cannot be said to be opposed to the interest of the State, or of justice, or of the public. (By that I am not saying that employment contracts cannot be against public policy.)

[29] A case in point is *De Klerk v Old Mutual Insurance Co. Ltd,* 1990 (3) SA 34 (ECD). A clause in an employment contract provided that if the services of the plaintiff, an

insurance representative in the employ of the defendant, should be terminated before the lapse of five years' continuous employment with the defendant only commission in respect of policies proposed by him which were payable on the date of termination of the contract, would be paid out. Commission which was not yet payable at that date would be forfeited. It seems that commission was only payable after the lapse of some time and it had become clear that policies proposed were not allowed to lapse, or were cancelled and premiums payable were not decreased. The contract also stipulated that if the services of the plaintiff were terminated after the five years, he would be entitled to receive all commissions earned as if he had never left the employ of the defendant. The plaintiff resigned before he had completed five years continuous service. He nevertheless claimed payment of commission which was, at the date of termination of his contract, not yet payable. It was submitted on behalf of the plaintiff that the clause in the contract whereby he forfeited such commission, was against public policy.

[30] After discussion of various cases, also the *Sasfin* case, the court concluded as follows on p 44 E-G:

> "The provisions of clause 2.8, in my view, certainly do not offend against public policy in the sense referred to in the *Sasfin* case. The fact that in clause 2.8 it was sought to limit the plaintiff's entitlement to commission which had fallen due by the date of termination of his employment where his employment was terminated before he had completed five

> years' continuous service with the defendant does not, in my judgment, in the words of Smalberger JA in the *Sasfin* case at 8C-D render the provisions of that clause '…… inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience……'. To hold otherwise would, in my judgment, amount to an intrusion upon the right of the parties to contract freely. I have not been persuaded that the provisions of clause 2.8 are plainly improper and unconscionable nor have I been persuaded that the impropriety thereof has been convincingly established."

[31] The excerpt from the *Sasfin* case on which Mr. Mouton relied for his submission that clause 11 of the Generic Rules was contra bonos mores, shows that that case is distinguishable from the present case. The contract in that matter virtually deprived the plaintiff of his livelihood and there was no way in which he could bring that situation to an end.

[32] I am likewise not convinced that clause 11 of the Generic Rules are "inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience and therefore against public policy and to find so would, in this instance, be an unjustified intrusion into the right of parties to freedom of contract.

[33] In my opinion, however, sec. 37(b) of the Labour Act. Act 6 of 1992, constitutes a hurdle for the appellant which it was not able to cross. The section provides as follows:

"37 No employer shall –

(a) …..

do any act or permit any act to be done as a direct or indirect result of which an employee is deprived of the benefit or of any portion of the benefit of any remuneration so payable or paid;"

[34] As pointed out previously in the matter of *Erongo Mining and Exploration Company Limited t/a Navachab Gold Mine v Mineworkers Union of Namibia,* NLLP 2002 (2) NCL, it was submitted by counsel for the applicant that the use of the word "remuneration" in sec. 33(3)(a) of the Labour Act should not bear the wide meaning set out in the definition of the word in sec. 1. The Court, Hannah, J, then investigated what the ordinary meaning of the word "remuneration" is and concluded as follows on p238-239:

> "Having regard to the authorities just referred to and to the dictionary definition of "remuneration" I have come to the conclusion that the ordinary meaning (of) "remuneration" is wider than "wage" or "salary" and includes bonuses and allowances."

[35] In sec. 1 of the Labour Act the word "remuneration" is defined as follows:

> "remuneration means any payment in money made or owing to such employee by virtue of his or her employment, excluding –"

(The exclusions are not relevant to the present proceedings.)

I can find no difference in meaning between the definition of the word "remuneration" in

sec. 1 of the Act and what was found by the learned Judge to be the ordinary meaning of the word. That, so it seems to me, was also the conclusion to which the learned Judge came to where he stated that whether one applies the ordinary meaning of the word or the meaning set out in sec. 1 the applicant was not complying with the subsection.

[36] I therefore accept that the meaning of the word “remuneration” as used in sec 37(b) is wider than “salary” or “wage” and that it includes bonuses and other money payments made or owed by virtue of an employee’s employment.

[37] Turning now to the facts of this case it is clear that the plaintiff (Symington) has done all that was required of him to earn the bonus which he claimed. This was common cause and for further confirmation thereof one needs only look at the letter of 12 March 2004 from which it appears that the targets set for the year 2003 were achieved by all, also the plaintiff and his team, and he was congratulated for the personal contribution made by him. That is in fact also the evidence. And when the end of March came all that stood between the plaintiff and payment of his bonus was clause 11. Even vesting of the bonuses took place in March according to the Generic Rules.

[38] Mr. Smuts, for appellant, submitted that because clause 11 provided that

bonuses were not payable if a person resigned in the payment month it follows that no "remuneration" was due to the plaintiff and sec 37 had no application.

[39] I do not agree. It seems to me that the Legislature, by enacting sec. 37, had in mind, instances such as the present where a person had done all that was necessary to earn remuneration to be made to him or her but was then, by some or other act, deprived from receiving what he or she had earned. This is to let in by the back door what was in the first place prohibited by the Act. A reading of the Generic Rules shows, in my opinion, that once the targets set are achieved the defendant would be contractually bound by its own rules to pay the bonus to persons, such as the plaintiff, who qualified in all respects, if it were not for the provisions of clause 11. Clause 11 therefore constitutes the act whereby a person was deprived of remuneration he or she was entitled to.

[40] I have therefore come to the conclusion that clause 11 of the Generic Rules is in conflict with the provisions of sec 37(b) of the Labour Act and cannot be invoked to deny the plaintiff payment of his claim. I do not understand the reference to the discretionary powers of the Executive Management in the definition clause of the Generic Rules to mean that they could at will deprive a person of the bonus which he or she has otherwise earned. Their discretionary power goes no further than to determine the month in which bonus payments must occur and to confirm eligibility in

accordance with clause A.1 of the Generic Rules. This discretion is subject to what the Generic Rules provide and subject to the provisions of the Act.

[41] Lastly in dealing with this provision of the Labour Act, Mr Smuts submitted that the finding by the court *a quo* that the clause 11 of the Generic Rules contravened section 37 of the Labour Act, was illegal and unenforceable was based on the court's "misconception of the nature of the incentive bonus itself. Since the court *a quo* found the terms of the scheme applicable, the terms also provided when the bonus would be payable". Therefore, he submitted, there could be no, contravention of ss 36 and 37, because the bonus "could only conceivably be due and payable in terms of the scheme, and would not merely become due and payable after the completion of the period and the accomplishment of the targets. It thus only become payable in the bonus payment month in its terms." With respect this seems to be a very contorted reasoning. Payable read in the context of the scheme, as a whole must be premised on all the factors mentioned in the scheme including the accomplishment of the present target and the profits achieved by the company, all of which take place before the month of payment, which itself depends on those factors being in place. As said previously the discretion of the company as to when the bonus achieved will be paid is subject to what the Generic Rules provide and subject to the provisions of the Act. I am therefore not persuaded that the above reasoning by counsel is sound.

[42] In the result the appeal is dismissed with costs, such costs to include the costs of one instructing counsel and one instructed counsel.

_____

MTAMBANENGWE, A.J.A.

I concur.

_____

STRYDOM, A.J.A.

I concur.

_____

DAMASEB, A.J.A.

Counsel for the Appellant:	Mr D. F. Smuts, SC
Assisted by:	Mr. G. Dicks
Instructed By:	LorentzAngula Inc.
Counsel for the Respondent:	Mr C. J. Mouton
Instructed By:	Koep & Partners