



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 2435 OF 2012
SBI INTERNATIONAL HOLDINGS AG (KENYA).....CLAIMANT
VS
AMOS HADAR.....RESPONDENT
AND
AMOS HADAR.....CLAIMANT
VS
SBI INTERNATIONAL HOLDINGS AG (KENYA).....1ST RESPONDENT
ALEXANDER YASHISH.....2ND RESPONDENT
PALUCH RONY.....3RD RESPONDENT

AWARD

Introduction

1. SBI International Holdings AG (Kenya), the Claimant in this case, is an international road construction company operating in Kenya. The Respondent, Amos Hadar who is an Israeli national worked as Head of Finance at the Claimant's Branch Office in Nairobi. By virtue of his employment, the Respondent was issued with a Power of Attorney jointly with the Branch Manager, Alexander Yashish.
2. The matter first came before me on 5th December 2012 by way of Notice of Motion under certificate of urgency seeking interim orders prohibiting the Respondent from disclosing the Claimant's trade secrets and other confidential information.
3. Simultaneously with the Notice of Motion, the Claimant filed a Memorandum of Claim seeking a permanent injunction in this regard. The Claimant also sought damages and an account for profits.
4. The Respondent filed a Memorandum of Reply and Counterclaim on 11th December 2012. The parties agreed not to proceed with the Notice of Motion in order to allow a speedy conclusion of the main suit. The hearing however took an unusually long time owing mainly to introduction of new evidence by

the parties in the course of the trial.

5. The Claimant called three (3) witnesses; Alexander Yashish, Benjamin Arbit and Moshe Effling. The Respondent testified on his own behalf and then called Christopher Makokha. Following direction by the Court, the Kenya Revenue Authority detailed an Assistant Manager, Alexander Ochieng Aineah to attend Court and testify as an independent expert witness specifically on the issue of tax payment on account of expatriate employees working for multinational companies in Kenya.

The Claimant's Case

6. The Claimant pleads that by virtue of the senior position held by the Respondent, he was bound under the provisions of his employment contract to devote all his time to the business of the Claimant. The Respondent was thereby prohibited from directly and/or indirectly engaging in any other business during his employment with the Claimant.

7. The Claimant states that in order for the Respondent to properly and effectively carry out his duties, he was availed the Claimant's trade secrets and confidential information. The Respondent was exclusively in charge of the Claimant's finances and financial operations in Kenya. He therefore owed the Claimant a fiduciary duty and a duty of fidelity.

8. Sometime in 2012, the Claimant discovered that in breach of his employment contract, fiduciary duty and duty of fidelity, the Respondent, while still employed by the Claimant, incorporated various companies to directly compete with the Claimant. The Respondent also took up directorship of various companies which he used fraudulently to trade with the Claimant.

9. The particulars of breach were set out as follows:

a) Becoming a director of a limited liability company known as Housing Solutions International Limited during the subsistence of his employment with the Claimant contrary to the express terms of the contract of employment;

b) Becoming a director of a limited liability company known as Silver Taltal Construction Limited which carried out the same business as the Claimant;

c) Using his position as the Claimant's Finance Manager to procure a sub-contract for Silver Taltal Construction Limited with the Claimant without disclosure that he was a director and a beneficial owner of the said company;

d) Using the Claimant's trade secrets and confidential information acquired in the course of his employment to set up and/or support other companies to either trade or compete with the Claimant;

e) Dishonestly using his position to obtain financial gain from payments made by him to outside companies of which he was a beneficiary without disclosing his interest;

f) Using his work permit and resident permit obtained for him by the Claimant unlawfully, by doing other business than those stated in his work permit. By this he exposed the Claimant to unknowingly breaching the law and Kenyan Immigration Regulations;

g) Threatening the Claimant's employees by making false and malicious allegations against them thereby causing alarm, fear and despondency among the staff of the Claimant;

h) Threatening to disclose confidential information and trade secrets to third parties;

i) Threatening to make false allegations against the Claimant to government bodies with whom the Claimant deals in the course of its work with a view to tarnishing the Claimant's reputation.

10. As a result, the Claimant terminated the Respondent's employment effective 13th June 2012. According to the Claimant, the said termination was fair and justifiable.

11. The Claimant further states that in breach of his employment contract, the Respondent suddenly deserted duty a month before expiry of his contract and traveled to Israel at the Claimant's expense which was not authorised. The Claimant goes on to state that the Respondent did not hand over his office, equipment and information used in the course of his work. The Claimant was apprehensive that the Respondent may have carried with him confidential information and trade secrets.

12. The Claimant avers that following the termination of his employment, the Respondent had resorted to making false and malicious allegations against the Claimant with the aim of tarnishing the Claimant's business reputation. The Respondent was also making baseless claims for USD 635,000 and threatening to disclose the Claimant's trade practices and other confidential information about the Claimant's business to competitors and other third parties.

13. The Respondent had also threatened to damage the Claimant's business reputation by spreading falsehoods about the Claimant to some of the Kenyan Government institutions with whom the Claimant was directly involved; including the Kenya National Highways Authority, Kenya Revenue Authority and Ministry for Roads.

14. The Claimant claims the following:

a) A permanent injunction restraining the Respondent from by himself, his agents, servants, employees or otherwise howsoever from harassing the Claimant's employees, disclosing the Claimant's trade secrets or confidential information, causing to be published and/or publishing disparaging materials about the Claimant, attempting to extort money from the Claimant, disparaging the Claimant's reputation by making false claims against the Claimant to the various entities with whom the Claimant carries on business; including but not limited to the Kenya National Highways Authority, the Kenya Revenue Authority and the Ministry of Roads or in any manner whatsoever pursuing any conduct designed to undermine the Claimant's business activities and interests

b) Damages

c) Account for profits

d) Costs and interest

15. In an amended Memorandum of Claim filed in Court on 11th February 2013, the Claimant claims special damages in the sum of Kshs. 83,927,590 made up of the following:

a) Taxes paid on behalf of the Respondent.....Kshs. 5,346,090.00

b) Withholding taxes for 6 years.....Kshs.7,200,000.00

c) Refund of 50% salary for working half time being Director of HSI Limited from July 2010 to August 2011.....Kshs.5,160,000.00

d) Refund of salary for working only 1/3rd of the time being director of HSI and Silver Taltal Holdings from August 2011 to August 2012.....Kshs.6,914,400.00

e) Refund of expenses paid to Immigration for residence permit on behalf of the Respondent when was a director of other companies.....Kshs.300,000.00

f) Refund of house rent paid on behalf of the Respondent when he was a director of other companies.....Kshs.1,544,000.00

- g) Refund of car hire paid on behalf of the Respondent when he was a director of other companies.....Kshs.7,020,000.00
- h) Refund of cost of air tickets paid on behalf of the Respondent when he was a director of other companies.....Kshs.442,700.00
- i) Compensation for breach of contract and breach of trust.....Kshs.50,000,000.00

The Respondent's Case

16. In his Memorandum of Reply and Counterclaim filed on 11th December 2012, the Respondent states that he was employed by the Claimant on 20th August 2006 in the position of Chief Accountant. He was issued with an Employment Agreement No. 2512 dated 20th August 2006. He was appointed to the position of Finance Manager on 20th August 2008.

17. The Respondent denies that he was among the two senior most employees or a trustee of the Claimant. He disputes Clause 2 of his contract of employment as quoted by the Claimant stating that the said clause had been altered with additional emphasis incorporated to mislead the Court to the Respondent's prejudice. The Respondent denies that he owed the Claimant a fiduciary duty and a duty of fidelity. He states that he only owed the Claimant a contractual duty which comprises a duty of candor, good faith and fair dealing.

18. In this regard, he states the following:

- a) That at all material times he acted in good faith and in the best interest of the Claimant;
- b) That at all material times he acted with utmost honesty and integrity and made all relevant disclosures to the Claimant;
- c) That throughout his employment with the Claimant he devoted all his skills, attention, competency and time exclusively to the Claimant's work as provided in his employment contract;
- d) That throughout his employment with the Claimant, he did not compete with the Claimant;
- e) That he had not used any information to the detriment of the Claimant.

19. In reply to the allegation that he had incorporated outside companies, the Respondent states that there was no provision in his employment contract that prohibited him from incorporating companies either by himself or with others.

20. He admits that he was a minority shareholder in Housing Solutions International Limited, a fact he had disclosed to the Claimant's Branch Manager. He adds that he was neither involved in the daily operations of the said company nor, to the best of his knowledge, did the aforesaid company have any business dealings with the Claimant.

21. The Respondent also admits that he was a minority shareholder at Silver Taltal Holdings Limited but adds that he was not involved in the daily operations of this company nor, to the best of his knowledge, had the company had any business dealing with the Claimant during the Respondent's employment with the Claimant.

22. The Respondent clarifies that he resigned as a shareholder of Silver Taltal Holdings Limited on 30th September 2011, when he was notified of negotiations between the Claimant's Managing Director and Silver Taltal Construction Limited Managing Director to avoid a conflict of interest situation. At the time Silver Taltal Construction Limited was incorporated on 30th September 2011, the Respondent had resigned as a shareholder of Silver Taltal Holding Limited. He was not a director of Silver Taltal Construction Company Limited.

23. The Respondent denies any knowledge and involvement in negotiations between the Claimant and Silver Taltal Construction Limited. He also denies using his position as Finance Manager to procure any contract or sub-contract between Silver Taltal Construction Limited and the Claimant. He clarifies that any business negotiations were undertaken between the Claimant's Branch Manager, Alexander Yashish and the Managing Director of Silver Taltal Construction Limited, Manachem Yaniv.

24. The Respondent states that payments made to Silver Taltal Construction Limited were exclusively for works done and sub-contracted by the Claimant to Silver Taltal Construction Limited which were supported by certificates issued by the Quantity Surveyor and approved by the Claimant's Project Manager and Branch Manager. He denies having used any trade secrets and/or confidential information to set up or support any company to either trade or compete with the Claimant. He further denies any violation of his work permit, Immigration Regulations or any employment agreement in force between him and the Claimant.

25. The Respondent pleads that the termination of his employment was premature, devoid of any reason and was unlawful. He denies abandoning his employment with the Claimant stating that he continued discharging his duties under the supervision of the Branch Manager. He clarifies that his travel out of the country was routine and that it was with the full knowledge of the Claimant's Branch Manager who approved his leave and payment of a one way flight ticket to Israel as provided in his employment contract.

26. The Respondent goes on to state that despite having been issued with a termination letter, he continued working for the Claimant and was paid his salary for June and July 2012. This was in accordance with the handover schedule handed to him by the Claimant's Branch Manager. He worked until 30th August 2012 when he handed over all the Claimant's equipments, property and documents in his possession. He adds that he does not hold any trade secrets or confidential information belonging to the Claimant.

27. After handing over, the Respondent sought payment of his salary for August 2012 plus four (4) weeks' salary in lieu of notice but the Claimant declined to pay.

29. The Respondent claims that his net salary in US Dollars was always paid 30 days late. He was not certain whether PAYE tax was paid to the Government of Kenya. He further states that he was also entitled to a salary in Kenya Shillings which was to be paid cumulatively at the end of his contract but was yet to be paid.

The Counterclaim

30. In his Memorandum of Counterclaim dated 11th December 2012 and filed in Court on even date, the Claimant in the Counterclaim has sued SBI International Holdings AG (Kenya) alongside Alexander Yashish, as the Managing Director of the 1st Respondent's Kenyan Branch Office and Pauluch Rony, as the Vice-President and Managing Director of the 1st Respondent's Head Office in Switzerland.

31. The Claimant states that he was employed by the Respondent on 20th August 2006 in the position of Chief Accountant. He was issued with an Employment Agreement No. 2512 dated 20th August 2006 which was renewable bi-annually.

32. In order to facilitate effective execution of the Claimant's duties, the 1st and 3rd Respondents donated a Power of Attorney dated 23rd January 2009 to the Claimant and the 2nd Respondent. The Claimant was issued with another Power of Attorney also dated 23rd January 2009 vide which he was appointed as legal representative of Reynolds Construction Company (NIG) Limited, a sister company of the 1st Respondent.

33. The Claimant avers that there was an oral agreement between himself on the one hand and the 2nd and 3rd Respondents on the other that the Claimant's employment was to terminate at the same time as the Power of Attorney on 31st December 2013. He further states that it was mutually agreed between him

and the 1st Respondent that from August 2006 to August 2008 he was to receive a net monthly salary of USD 7,213 payable to a bank account designated by him in Europe. The Claimant adds that it was a mutual agreement between him and the 1st Respondent that from August 2006 to August 2008 he was entitled to an estimated net local salary of Kshs. 154,318 payable monthly in Kenya.

34. The Claimant pleads that between August 2006 and August 2008 the Respondents only paid him his net monthly salary in Dollars promising him that the net salary in Kenya Shillings would be paid as a lump sum at the end of his contract.

35. On 20th August 2008, the Claimant was promoted to the position of Finance Manager and was issued with an Employment Agreement No. 2890 dated 20th August 2008. It is the Claimant's case that under this contract, he was entitled to a net monthly salary of USD 9,750 and a gross monthly local salary of Kshs. 383,000. The Claimant avers that his monthly USD salary was paid late and the salary in Kenya Shillings was not paid and remained outstanding. Upon inquiry about his salary in Kenya Shillings, the Claimant was notified that it would be paid at the end of the contractual period of employment.

36. On 20th August 2010, the Claimant was issued with a new Employment Agreement No. 3251 which entitled him to a monthly salary of USD 10,000. He states that under this contract, he was also entitled to a gross monthly local salary of Kshs. 412,000. The Claimant further states that his USD salary was paid late and his local salary was not paid and remains outstanding.

37. Under his successive employment contracts, the Claimant was paid one month's salary in USD as annual bonus. He was also entitled to annual leave and leave allowance payable quarterly.

38. With regard to the termination of his employment, the Claimant states that he met the 2nd Respondent who informed him of the termination but no reason was assigned for the said termination. In June 2012, the Claimant was issued with a termination notice dated 13th June 2012 indicating that the Claimant's contract would be terminated with effect from 31st August 2012 and that he was entitled to four (4) weeks' salary as notice for the termination. It is the Claimant's case that prior to the termination of his employment he was not given an opportunity to be heard. By the time of termination, the Claimant had worked for the Respondents for six (6) years.

39. The Claimant's claim under the counterclaim is as follows:

- a) A declaration that the termination of his employment was unfair and unlawful
- b) 24 months (August 2006-August 2008) unpaid local salary in Kshs net calculated at Kshs.154,318x24 months.....Kshs.3,708,632.00
- c) 24 months (August 2008-August 2010) unpaid local salary in Kshs net calculated at Kshs.383,000x24 months.....Kshs.6,764,856.00
- d) 24 months (August 2010-August 2012) unpaid local salary in Kshs net calculated at Kshs. 354,318x24 months.....Kshs.8,503,632.00
- e) Unpaid salary for August and September 2012 conversion from USD 20,769XKshs.85.....Kshs.1,765,365.00
- f) Accrued and unpaid (12) leave days at end of contract conversion from net USD 4,178XKshs. 85.....Kshs.355,130.00
- g) End of contract/repatriation allowance conversion from USD 500XKshs. 85.....Kshs.42,500.00
- h) Severance pay at one month's salary for each completed year in local currency calculated at gross Kshs.497,500x6 years..Kshs.2,985,000.00

- i) Severance pay at one month's salary for each completed year for USD salary calculated at gross USD 14,286xKshs.85X6 years.....Kshs.7,285,860.00
- j) Annual bonus for 2012 computed on pro-rata basis calculated at USD 10,000xKshs. 85X9/12.....Kshs.637,500.00
- k) Salary for the remainder of the contract period to 31st December 2013
calculated at net USD 10,000xkshs.85X15 months.....Kshs.12,750,000.00
- l) Salary for the remainder of the contract period to 31st December 2013
calculated at net Kshs.354,318x15 months.....Kshs.5,314,770.00
- m) Damages for delay in payment of salary being 12 months' salary calculated at USD 10,000xkshs. 85X 12 months....Kshs.10,200,000.00
- n) An order directing the Respondent to issue him with a Certificate of Service
- o) An order directing the Respondent to obtain and issue him with a tax compliance certificate for the 6 years of his employment
- p) An order directing the Respondent to remit to Kenya Revenue Authority un-remitted PAYE deducted from the Claimant's USD salary throughout the 6 years of his employment
- q) Costs and interest

Findings and Determination

40. From the pleadings and evidence adduced before the Court, I have distilled the following issues for determination:

- a) Whether SBI International Holdings AG (Kenya) has made out a case for a permanent injunction against Amos Hadar;
- b) Whether Amos Hadar breached his duty to SBI International Holdings AG (Kenya) under his contract of employment;
- c) Whether the termination of the employment of Amos Hadar was lawful and fair;
- d) Amos Hadar's salary and PAYE tax obligations;
- e) Whether SBI International Holdings AG (Kenya) has made out a case for damages, special damages and an account for profits;
- f) Whether Amos Hadar is entitled to leave pay, repatriation allowance, severance pay and annual bonus.

The Injunction

41. SBI International Holdings AG (Kenya) seeks a permanent injunction restraining Amos Hadar from disclosing what it refers to as trade secrets, confidential and disparaging information. On his part, Amos Hadar opposes this prayer on the basis that the information which he is to be barred from disclosing has not been specified and that in any case there is no confidentiality clause in his contract of employment.

42. As parties to an employment relationship, both the employer and the employee will of necessity have access to confidential information about each other. For the employee, the employer will have information that should not be disclosed to any other person including the immediate family of the employee. For the employer, the employee will have access to information that should not be disclosed to third parties including clients and competitors.

43. In the normal course of employment, the employee will get to learn their employer's confidential information and as long as the information is proprietary in nature and is revealed in confidence, then the employee has a common law duty not to reveal the information. This duty applies irrespective of whether there exists a confidentiality agreement or clause in the employee's employment contract and generally extends beyond the life of the employment relationship.

44. The question must however be asked as what constitutes confidential information. In ***Advtech Resourcing (Pty) Ltd v Kuhn 2007(4) ALL SA 1386, C para [51]*** the Court held that for information to qualify as confidential the following requirements must be fulfilled:

- a) The information must involve and be capable of application in trade and industry; that is: it must be useful;
- b) The information must not be public knowledge and public property, that is objectively determined it must be known to a restricted number of people or to a closed circle;
- c) The information objectively determined must be of economic value to the person seeking to protect it.

45. More importantly, public policy dictates that confidentiality agreements cannot be invoked to bar disclosure of illegal or immoral activity that would be injurious to society. It follows therefore that all sources of trade secret law exclude from protection information concerning wrongdoing. In employment law, an employer cannot use trade secret laws or confidentiality agreements to conceal wrongdoing. Further, confidentiality agreements are not meant to hide evidence from the Court. (see ***William Mitchell Law Review***)

46. From the above analysis, the Court has arrived at the following conclusions regarding the duty of confidentiality imposed upon an employee:

- a) The protected information must concern specific skills and not general information in the public domain;
- b) Information relating to illegal activities undertaken by the employer either independently or in cahoots with the employee does not qualify for protection under the duty of confidentiality. On the contrary in such cases, the employee is under a duty of disclosure;
- c) The duty of confidentiality is not vitiated but the absence of a written confidentiality agreement or clause;
- d) The protected information must be specific and of proprietary value because not every piece of information that is labeled confidential is in fact confidential.

47. In its prayers, the Claimant seeks a permanent injunction restraining the Respondent from disclosing what is referred to as 'trade secrets or confidential information'. In the course of the trial, the Respondent's first witness, Alexander Yashish told the Court that the information over which protection was sought related to negotiations with clients, financial statements and pricing policy. He could not however identify any particular trade secret.

48. In my view, the description of the information which is the subject of the Claimant's prayer for a permanent injunction against the Respondent generated more heat than light and the Court was at a loss as

how to gag the Respondent.

49. In adjudicating a dispute such as the one before me, the Court must be careful not to issue orders whose effect is to leave an employee or former employee walking on egg shells wondering what information about his employer or former employer he can or cannot disclose.

50. In the instant case, no particular trade secret or confidential information was placed before the Court on account of the restraining orders sought against the Respondent. There was also allusion to information regarding possible flouting of tax laws by both the Claimant and the Respondent which caught the Court's attention. For the foregoing reasons, I find the Claimant's plea for a permanent injunction not merited and therefore decline to grant it. Consequently, the interim orders granted on 5th December 2012 are hereby set aside.

Amos Hadar's Duty to SBI International Holdings AG (Kenya)

51. The Claimant states that the Respondent breached his duty under the contract of employment by getting involved in companies that were in competition with the Claimant and using his position to further the interests of these companies.

52. The first complaint on this score was that contrary to the terms of his employment contract, the Respondent took shares in and became a director of Housing Solutions International Limited.

53. Secondly, the Claimant was accused of taking shares and becoming a director of Silver Taltal Holdings Limited and Silver Taltal Construction Limited. The Claimant stated that the Respondent influenced the awarding of a sub-contract to Silver Taltal Construction Limited without disclosing his interest in the company.

54. With regard to his involvement in Housing Solutions Limited, the Respondent stated that he took up minority shareholding to assist his friend, Steven Gary Stav to comply with company incorporation requirements. He told the Court that he had secured the permission of Alexander Yashish and denied engaging in any active business of the company. At any rate, the issue had been discussed and resolved between himself and Stav on the one hand and Yashish and Arbit on the other. According to the Respondent, this issue had been laid to rest in June 2011.

55. Regarding Silver Taltal Holdings Limited and Silver Taltal Construction Limited, the Respondent testified that he took up minority shareholding in Silver Taltal Holdings Limited to assist his son in law, Andres Arie Ritcher to comply with company incorporation requirements. Subsequently, Silver Taltal Holdings Limited came together with Bronze Taltal Holdings Limited to set up Silver Taltal Construction Limited on a 50-50 shareholding.

56. The Respondent signed the incorporation documents for Silver Taltal Construction Limited as a shareholder and director of Silver Taltal Holdings Limited. Manachem Yaniv in his capacity as Managing Director for Silver Taltal Construction Limited signed a sub-contract with the Respondent on 21st September 2011.

57. Strangely, by the time the sub-contract was signed on 21st September 2011, Silver Taltal Construction Limited was not yet registered. The incorporation drama was completed by the Claimant's letter dated 30th September 2011, indicating his desire to resign as a director and shareholder of Silver Taltal Holdings Limited. For some unexplained reason, the resignation was never formalised. Silver Taltal Construction Limited was also awarded a sub-contract by the Claimant's sister company, Reynolds Construction Company (NIG) Ltd.

58. In demonstration of the Respondent's breach of duty, the Claimant made reference to the employment contract. Clause 2.2 of the contract provides as follows:

“The employee shall devote all his time, energy and ability to the execution of his work, and he

shall not, directly or indirectly, engage in any other or additional work or business whatsoever in the Country of Service or elsewhere, during the term of his employment.”

59. In his defence against the accusation on breach of duty, the Respondent states that he was not involved in the day to day management of the companies in issue. In specific reference to his involvement in Housing Solutions International Limited, he claims to have had the blessing of his immediate supervisor, Alexander Yashish. Additionally, the Claimant's lawyer assisted in the incorporation of Silver Taltal Holdings Limited again with the approval of Yashish. Further, equipment imported by Silver Taltal Construction Limited was cleared by the Claimant's Clearing Agents.

60. Section 9 of the Employment Act, 2007 requires an employment contract spanning a period of three months or more to be in writing. By time he left the Claimant's employment, the Respondent had been issued with three employment contracts of two years each. A reading of these contracts which are fairly detailed reveals the intention of the parties to reduce the terms of engagement in writing.

61. That said, Clause 2.2 of the contract clearly prohibited the Respondent from engaging in any other work or business during his employment with the Claimant. To my mind, this would include participation at whatever level in a company in the country of service. This limitation was significant in view of the fact that the Respondent's work in Kenya was on the basis of a specific work permit. Further, the argument that the Respondent was required to offer service to the Claimant's sister company, Reynolds Construction Company did not in any way diminish the Respondent's duty to the Claimant.

62. With respect to the Respondent's assertion that he had the tacit approval of his bosses to participate in the incorporation of Housing Solutions International Limited, the only thing to say is that these bosses had no authority to allow the Respondent to do what was outlawed by his contract of employment. Being a fairly senior employee of the Claimant and in view of his many years experience as a professional, this would be information well within the Respondent's knowledge.

63. The Court therefore finds that the Respondent knowingly breached an express term of his employment contract.

The Termination of the Respondent's Employment

64. For coherence, I will now deal with the termination of the Respondent's employment which is the basis of some of the prayers in his counterclaim. In his evidence before the Court and in the final submissions filed on his behalf, the Respondent pursued a claim for unfair and unlawful termination of employment.

65. On 13th June 2012, the Claimant wrote to the Respondent as follows:

“Following our meetings and conversations in relation to the above matter, I hereby inform you about the Company's decision concerning the termination of your employment as of 31/08/2012. (Date of termination)

As mutually agreed in our meeting you will continue to be employed by the Company until the Date of termination.

Accordance (sic) to the instructions of clause 10.2.2 to (sic) the Employment Agreement you will be entitled to a payment of four (4) weeks salary as of the Date of termination.

On behalf of the Company I thank you for your service and wish you all the best in the future.

Sincerely,

A Yashish

Branch Manager

PS: You are required to hand over all issues that are under your responsibility in accordance to (sic) time table attached herewith.”

66. From this letter whose contents were not challenged by the Respondent, it would appear that the Respondent's separation from the Claimant's employment was the subject of previous discussions between both parties. This is buttressed by an electronic mail sent by the Respondent to Yashish on 8th May 2012 in the following terms:

“This mail is sent following our verbal agreement, meeting taking place in your office regarding my employment terms.

I have decided to send the details of the agreement to you by e-mail since you are unwilling to sign on official letter.

Find below our agreement:

Pursuant to Sub-clause 10.2.2 of the our (sic) agreement, SBI hereby terminate your services on the following conditions;

- 1. You shall work up to and until 30th September 2012 (both dates inclusive).*
- 2. The said period (up to 30th September 2012) shall serve as both the handing over period to your successor and shall also include your contractual one month's notice.*
- 3. You shall be paid your full monthly salary up to 30th September 2012.*

Kindly acknowledge receipt.

Amos Hadar”

67. The Claimant states that although there were sufficient grounds for summary dismissal, it was agreed that the Respondent would be allowed to serve until the end of his then running contract.

68. The expiry date of this contract was however in contention. On the face of it, the contract was to run from 20th August 2010 up to 20th August 2012. This was the position held by the Claimant. The Respondent however took a different trajectory. He stated that in view of a Power of Attorney dated 23rd January 2009 issued to him together with Alexander Yashish, then his contract was extended to the expiry date of the Power of Attorney; being 31st December 2013.

69. ***Blacks Law Dictionary (Ninth Edition)*** defines a Power of Attorney as:

“An instrument granting someone authority to act as agent or attorney-in-fact for the grantor.”

70. The Power of Attorney granted to the Respondent together with Alexander Yashish donated the following powers:

“1. To be our lawful Attorneys/Representatives and to represent SBI in The Republic of Kenya in all matters concerning the submission of bids, prequalification and/or tenders, to execute, sign and perfect agreements, documents, instruments, conduct any negotiations, transactions including banking transactions, that are incidental to the running of the Company and to do all deeds and acts within the aforesaid Republic in the name and on behalf of SBI.

2. To do and perform all such acts and things that are incidental to the above mentioned objectives or as shall be deemed necessary for the achievement of the same.

Giving and granting the said attorney(s) full power and authority to do and perform all and every act and thing whatsoever necessary to be done in and about the premises set out herein as fully, to all intents and purposes, as might or could be done if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that said attorney(s) shall lawfully do or cause to be done by virtue hereof.”

71. A Power of Attorney is an instrument employed by bodies corporate for transaction of their business. Apart from the obligation on the Attorney to act lawfully and in the best interest of the Grantor, I do not think a Power of Attorney imports any special terms into the employment contract of an employee.

72. At any rate, from the details contained in the Power of Attorney granted to the Respondent alongside Alexander Yashish, the Court found no intention of importing any condition in the Power of Attorney into the Respondent's terms of employment. The Court therefore finds the Respondent's attempt to link the expiry date of his contract with that stated in the Power of Attorney to be without any basis in law or fact. The expiry date of the Respondent's employment contract was therefore 20th August 2012 as provided in the contract itself.

73. Back to the claim for unlawful and unfair termination of employment. Granted that the Respondent was allowed to serve the full term of his contract and deducing from the electronic mail dated 8th May 2012 and the termination letter dated 13th June 2012 that there were prior discussions and agreements on the Respondent's departure, I do not find any ground for a claim for unlawful and unfair termination.

74. The Respondent claims salary for the months of August and September 2012 which the Claimant refutes on the explanation that the Claimant deserted duty from July 2012.

75. Section 44(4) of the Employment Act, 2007 provides that desertion of duty is a valid ground for summary dismissal. However, like all other grounds of misconduct, an employer who relies on this ground must demonstrate its existence.

76. There is now firm jurisprudence from this Court that an assertion by an employer that an employee has deserted duty must be evidenced by a notice to show cause why employment should not be terminated on this ground (see **Abuodha J in Geoffrey Muringi Mwangi Vs Rwaken Investments Limited (Cause No. 1658 of 2012)**). In the absence of proof of any action taken by the Claimant to remedy the Respondent's desertion of duty the Court finds the assertion of desertion unsupported and therefore unsustainable.

77. Moreover, there was evidence that Alexander Yashish who was the Respondent's immediate supervisor signed the Respondent's time sheets up to the month of September 2012. The Court found Yashish's explanation that he signed the time sheets in advance on some understanding between himself and the Respondent unacceptable. In addition, there was no evidence that Yashish was reprimanded for irregularly committing the Claimant. The Court therefore finds that the Claimant remained in the Respondent's employment until 30th September 2012.

78. The effect of my findings under this head is that the Respondent's claim for unlawful and unfair termination as well as for salary for remainder of the contract period fail and are dismissed. The claim for damages for delay in payment of salary also fails and is dismissed. The claim for salary for August and September 2012 succeeds and is allowed.

The Respondent's Salary and PAYE Tax Obligations

79. The Respondent's salary was also a matter in contention between the parties. According to the Respondent he was entitled two salaries; one in US Dollars paid to his bank account abroad and the other in Kenya Shillings to be paid at the end of the contract period.

80. The Claimant on the other hand states that the entire salary due to the Respondent was as contained

in his contract of employment. Clauses 3.2 and 3.3 of the subject contract provide as follows:

“3.2 The employee shall not be entitled to any other, or any additional payment from the Company of any kind whatsoever, over and above his monthly salary, specified in Appendix 1.

3. The monthly salary constitutes full and final consideration for each full calendar month of work, in which the Employee shall work for six days a week, including all overtime which the Employee will work if so instructed by the Company. The Employee shall not be entitled to any additional or other consideration in respect of work performed, over and above normal working hours, and the Employee hereby agrees and undertakes to work during overtime hours beyond the normal working hours, during weekends and holidays without any additional consideration, if and to the extent he is so instructed by the Company. The Employee confirms that when fixing the monthly salary, regard was given to such eventual overtime work and full consideration for same is included in the monthly salary.”

81. The Respondent told the Court that during negotiations preceding his employment by the Claimant, he received a verbal promise from Benjamin Arbit that over and above his monthly salary in US Dollars, he would also be entitled to a monthly salary in Kenya Shillings. To advance his point, the Respondent took the Court through a number of Kenya Revenue Authority tax deduction cards (P9A) showing salary figures and PAYE tax charged thereon. He also produced payroll summaries showing salary figures and PAYE tax charged on account of other expatriate employees working for the Claimant.

82. The Respondent's witness, Christopher Makokha, a former Payroll Accountant at the Claimant Company gave a detailed account of the procedure for payment of taxes on account of expatriate employees working for the Claimant. Makokha told the Court that it was his role to work out PAYE taxes payable to KRA on account of expatriate employees based on summaries prepared by the Chief Accountant.

83. It was common cause that some PAYE taxes were paid by the Claimant on account of its expatriate employees. What was not clear is what happened to the net salaries declared on the payroll summaries and in the tax deduction cards. There was no evidence that these salaries were paid to the expatriate employees and according to the Claimant there was no such a thing as local salaries payable to expatriate employees.

84. Pressed by the Court to explain the status of these figures, the Claimant's witnesses were evasive. On his part, the Respondent maintained that these figures were actual salaries payable to the individual expatriate employees upon expiry of their tour of duty. This assertion was however not supported by any documentary evidence.

85. Parties who come to Court must be ready and willing to provide the Court with every bit of information that will aid the cause of justice. Sadly, both the Claimant and the Respondent failed in their duty in this regard. While the Claimant deliberately concealed information, the Respondent who was part of top management at the Claimant Company set out to use the gap created by the Claimant to mislead the Court and the Court saw through all that.

86. When the Court sits, it does not just concern itself with the prayers sought by the parties; it scans the entire spectrum of the circumstances leading to the dispute before it. The Court always maintains an eagle's eye view and does not wear blinkers.

87. Having heard both parties on the issue of local currency salary figures for expatriate employees on the basis of which PAYE tax was deducted and paid to the Kenya Revenue Authority, the Court formed the opinion that the Claimant, working in cahoots with the Respondent, was engaged in manipulation of salary figures with the aim of denying the Kenya Revenue Authority and by extension the Kenyan public much needed taxes. The irony of it is that the Claimant was in fact trading with public bodies who themselves are custodians of public funds. That said, appropriate orders will be made at the end of this award.

88. Related to this, is the Claimant's claim for refund of taxes paid on behalf of the Respondent and the Respondent's counterclaim for a tax compliance certificate for the last six years.

89. Alexander Ochieng Aineah, an Assistant Manager with Kenya Revenue Authority appearing as an expert witness on invitation by the Court, testified that under the Income Tax Act, there is no distinction on payment of taxes by expatriate and local employees. Under Sections 3 and 5 of the Act, the Kenya Revenue Authority is mandated to levy tax on employment income while under Section 37 employers are obligated to deduct and remit PAYE tax. Aineah clarified that all persons resident in Kenya are liable to pay tax on income earned within the Country.

90. On assignment of duty, the witness told the Court that prior to 2006 the responsibility to remit tax lay with the employee. However the responsibility to collect and remit tax had since shifted to the employer. With specific reference to expatriate employees, the employer's responsibility is to aggregate the salary paid overseas and locally for purposes of charging tax for remittance to the Kenya Revenue Authority. It was however the personal responsibility of the employee to obtain a tax clearance certificate.

91. Aineah testified that certain expatriates were exempted from income tax either fully or partially by way of rebate. In all such cases, there are specific agreements between the Government of Kenya and the Government of the expatriate's home country. Further under Section 41 of the Act there is provision for double taxation relief where tax paid in the expatriate's home country is treated as a tax credit in Kenya. This would be evidenced by a double taxation agreement. Where double taxation agreements exist the expatriate employee must pay tax in their country before accessing relief in Kenya.

92. In cases where there is no double taxation agreement, the employee would pay tax in both countries. Aineah emphasised that it was the duty of the employer to deduct and remit tax to the Kenya Revenue Authority and if an employer agreed to pay tax on behalf of an employee, the tax relief was deemed as a taxable benefit. This arrangement would ordinarily be incorporated into the employee's employment contract.

93. From the expert testimony of Alexander Ochieng Aineah, it emerges that it is the primary duty of the employer to deduct and remit taxes on account of all its employees including expatriates. It is also clear that in the absence of specific agreements granting tax exemption or relief, expatriate employees working in Kenya are subject to pay full tax. No such agreement was produced before the Court and it follows therefore that the Respondent and all the other expatriates working for the Claimant ought to have paid tax on all their income whether paid locally or abroad.

94. Moshe Effling, the Chief Finance Officer for SBI Holdings appeared to have no clue as to the Claimant's tax obligations in Kenya. On the other hand, the Respondent who was the Claimant's Head of Finance in Kenya appears not to have raised any issue with regard to compliance with tax regulations in Kenya. An examination of the Respondent's payslips produced before the Court shows that the Respondent was paid a gross monthly salary in US Dollars and no tax was charged on this account.

95. The Claimant's position is that the Respondent was liable for his payment of his own tax and on this they rely on Clause 3.4 of the Claimant's employment which states as follows:

“It is hereby declared and agreed that should the employee be obliged by the tax authorities of the country of which he is a citizen or resident, to pay any taxes or other compulsory payment with respect to the amount paid to him by the company aforesaid in Clause 3.1, he shall bear by himself at his own expense, such taxes and/or compulsory payments, without being entitled to receive any refund from the company of the taxes and/or compulsory payments imposed on him as aforesaid.”

96. The only thing I will say about this clause is that it flies right in the face of Kenyan law which puts the obligation to deduct and remit taxes on the employer. By this clause therefore, the Claimant abdicated its responsibility.

97. I need to add however that the Respondent was not just any employee; he was second in command

in the Claimant's Branch in Kenya complete with a Power of Attorney and was in charge of the Respondent's financial operations. The Court was therefore puzzled as to why he did not raise this fundamental breach of the Respondent's tax obligations with his bosses either locally or abroad.

98. In the absence of any explanation, the Court arrived at the conclusion that the Respondent was an active player in and a beneficiary of the breach. He cannot therefore turn around and demand a tax compliance certificate from the Claimant. Similarly, the Claimant cannot turn around and demand refund of tax paid on account of the Respondent's local salary whose basis was unclear even to the Claimant as an employer. The Claimant's claim for refund of taxes paid on behalf of the Respondent and the Respondent's counterclaim for a tax compliance certificate for the last six years therefore fail and are dismissed.

The Claimant's Claim for Damages, Special Damages and Account for Profits

99. In its amended Memorandum of Claim the Claimant lays a claim for damages and a litany of special damages ranging from refund of taxes to compensation for breach of trust. I have already dealt with the issue of refund of PAYE and find no basis for the claim for withholding taxes since the Respondent was an employee and not a consultant. With regard to the claims for partial salary on account of the Respondent working for other companies, the Court did not find any basis for the figures claimed.

100. Similarly, no formula for the figures attached to the claims for refund of expenses relating to the Respondent's work permit, house rent, car hire and air tickets was provided. As held by the Court in *Bonham Carter v Hyde Park Hotel (1948) 64 T.L.R 177* parties who bring actions for damages must prove them. It is not enough to throw figures at the Court. In my estimation, the Claimant did not prove its claim for special damages which is therefore dismissed.

101. The Claimant further claimed that the Respondent negotiated inflated insurance premium rates thus occasioning loss. In his defence, the Respondent states that his choice of insurance service provider was informed by the ability to execute a customs bond. In my view, in sourcing for an insurance service provider, cost is not the only issue. Ability to deliver is also an important consideration and there was no evidence that overall, the Respondent flouted any procurement procedures. The Court therefore found no basis for this claim which therefore fails and is dismissed. The claims for breach of contract and trust and account for profits were also not proved and are dismissed.

The Respondent's Counterclaim for Leave Pay, Repatriation Allowance, Severance Pay and Annual Bonus

102. The Respondent claims 12 days' leave pay and the Claimant did not produce any leave records to counter this claim which therefore succeeds and is allowed. The claim for repatriation allowance which is derived from the Respondent's contract of employment is also allowed.

103. The Court however found no basis for the claim for severance pay which is payable in cases of declaration of redundancy under Section 40 of the Employment Act, 2007. The claim for annual bonus which was based on performance of both the Branch and the individual employee was not supported and is also dismissed.

104. The Court took notice that the Respondent's counterclaim was brought against the Claimant Company together with Alexander Yashish, as the Managing Director of the 1st Respondent's Kenyan Branch Office and Pauluch Rony, as the Vice-President and Managing Director of the 1st Respondent's Head Office in Switzerland.

105. However, no specific wrong was raised that could be assigned to either Yashish or Rony in their personal capacities. All their actions were undertaken in their official capacities and the Court therefore found no legal basis for their joinder in these proceedings. The result is that the counterclaim as against the 2nd and 3rd Respondents fails and is dismissed.

Final Orders

106. Arising from the foregoing findings and determination I make the following orders:

- a) The interim orders granted on 5th December 2012 are hereby set aside;
- b) The Claimant shall pay to the Respondent the sum of Kshs.1,700,000 being salary and living expenses for August and September 2012;
- c) The Claimant shall pay to the Respondent the sum of Kshs.340,000 being 12 days' leave pay;
- d) The Claimant shall pay to the Respondent the sum of Kshs. 42,500 being repatriation allowance;
- e) The Claimant is directed to release the Respondent's certificate of service;
- f) The Commissioner for Domestic Taxes is directed to make inquiry into and investigate the Claimant's payroll operations with a view to determining tax compliance on account of the Claimant's expatriate employees and to institute corrective measures including recovery of unpaid taxes and penalties thereon;
- g) All the money payable to the Respondent under this award is subject to income tax in the normal manner;
- h) The Deputy Registrar of this Court is directed to serve a copy of the entire award on the Commissioner for Domestic Taxes within the next seven (7) days from the date hereof;
- i) Each party will bear their own costs.

107. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF MAY 2015

LINNET NDOLO

JUDGE

Appearance:

Mr. Agwara for the Claimant

Mr. Odera for the Respondent