**THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS**

**In the name of His Highness Sheikh Mohammed Bin Rashid Al Maktoum, Ruler of Dubai**

**IN THE SMALL CLAIMS TRIBUNAL OF DIFC COURTS**
**BEFORE SCT JUDGE DELVIN SUMO**

BETWEEN

**LAMIS**

Claimant

and

**LUTHANI**

Defendant

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Hearing : **23 March 2022**
Judgment : **30 March 2022**

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**JUDGMENT OF SCT JUDGE DELVIN SUMO**

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**UPON** the Claim Form being filed on 11 February 2022

**AND UPON** a Hearing having been listed before SCT Judge Delvin Sumo on 23 March 2022 with the Claimant's representative and the Defendant in attendance

**AND UPON** considering all documents submitted on the Court file

**IT IS HEREBY ORDERED THAT:**

1. The Defendant shall pay the Claimant the sum of AED 372,514.97 (the "Amount").

2. The Defendant shall pay the Claimant the DIFC Courts' filing fee in the sum of AED 7,450.30.

3. In the event that the Defendant fails to comply with Paragraph 1 within 21 days from the date of this Order, interest at the rate of 9% per annum, pursuant to Practice Direction No 4 of 2017 (Interest on Judgments) will accrue on the Amount from the date of filing this Claim until the date of full payment.

4. There be no order as to costs.

Issued by:
Ayesha Bin Kalban
SCT Registrar
Date of Issue: 30 March 2022
At: 3pm

**THE REASONS**

**The Parties**

1. The Claimant is Lamis and, the representative office is located in DIFC, Dubai, UAE (hereafter "the Claimant").

2. The Defendant is Luthani, an individual who was employed at the Claimant company (hereafter "the Defendant").

**Background and the Preceding History**

3. The underlying dispute arises over alleged advance monthly payments paid to the Defendant by the Claimant as set out in the letter of amendment dated 5 May 2017 (the "Amendment Letter"). The Amendment Letter was issued to the terms of the employment contract entered into between the parties on 28 April 2016 (the "Employment Contract").

4. The Defendant was terminated by way of a letter dated 26 July 2021 with the termination date set out to be 12 August 2021 (the "Termination Date").

5. On 11 February 2022, the Claimant filed a claim in the DIFC Courts' Small Claims Tribunal (the "SCT") claiming the sum of USD 101,433.61 to be paid to the Claimant by the Defendant for the outstanding amount pursuant to the Amendment Letter.

6. The matter was called for a Consultation before SCT Judge Ayman Mahmoud Saey on 14 March 2022. Although both of the parties were in

attendance, they failed to reach a settlement.

7. In accordance with the rules and the procedures of the SCT, the matter was referred to me for determination, pursuant to a hearing held on 23 March 2022 (the "Hearing"). After considering all documents and evidence submitted on the Court file, I give my judgment below.

**The Claim**

8. The Claimant submits that the Defendant's termination was a result of the closure of the Claimant's office in the DIFC. The Claimant suffered financial difficulties and was placed into receivership. As a consequence, there was no longer a United Arab Emirates entity through which the Claimant could remain engaged as an employee and the Defendant's employment was terminated as part of the winding up process. Therefore, the Claimant submits that the Defendant's termination was necessary and valid.

9. The Claimant further submits that, by way of the Amendment Letter, it was agreed between the parties that the Claimant would provide the Defendant with advanced monthly payments on the Defendant's commission in the sum of USD 4,166.67 from April 2016 until January 2021 which totaled to USD 241,666.86 (the "Advance Commission Payment").

10. The Claimant further submits that as per the terms of the Amendment Letter, and as per the initial discussions between the Defendant and the Claimant, it was a clear condition that any amounts paid to the Defendant would be repayable to the Claimant should the Advance Commission Payment not subsequently be earned. The total earned commission by the Defendant is calculated by the Claimant to be in the sum of USD 69,909.99 (the "Earned Commission").

11. Therefore, the Claimant claims that, on the Termination Date, an outstanding balance of the Advance Commission Payment in the sum of USD 171,756.87 was owed to the Claimant, following the deduction of the Earned Commission.

12. The Claimant submits that, pursuant to the DIFC Employment law No. 2 of 2019 (the "DIFC Employment Law"), the Defendant, upon termination, was entitled to the sum of USD 70,323.25 for his end of service entitlements (the "End of Service Entitlements"). As per the terms of the Amendment Letter and Articles 20(1)(c) and 66(5) of the DIFC Employment Law, the Claimant Claims that it is entitled to deduct the End of Service Entitlements from any advances or overpayments made to the Defendant in excess of accrued entitlements that fall under the Defendant's Employment Contract. Articles 20(1)(c) and 66(5) of the DIFC Employment Law state the following:

> "Article 22 (1) (c):
> An Employer shall not deduct from an Employee's Remuneration or accept payment from an Employee, unless: the deduction or payment is a reimbursement for an overpayment of any Remuneration or expenses, or to recoup benefits utilised by an Employee in excess of their accrued entitlement under their Employment Contract.
>
> Article 66 (5):
> An Employer may deduct from a Gratuity Payment any amounts due and owing to the Employer by an Employee pursuant to the provisions of Articles 20 or 28(2)."

13. Accordingly, the Claimant deducted the End of Service Entitlements from balance of the Advance Commission Payment in the sum of USD 171,756.87 owed by the Defendant to the Claimant. On this basis, the Claimant claims that a balance of USD 101,433.61 of the Advance Commission Payment remains unpaid (the "Outstanding Amount").

14. Alternatively, the Claimant submits that the Defendant has breached Article 5 of the Employment Contract which relates to an employee's duty relating to non-solicitation and non-competition. The Claimant claims that the Defendant was found to be entering (or actively entering) into other business contracts while he was still employed with the Claimant. In support, the Claimant filed a copy of a draft business contract, and a related consultancy agreement. Therefore, the Claimant claims that this breach is a further cause for immediate repayment of the Advance Commission Payment as per the terms of the Amendment Letter.

15. In any event, the Claimant asserts that, as per the terms of the Amendment Letter, the Advance Commission Payment represents loan payments to which the Defendant is obliged to repay the Claimant in full. Therefore, the Claimant seeks payment of the Outstanding Amount in the sum of USD 101,433.61 which converts to AED 372,514.97.

**The Defence**

16. The Defendant, in short, objects to the Outstanding Amount and contends that the termination of the Defendant was *`unjust and illegal'*.

17. The Defendant submits that the termination of the Defendant was for reasons not attributed to the Defendant, however, these are due to the conduct of the Claimant. The Defendant alleges that the reason for the closure of the Claimant's office in DIFC was due to the liquidation of the parent company in Bermuda as a consequence of the conviction of the beneficial owner.

18. Therefore, the Defendant submits that Article 63 of the DIFC Employment Law *`does not stipulate that for a termination under cause, any money which was paid to an employee whether advance or additional has to be returned back where the party terminated had not contributed to his termination'*. Article 63 of the DIFC Employment Law states the following:

> "Termination for cause
>
> (1) An Employer or an Employee may terminate an Employee's employment with immediate effect for cause in circumstances where the conduct of one (1) party warrants termination and where a reasonable Employer or Employee would have terminated the employment as a consequence thereof.
>
> (2) If an Employee terminates their employment for cause pursuant to Article 63(1), the Employee shall be entitled to:

(a) a payment of Wages in lieu of their notice period;

(b) a Gratuity Payment calculated to include the notice period the Employee would have been required to give to terminate their employment in accordance with Article 62(2); and

(c) a payment in lieu of the Employee's accrued untaken Vacation Leave calculated to include the notice period the Employee would have been required to give to terminate their employment in accordance with Article 62(2).

(3) If an Employer terminates the employment of an Employee for cause pursuant to Article 63(1):

(a) the Employee shall not be entitled to receive any payment of Wages in lieu of their notice period; and

(b) the Employee's Gratuity Payment and outstanding Vacation Leave shall be calculated up to the Termination Date."

19. The Defendant further relies on Article 67 (1) of the DIFC Employment Law and submits that the conduct of the employer falls within the realm of this Article which reads as follows:

"An Employer who:

(a) does an act or thing that the Employer is prohibited from doing under this Law;

(b) does not do an act or thing that the Employer is required or directed to do under this Law or by the Competent Authority; or

(c) otherwise contravenes this Law,
commits a contravention of this Law and maybe liable to a fine as set out in Schedule 2 or such penalty or order that the Court determines."

20. Furthermore, the Defendant states that the terms of the Amendment Letter do not specify that the Advance Commission Payment was indeed a loan to the Defendant or that these payments should be repaid to the Claimant. The Defendant further refers to the conversations between the parties prior to the Amendment Letter being formalised and submits that these were merely brainstorming sessions to arrive at a solution for the Defendant's debts.

21. The Defendant alleges that the only ground for repayment of the Advance Commission Payment is set out in paragraph 2 of the Amendment Letter which relates to the duty of non-solicitation and non-competition.

22. The Defendant denies that he has breached the non-compete clause as the circumstances leading up to his termination are beyond the scope of any non-compete clause. The Defendant states that, once the Claimant was directed to be liquidated, the non-compete clause became null and void. The Defendant submits that it is only natural that an employee would look for employment opportunities elsewhere under these circumstances and it should not be expected to wait until the forma termination.

23. Therefore, the Defendant submits that the Claimant is not entitled to the Outstanding Amount and that the Claim should be dismissed in its entirety.

**Discussion**

24. In essence, the disagreement between the parties pertains to whether the Claimant should be reimbursed the Advance Commission Payment by the Defendant, pursuant to the Amendment Letter.

25. Firstly, I note that the numbers and calculations as presented by the Claimant, as stated in paragraph 9, 10 and 12 of this Judgment, are not disputed by the Defendant. Therefore, I will take them as provided for the purposes of this Judgment.

26. I will start off by setting out the content of the Amendment Letter which reads as follows:

"Lamis (the `Company') will continue to pay you an advance of USD $4,166.67 per month over and on top of your regular monthly salary payment of USD 11,250. This arrangement to provide you with a monthly advance of commissions shall be This payment is not and shall not be construed as an increase in your annual salary of USD 135,000

You agree that this amount shall instead be construed as an advance payment pf any commissions that would be payable to you under the terms of the Employment Agreement. You further agree that the Company will not pay you any separate commission amount until the cumulative commissions payable to you in accordance with the formula set out in the Employment Agreement (disregarding any reference to a guaranteed commission) form the time you started employment with the Company (`Accrued Commissions') exceeds the sum of (A) the minimum commission of USD50,000 that has already been advanced to you under the terms of the Employment Agreement and (B) the aggregated sum of any ongoing monthly commission advances made to you under the terms of this letter. In the event Accrued Commissions does exceed the sum of the amounts described in (A) and (B) above, the Company will pay you an amount equal to such excess on a monthly basis on accordance with the terms of the Employment Agreement

The Agreement to pay monthly commission advances to you is subject to the following conditions:

1. If any payment in lieu of notice under the Employment Agreement has to be made in connection with a termination of employment, the monthly commission advances paid under the terms of this letter shall be applied towards satisfaction of such payment in lieu of notice; and

2. If the terms of paragraph 5 of your Employment Agreement (Duty of non-Solicitation and Non-Competition) are breached or not observed in any manner any commission advances made to you under the terms of this letter will be immediately repayable back to the

Company upon any demand made by the Company

Provided that the conditions in paragraph 1 and 2 shall not apply if Accrued Commissions exceeds the sum of the amounts described in (A) and (B) above at the time of such payment in lieu of notice is payable (in the case of paragraph 1) or at the time of such breach or non-observation (in the case of paragraph 2). For the avoidance of doubt, the full extent of paragraph 5 of the Employment Agreement shall continue to apply."

27. In review of the submissions made by both parties, I find that it was an implied term of the Amendment Letter that the Advance Commission Payment would be repayable. The term `advance payment' used in the Amendment Letter suggests, firstly, that it is a payment prior to any other payment, whether that would be earned or repayable. Secondly, from the content of the various email correspondence that took place between the parties, between January 2017 and January 2018 (the "Email Correspondence"), it is evident that the Defendant sought financial support from the Claimant as he was suffering significant financial difficulties.

28. Furthermore, Article 49 of the Contract Law DIFC Law No. 6 of 2004 states the following:

"Intention of the parties

(1) A contract shall be interpreted according to the common intention of the parties.

(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances."

29. The ongoing discussions in the Email Correspondence clearly demonstrate the intent that the Advance Commission Payment would be regarded as a loan from the Claimant to the Defendant. In an email dated 22 January 2018, the Defendant writes:

"Would not like to burden Lamis with a huge ask but would appreciate if something can be worked out to help me manage my cashflow which is severely affected due to high interest rate borrowings on credit cards.If required i would be more than happy to pay interest on the borrowed amount to the company lesser than what I am paying to credit card lenders."

30. In an email dated 22 January 2018, the Claimant writes:

"We need a plan that fixes the problem. Lending you money without addressing the issues would just alleviate the pressure temporarily but you will be in trouble again in a few months. It is also a risk to Lamis as we would sit behind other borrowers and if you left, we would have no salary offset.We cannot just lend money and hope for the best when you have 16 credit cards on overdraft."

31. In my view, the Defendant has failed to provide any further proof or evidence that would demonstrate that the Advance Commission Payment is not intended to be repaid back to the Claimant. Furthermore, there seems to be no implication in the Email Correspondence or the Amendment Letter that the Advance Commission Payment was intended to be a non-repayable (incentive) payment.

32. Now that I have established that the Advance Commission Payment is repayable by the Defendant to the Claimant, I shall not discuss the issue of non-competition.

33. The Claimant has, pursuant to Articles 20(1)(c) and 66(5) of the DIFC Employment Law and the terms of the Amendment Letter, rightfully deducted the Earned Commission and the End of Service Entitlements from the Advance Commission Payment. Therefore, I find that the Defendant shall pay back the Claimant the Outstanding Amount in the sum AED 372,514.97.

**Conclusion**

34. In light of the aforementioned, I find that the Defendant shall pay the Claimant the sum of AED 372,514.97 (the "Amount").

35. The Defendant shall pay the Claimant the DIFC Courts' filing fee in the sum of AED 7,450.30.

36. In the event that the Defendant fails to comply with Paragraph 34 within 21 days from the date of this Order, interest at the rate of 9% per annum, pursuant to Practice Direction No 4 of 2017 (Interest on Judgments) will accrue on the Amount from the date of filing this Claim until the date of full payment.

37. There be no order as to costs.