

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO: J891/03

In the matter between

RIAAN GRAHAM

APPLICANT

and

Q- KON (PTY) LTD

RESPONDENT

JUDGMENT

SEMENYA AJ

[1] The applicant and the respondent concluded a written contract of employment (Annexures “**RSG1**”, “**RSG2**” and “**RSG3**”) on 29 August 2000. Flowing from that agreement, the applicant seeks relief couched in the following terms: Ordering the respondent to pay the applicant an amount of R347 815, 33; ordering the respondent to pay interest on that amount calculated at 15, 5% per annum a *temporae morae* as well as ordering the respondent to pay the costs of the application.

[2] The applicant asserts on the papers that in terms of the agreement of employment (“**the agreement**”) the parties agreed a remuneration that was two- fold –a fixed salary and participation in an “**income benefit sharing plan**”. The issue between the parties relates to

the latter element of the remuneration and not the former.

[3] Regarding the Company Income Benefit Plan (“CIBP”), the written agreement deals with the written aspect in the following terms: the company shall compensate the employee according to the agreed baseline appended (Appendix A) hereto. The compensation will be reviewed every six months. (Clause 3); the employee shall participate in the Company Income Benefit Plan from date of appointment. (Clause 4) RSG3 shows the RF Networking with a gross profit target of R200 000, 00 a month and a percentage of six that the applicant will share in when there is a positive difference between the actual gross profit and the target gross profit. The calculation was to be made on a 3 months’ period, payable over the 3 following months and subject to review.

[4] During December 2001 Dimension Data placed separate orders with the respondent for the provision and installation of the wireless network hardware at various sites of Theba Bank that fell within the RF Networking unit to which the applicant was employed. The applicant stood to benefit from the CIBP, if any positive variance occurred.

[5] The applicant asserts that he is entitled to the amount of R368 783, 33 computed in a manner tabled in annexure “RG6” to the founding papers. The respondent challenges the claim on various grounds. Other than matters of law to which I will revert later, the respondent challenges the correctness of the amounts of R5 186 406, 66 and R1 950 000, 00 corresponding to the quarters, 1 December 2001 to 28 February 2002 and 1 June 2002 to 31 August 2002 respectively. The language used in the refutation appears against paragraphs 27 and 28 of the answering affidavit as follows:

“The contents of this paragraph are not correct and are denied. In at least two material respects they are wrong. The GP baseline for the RF Networking Division has been maintained at R600 000, 00 throughout and calculations have been performed at a figure of 6%. Both these factors are contradicted by adjustments and reviews accepted

by the applicant.”

[6] It is that challenge and others that the respondent argued that the papers raise disputes of fact that are not capable of resolution on the papers but would require the viva voce evidence and that the applicant’s case stands to be dismissed for that reason. The other dispute of fact alleged by the respondent relates to the basis of income derived from the Dimension Data transaction and how that profit is to spread and be shared. I shall deal with the alleged dispute of fact later.

[7] It is common cause that the agreement provided for the review of the CIBP every three months. For the purpose of my judgment I will accept that the executive of the company did adjust the baseline or target figure and did pay the applicant as well as others on the adjustments that have been made. I am also prepared to accept the respondents’ contention that the adjustments are a management’s prerogative. The question that stands to be answered is whether the reviews were done in terms of the agreement or not. It is worth mentioning that no basis has been made on the pleadings for rectification of the agreement.

[8] A proper interpretation of the agreement, contends that the applicant, is that any review has to follow the agreed procedure to effect the amendment of the agreement. The applicant contends that the agreement was not amended and stands to be enforced on its terms. The relevant clause of the agreement provides that any changes to the agreement have to be in writing and signed by both parties. It is common cause that no changes were made in writing and signed by both parties as agreed to by the parties in clause 23 of the agreement.

[9] It was argued to me that the issue between the parties relates to the interpretation of the agreement. Various authorities were cited in support of the argument. It is trite law that in interpretation of agreements the intention of the parties is to be gleaned firstly from the ordinary meaning of the words used in the documents – See **Joubert v Enslin 1910 AD 6 @ 37-38; Delmas Milling Co. Ltd v Du Plessis 1955 (3) SA 447 (A) @ 453 C; Worman v**

Hughes and others 1948 (3) SA 495 (AD) @ 505 where **Greenberg J** stated “ **It must be borne in mind that in an action of contract, the rule of interpretation is to ascertain, not what the parties’ intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract.**

[10] Whereas the parties define the issue as one of interpretation of the agreement, the dispute does not occur to me to raise interpretational difficulties. In the first instance there are no two or more contending meanings which are attributed to any clause of the agreement nor any ambiguity relating to the meaning of any particular clause. As I understand the case for the respondent, the argument is that the agreement provided for review, was not cast in stone and that it remained management’s prerogative to effect the review. In a somewhat slanted sense, it was even argued that management could unilaterally review the agreement. In the alternative, the respondent claims that the applicant acquiesced in the review and waived his right as a result.

[11] Even if I were to accept that the parties conducted themselves different to the terms of the agreement, it would not answer the question whether the terms of the agreement between the parties remain enforceable as they stand. **Cameron JA**, giving a concurring judgment in **Brisley v Drostky 2002(4) SA 1 (SCA) par [89]** stated “**In it, the appellant asks this Court to reverse the doctrine that the contracting parties may validly agree in writing to an enumeration of their rights, duties and powers in relation to the subject- matter of a contract, which they may alter only by again resorting to writing. This Court nearly four decades ago upheld the validity of such clauses. It did so after some years of academic and judicial controversy, and after that full agreement which canvassed the opposing contentions. Its decision expressly considered the paradox at the core of such provisions: that they limit contractual freedom, but to do so by the prior design and agreement of the parties themselves, in the exercise of their contractual freedom, and in order to enhance certainty in their future dealings and to minimise disputes between**

them.

The appellant's attack invites us to reconsider that decision. We are obliged to do so in the light of the Constitution and of our 'general obligation', which is purely not discretionary, to develop the common law in the light of fundamental constitutional values. For the reason the joint judgment gives, I do not consider that the attack can or should succeed. The *Shifren* decision represented a doctrinal and policy choice, on balance, was sound. Apart from the fact of precedent and weight considerations of commercial reliance and social certainty, that choice in itself remains sound for four decades later. Constitutional considerations of equality do not detract from it. On the contrary, they seem to enhance it. As the joint judgment observes (para [7]), it is fallacious to suggest that insistence on only written alterations to a contractual regimen necessarily protects the strong at the expense of the weak.

[12] The facts in the present matter are not on all fours with those considered in the *Drostky* matter save to point out that where the parties to a contract agree to formalities in the amendment or changes or **"review"** of their terms, then the parties would be held to those terms unless there are other excusing factors. No excusing factors are offered in this instance. I put it to Mr Scales to offer any meaning to clause 23 other than what it says. He could only say that the clause does not apply to the other provisions of the agreement. The literal reading of the clause says **"any changes"** to the contract have to be in writing and signed by both parties. That argument cannot stand.

[13] Regarding the alleged disputes of fact, the respondent makes the bald denials on matters where it has and bears knowledge of the facts. It would have been easy for the respondent to show exactly how the Dimension Data income was allocated and how the applicant would not be entitled to the sharing of the positive variance between the Actual Gross Profit and the Target Gross Profit. To simply state that the applicant is wrong does not constitute a dispute of fact. A dispute of fact exist not because it is asserted but where the

assertion is supported by information which, if correct, is hostile to and dispositive of a corresponding assertion- See **Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T); Plascon – Evans Limited v Van Riebeek Paints (Pty) Ltd 1984 (3) SA 623 (A).**

[14] In the present matter, I do not find that there is a *bona fide* dispute of fact. The respondent has elected to withhold information that is clearly within its knowledge. The consequence thereof will be that the allegation of the amounts owing remain unchallenged by any credible evidence. The amounts claimed and the basis for the claim remains unchallenged where the denial is nothing but bald.

[15] It was also argued before me that the issue relating to costs in the Rule 11 application that was brought by the respondent against the applicant. I point out the short background for the purpose of determining the issue.

[16] When the applicant in the present matter instituted the present proceedings, he did so on a notice of motion that did not indicate or inform the respondent that the latter had 10 days within which to oppose the matter, if it elected to do so. In a very unfortunate manner, the attorneys in this matter decided to choose form above reasoning or practicality. The respondent's attitude was that it would not react to the application in the manner it was and would bring an application setting aside the notice of application as an irregular step. The nature of the objection would be that the notice of application was defective for reasons already alluded to above. The applicant's attitude was that the application was in order and in any event he would extend additional period of 10 days to the respondent to file answering or opposing papers.

[17] Despite applicant knowing that the respondent intends opposing the relief sought in the main application, the applicant proceeded to set the matter down on the unopposed roll for 8 July 2003. On that day the parties reached a settlement regarding the further conduct of

the matter and the question of cost was reserved.

[18] The applicant could not offer any argument why he ought not to bear the cost order wasted by the setting down of the matter on 8 July 2003 when he knew that the other side intended to oppose the matter. The argument that the respondent would suffer no prejudice, once the days were 'extended' is of no help. The rules of Court are intended for the parties to adhere to. It is not for the parties to design the Rules for themselves. In the following circumstances I make the following order:

1. The respondent is ordered to pay the applicant an amount of R347 815, 33.
2. interest thereon at 15, 5% per annum a *temporae morae*.
3. costs of suit
4. The applicant is ordered to pay the respondent costs occasioned by the Rule 11 application including the costs of 8 July 2003.

SEMENYA AJ

Appearances:

For the Applicant	:	M.E.Eybers Attorneys
For the Respondent	:	Janse Van Rensburg, Strydom & Botha Inc

Date of hearing : 12 February 2004
Date of judgement : 27 February 2004