IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NUMBER: C 736/16

Not reportable

Of interest to other judges

In the matter between:

KUMARIE EMETONJOR Applicant

and

KINTETSU WORLD EXPRESS SA (PTY) LTD Respondent

Heard: 21-21 August 2018

Delivered: 11 September 2018

SUMMARY: Contractual claim for commission payments. BCEA s 77. Interpretation of agreement.

JUDGMENT

STEENKAMP J:

Introduction

[1] The applicant, Ms Kumarie Emetonjor, claims outstanding commission payments from her erstwhile employer, Kintetsu World Express SA (Pty) Ltd.

The facts

[2] The applicant was employed by the respondent from 1 October 2014 to 30 October 2016 as a business development manager. They entered into a contract of employment as well as a commission agreement. She initially earned R780 000 per year (i.e. R65 000 per month). When she left the employ of the company, she was earning R67 700 per month.

[3] The commission agreement included the following crucial clause:

> "To qualify for the commission scheme, you would have to have written total revenue (excluding facility fees) of 2.6 x cost to company over a rolling 24 month period".

[4] It is this rather badly drafted clause that has led to the current dispute.

Evaluation

[5] The applicant seeks to enforce a contractual claim in terms of s 77 of the Basic Conditions of Employment Act.[1] She claims that she was entitled to a commission payment worked out on the basis of new business written up according to the following formula:

2.6 X R780 000 = R2 028 000.

[6] Based on that formula, she calculates the commission due to her, not on the basis of the "cost to company" that the company actually incurred over 24 months, but on her annual remuneration of R780 000. She then calculates the commission as follows:[2]

6.1 Applicant's cost to company over 12 months: 2,6 x R780 000 = R2 028 000.

6.2 Revenue generated by applicant over 24 months (October 2014 to September 2016) = R 2 839 770.

6.3 R2 839 770 – R 2 028 000 = R811 770.

6.4 Commission: R811 770 x 8,5% = **R 69 000, 45.**

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[1] Act 75 of 1997 (BCEA).

[2] Although she initially claimed commission of R 72000, Mr *Kathemba* argued for the sum of R69 000 based on the above calculation.

[7] The company interprets the commission agreement differently. It stresses that the revenue is calculated on the basis of cost to company "over a rolling 24 month period". It then calculates the commission payable (if any) as follows:

Period	**Cost to Company for the period**	**Target for period (CTC x 2.6)**	**Revenue Generated for Period**	**Commission due**
October 2014 to December 2014	R65,000 x 3 = R195,000	R507,000	R235,443.47	**R0**
January 2015 to December 2015	R67,600 x12 = R811,200	R2,109,120	R1,304,489.05	**R0**
January 2016 to October 2016	R70,980 x 10 = R709,800	R1,845,480	R1,110,295.14	**R0**
1. Total <u>target</u> for 24 months = R4,461,600 **2. Total <u>revenue generated</u> for same 24 month period = R2,650,227.66** **Commission due: R0 (as target for 24 months not achieved)**				

[9] Whether or not the applicant is entitled to any commission payment, therefore, rests on the interpretation and application of the commission agreement.

<u>Evaluation</u>

[10] The *locus classicus* with regard to the interpretation of contracts has, until recently, been the *dictum* of Wallis JA in *Natal Joint Municipal Pension Fund*:[3]

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

[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) pars [18] and [25] - [26] (footnotes omitted).

must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

…

"Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning, a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.

> In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration."

[11] More recently, and in the same court, Wallis JA held:[4]

> "That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise' .
>
> Accordingly it is no longer helpful to refer to the earlier approach."

[12] This Court must therefore give a sensible meaning to the badly drafted and somewhat ambiguous clause in the commission agreement, "in the light of all relevant and admissible context, including the circumstances in which the document came into being." But the one person who could shed light on the circumstances in which the document came into being was not called as a witness by either party. That is Mr Louis Coetzee, the national sales manager who drafted the clause and left the company under a cloud in 2016. It is therefore up to the Court to give a sensible and businesslike

[4] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA) par [12].

meaning to the clause in the light of the evidence before it, the context and purpose.

[13] The applicant contends for a meaning of the words "cost to company" in the commission agreement to equate to her annual remuneration (i.e. over 12 months instead of 24 months) of R780 000 (in October 2016), relying on this clause[5] in the contract of employment:

> "Your remuneration is determined on the basis of the total direct costs to the Company, of employing you, excluding Unemployment Insurance Contributions, and any other statutory charges over which you have no control."

[14] On her version, she would be able to recover 2.6 times her annual remuneration over 24 months, plus an additional 0,6% to qualify for the commission.

[15] The company sees it otherwise. It would not be businesslike or make commercial sense, it argues, for an employee barely to cover her own salary in order to qualify for the commission. It reads the clause to mean that the employee would have to write total revenue of 2.6 times cost to company "over a rolling 24 month period", i.e. a target of R 4 461 600 over 24 months.

[16] This calculation – as set out in paragraph 7 above – calculates the target over the rolling 24 month period based on the employee's actual "cost to company" over the same period. Her total cost to company over that period is R1 716 000, translating to a target (x 2.6) of R 4 461 600. She generated revenue of R 2 650 227, 66 over the same period. *Ergo*, she did not achieve the target and does not qualify for commission over and above her monthly remuneration. That is also how the chief operating officer, Mr Pierre Engelbrecht, understood it. Her remuneration changed twice over the 24 month period; that is the (rolling) basis on which the target over 24 months was based.

[17] The applicant's interpretation does not make businesslike sense. On her understanding, she should be given the benefit of two years' income

[5] Capitalisation as in the original.

measured against one year's cost to the company. That is not plausible in the context of an incentive structure combined with a generous monthly salary.

[18] In my view, the more plausible and businesslike interpretation of the commission clause in the context of the incentive structure is that advanced by the company, i.e. to calculate both the target and the "cost to company" over a "rolling 24 month period".

[19] That interpretation has the consequence that the applicant does not qualify for a bonus; but the contrary interpretation is not the logical and businesslike one.

Conclusion

[20] Given the interpretation of the clause set out above, the applicant is not entitled to a commission payment. Her claim must fail.

[21] With regard to costs, I take into account that the applicant is an individual; and that she may have had a *bona fide* understanding of the commission structure that differs from that of the company. Taking into account the requirement of fairness, I do not consider a costs award to be warranted.

Order

The applicant's claim is dismissed.

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Anton J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Vernon Kathemba of S Kondlo attorneys.
RESPONDENT:	Malcolm Lennox Instructed by Eversheds Sutherland.