REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **34512/2015**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

16/12/18

Date: **WHG VAN DER LINDE**

In the matter between:

Teague, Bernard Anthony — **Plaintiff**

and

Zest Electric Motors (Pty) Ltd — **First Defendant**
Zest Weg Electric (Pty) Ltd — **Second Defendant**

Judgment

Van der Linde, J:

Introduction

[1] The plaintiff sues the defendants for a statement and debatement of account, and payment of the amount found owing to him. His claim arises from his employment contract with the first defendant, then his employer, in terms of which he was appointed the branch manager

of the first defendant's Trichardt branch, for which was to receive a fixed salary, an incentive bonus, and 7,5% of what was described as the *"pre-tax gross profit"* of the branch. I will revert below to the meaning of this phrase. There are two defendants because the original first defendant employer later sold the business to the second defendant with effect from 1 April 2015,[1] who then became his employer until the end of November of that year.

[2] His appointment as such was with effect from 1 August 1998. In time, his appointment was amended with effect from 1 July 2011. He was relieved of his duties as branch manager and was required to dedicate his services to managing the central client of the employer for that branch, being the petroleum behemoth Sasol in whatever the appropriate commercial guise might have been. The plaintiff's job designation now became Key Accounts Manager. A Mr Kuhn took over from him as branch manager.

[3] The parties were essentially ad idem as concerns these basic moments. They parted ways on what lay beneath this. The plaintiff says that when his employment designation changed, nothing else did, and that he was entitled to receive his full remuneration package just as before. The defendants contest this, and say that at a meeting on 9 June 2011 attended by messieurs Blakemore, Meiring, and Daines of the first defendant and the plaintiff, it was expressly agreed that the plaintiff would no longer be entitled to the 7,5% share of the pre-tax gross profit of the Trichardt branch, because the incentive bonus structure of the first defendant's employees would henceforth be aligned with those of the Brazilian holding company, which had just acquired 51% of the shares in the employer. Although the defendants' witness and ex-chairman Mr Blakemore could not say precisely what the new structure entailed, he was adamant that profit-sharing was out.

[4] The plaintiff said that he was in fact never paid any profit-share, whether before or after June 2011. He does not know how much the profit-share comes to, since he was never privy

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[1] By virtue of s.197 (8) of the Labour Relations Act 66 of 1995, the defendants are jointly and severally liable in respect of a claim of the plaintiff that legitimately arose prior to 1 April 2015. In respect of any claim that arose only after that date only the second defendant is liable.

to the final accounting figures of his employer. Mr Blakemore was adamant that the plaintiff was in fact paid his profit-share before June 2011, but this was not put to the plaintiff when he testified, and it is thus not open to the defendants to contend that the plaintiff's evidence on this score should be rejected.

[5] There was a sharp debate as whether the plaintiff was entitled, in principle, to a statement and debatement of account. In addition, there was an equally sharp difference as to whether the plaintiff's entitlement to profit-sharing was taken away by agreement at the June 2011 meeting. These two points were really the main differences between the parties, the plaintiff's counsel very fairly submitting at the end of the trial that he could not suggest that prescription did not extinguish his client's claim in respect of the financial years prior to the year ended December 2012. In effect thus, the plaintiff's claim became for an accounting in respect of the financial years ended December 2012, 2013, 2014, and 2015, since the plaintiff retired in November 2015.

[6] If the plaintiff succeeds, it will then be against the first and second defendants jointly and severally for the first three of those four years, and against the second defendant alone in respect of eleven twelfths of 2015.

[7] Something needs to be said about the meaning of *"pre-tax gross profit"*, the phrase the parties used in their contract of employment. There was no evidence, factual or expert, as to what this accounting term of art means. Gross profit is usually the function of sales revenue less cost of sales, meaning those expenses directly related to the product sold. It is a concept that is usually juxtaposed with net profit, also known as net income, which is in turn a function of sales revenue less not only cost of sales, but also all expenses, including for example head office and administrative costs that are ongoing, irrespective of fluctuations in sales revenue or cost of sales. Gross profit is therefore a larger amount than net profit.

[8] It could be, of course, that in this case the parties used loose language when referring to *"pre-tax gross profit"*, and that the key to unlocking the true meaning here lies in the

reference to and use of the phrase *"pre-tax"*. The usual meaning of gross profit, as said, refers to a figure that is arrived at long before one arrives at the profit which is taxable.

[9] Put differently, gross profit is never taxable; net profit is. It would have seemed far more likely then that the parties had in mind that the profit in which the plaintiff would share, would be the accounting amount that will have been arrived at just before such profit as is subject to taxation. On this construction, the phrase *"pre-tax"* was inserted to refer to the profit before tax, but only taxes, is deducted; and not to the profit before not only tax but also all general expenses are deducted.

[10] Despite these considerations, which I put to counsel for both parties, both counsel assured me that their clients were agreed that *"pre-tax gross profit"* as used in the contract referred to the sales revenue of the branch, less the cost of those sales; and not net profit. In other words, they agreed that the plaintiff's contractual entitlement was 7.5% of the amount arrived at by deducting cost of sales from sales revenue; and not also other expenses, such as overheads, head office expenses, and the like.

[11] Against this introduction I turn then to consider first whether the employment contract contained a tacit term entitling the plaintiff to an account, and then to the question whether by contractual variation in 2011 the plaintiff lost his right thenceforth to claim 7.5% of the pre-tax gross profit of the Trichardt branch.

The evidence

The plaintiff

[12] There were only two witnesses: the plaintiff, and Mr Blakemore, the employer's ex-chairman. Both impressed me as being completely honest in their attempted recollection of events back yonder. Inevitably though, much of their evidence was reconstruction.

[13] The plaintiff explained that he had been employed by the first defendant twice before this instance, being the third. The Trichardt branch of the first defendant came into existence

during his second engagement with the first defendant. He considered that Sasol became a client of the first defendant, and its main client, through his personal endeavours.

[14]The Trichardt branch was established to serve Sasol's requirements. Initially there were only three employees of the first defendant at that branch. It was an inevitable spin-off of the Sasol business that other clients were also drawn to the Trichardt branch. For example, Sasol might have placed an order on a supplier for a pump, but would insist that the electric motor that drives the pump complied with Sasol's requirements. Since the Trichardt branch knew what the Sasol requirements were, it would be able to provide an electric motor compliant with those requirements. And so the particular supplier would order the motor from the Trichardt branch.

[15]The plaintiff explained that the *"staff incentive bonus scheme"* benefitted not only the branch manager, but also the other employees. It was based on the performance of the particular staff member, and was a benefit different from the 7.5% profit-share.

[16]When initially he was appointed as branch manager, he was living in Johannesburg. He travelled to and from Trichardt on a daily basis. This became too much and, in time, he moved with his family to Secunda (which is next to Trichardt).

[17]He testified to the books of account of the Trichardt branch. He explained that these were initially prepared at the head office, and not at the branch, until about 2009. Thereafter the branch itself sent out invoices and statements on a monthly basis. Still, he explained that the expenses were recorded and calculated at the head office in Johannesburg.

[18]In mid-2011 he was required to relinquish his position as branch manager, and take up the position of Key Accounts Manager. Mr Kuhn would take on the branch manager position. This involved a variation of his employment contract in terms of which he had been appointed branch manager with effect from 1 August 1998. However, he says it involved no change to his remuneration package. He stressed the importance of Sasol to the branch. It contributed about 60 – 65% of the total revenue of the branch.

[19]He did not know how the incentive bonus was made up. It was paid at the end of each financial year. However, the profit-share was in fact never paid. The plaintiff was taken to documents discovered by the defendants concerning the revenue and profit before taxation of the branch. His evidence illustrated that in some instances 7.5% of the pre-tax profit of the branch – at last according to the document discovered by the defendants – was greater than, and in other cases less than, the incentive bonus he received.

[20]It was only in 2011 that he started making enquiries about the 7.5% profit –share, and then only because his attorney suggested that he does it. He was then 61 years old, and knew that he would be retiring at age 65. Up to that stage he simply accepted that at some stage it would be paid to him, but since he had viewed it as a pension, he had let it lie.

[21]So in 2011 he approached both the CEO, Mr Meiring, and the FD, Ms Marsh. He wanted to know how his profit share would be paid to him. Both promised to revert to him; neither did. This approach by the plaintiff to the CEO and the FD therefore occurred in the same year as that in which the contract variation occurred and in which, according to the defendants, the plaintiff agreed to a salary package going forward, in which he would no longer be paid a profit-share of 7.5%.

[22]Cross-examined, he said that he never got himself involved in financial aspects; that was head office's domain. He accepted that his appointment as Key Accounts Manager meant that he was relieved of the full range of duties as branch manager. It was put to him that the change in position implied a change in his remuneration package, and that this was expressly agreed between him and Messieurs Blakemore and Meiring; but he denied this.

[23]He accepted that such accounting information as was available at the branch enabled him to estimate future gross profits. He accepted that the sales were recorded at the branch, as well as the expenditure. The accounting personnel at the branch would therefore have been able to access the trading history and the gross profit of the branch. They could also track the assets and liabilities of the branch.

[24]He did not remember whether from 2011 onwards plans were in place to bring the remuneration structure of the first defendant in line with that of the Brazilian holding company. At one stage he thought the 7.5% profit-share was included in the incentive bonus; but in truth he simply did not know how the incentive bonus was calculated. He now contended however that the profit-share was never paid.

[25]It was not put to the plaintiff that in fact he was paid the profit-share owing to him in respect of the period prior to the package variation on which the defendants rely. It seems clear that in those circumstances it is not open to the defendants to challenge the plaintiff's evidence on this score.[2]

Mr Blakemore

[26]Mr Blakemore was the defendants' only witness. He has known the plaintiff since the late 1970's. He was the chairman and CEO of the first defendant until the end of December 2011. He eventually sold the business of the first defendant to the Weg Group, a Brazilian group of companies, and then left the first defendant. The Weg Group started small, in 1963 in a village in Brazil. The business that the witness founded in South Africa started importing electric motors from the Brazilian company in 1981. The Weg Group has grown ever since, and at one stage it had a market capitalisation of US $15m on the Sao Paulo stock exchange.

[27]The Weg Group acquired its shares in the local company in three tranches, starting on 30 June 2010, and acquiring the final tranche in June 2011, so becoming the sole shareholder in the local business. At a board meeting on 19 October 2010 the board of the first defendant resolved that the bonus programme of all employees had to be aligned with the Zest Group. In his evidence the witness referred to this bonus programme as the "incentive bonus scheme". He explained too the problem with the then current scheme: that it was very subjective, and dependant on individual performances, meeting budgets, and the like.

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[2] Small v Smith 1954 (3) SA 434 (SWA).

[28]At an Exco meeting of 24 January 2011, Mr Meiring presented a proposed incentive plan for sales managers and teams. The plan itself was not included in the documentary evidence. The witness spoke to the meeting held on 9 June 2011 between himself, the plaintiff, and Messieurs Meiring and Daines. This was at the head office in Linbro Park, Sandton.

[29]They discussed the appointment of Mr Kuhn as branch manager, and that of the plaintiff as Key Accounts Manager. His remuneration was also discussed. He was expressly told that although he would continue to receive an incentive bonus, he would no longer be entitled to a profit-share. He said that the plaintiff listened attentively to what was being said but showed no reaction.

[30]Cross-examined the witness said that in fact the 7.5% profit was paid annually to the plaintiff as part of his incentive bonus, and that he was paid up to December 2011. The witness said that he thought that the way in which the contract described the plaintiff's entitlement to the share in profits was wrong: in fact, it should have spelled out that the incentive bonus and the profit share were one and the same thing. In commerce, a profit share and an incentive bonus is the same thing, he said.

[31] The witness was unable to tell how the plaintiff's incentive bonus was actually calculated, nor to explain why no documents were discovered to disclose the computation. He was adamant that he told the plaintiff at the meeting on 9 June 2011 that the profit-share portion of his package would cease. He added that he may have said to the plaintiff not to worry; that he would look after him.

Did the plaintiff's entitlement to the profit-share cease?

[32]The answer to this question depends on what happened at the contentious June 2011 meeting. Only the two witnesses referred to above testified. Their credibility and reliability, and the probabilities, are involved in resolving whether on that occasion Mr Blakemore told

the plaintiff that his entitlement to share in the profits would cease.[3] But as Nienaber, JA said in that matter, "... *when all factors are equipoised probabilities prevail.*"[4]

[33]As to credibility, I have already indicated that both witnesses made a favourable impression on me. As it happened, the plaintiff was perhaps less sophisticated and more hands-on that Mr Blakemore, but they were both clearly set on contributing their honest recollection of the events. I did not observe any conflict in their evidence that might have been suggestive of fabrication. As to reliability, here my sense is that, as was to be expected, both parties struggled to remember generally what happened so many years ago. Of course, when it got to the crucial part of their tale, each held fast to his version: that at the meeting it was said that profit-sharing would cease, or that this was not said, as the case may be.

[34]Where do the probabilities lie? There are the following features that were impressed upon me in this context. The first was Mr Blakemore's firm view that the plaintiff's entitlement to share in the staff incentive bonus scheme and his entitlement to share in 7.5% of the Trichardt branch gross profit was one and the same thing. He said this more than once, and referred to the commercial world where he said this was so. In fact, he went so far as to say that the written contract between the parties was erroneous in reflecting these as two separate items of remuneration.

[35] No-one suggested that the parties in fact had the written contract in front of them when the contentious meeting took place and, given Mr Blakemore's conflation in court of the staff incentive bonus and the profit share elements of the plaintiff's remuneration, it seems to me more probable than not that at the meeting he did the same. So it seems to me that he simply conveyed there that the employer would (have to) move from its current system of calculating the incentive bonus to a new system, one that would align with Weg but one that would not prejudice the plaintiff. His insistence that he expressly told the plaintiff that

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[3] Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others, 2003 (1) SA 11 (SCA) at [5] ff.

[4] Op cit.

the profit-share feature of his package would be discontinued, must accordingly be put down to bona fide reconstruction.

[36]The second feature is that no-one at the first defendant thought it appropriate to write a confirmatory letter to the plaintiff confirming this very important change in his remuneration package. After all, the contract of employment, and with it the remuneration package, was in writing. No explanation appeared from the evidence, viva voce or written, for this omission.

[37]The third feature is this. The plaintiff's counsel submitted at the end of the trial that the plaintiff was a simple man. Perhaps a more accurate description would have been that the plaintiff was clearly aware of and sensitive to, perhaps even suspicious of, that which he did not understand. In consequence he appeared very cautious in his responses to questions put to him, even to the extent of self-correcting ex post facto, or not as the case may be, portions of his earlier evidence. In this present context it must be remembered that Mr Blakemore knew the plaintiff well, and likely felt a sense of paternal responsibility for him.

[38]Against this background, the description by Mr Blakemore of the plaintiff's reaction at the meeting to being told about the change in remuneration package, does not fit him being told – and comprehending - that what he had considered as his pension was being taken away from him. Rather, it fits the scenario of the plaintiff being told that the staff incentive bonus scheme was being changed so as to align it with that of the holding company; but that he (the plaintiff) need not worry, as he (Mr Blakemore) would look after him.

[39]Finally, there is the election by the defendants to call neither Mr Meiring nor Mr Daines in support of Mr Blakemore's proffered recollection of the events at the meeting. There was no suggestion that they were unavailable; on the face of it they would have been able readily to assist the court in assessing what had occurred on the day. The inference is justified, absent an explanation, that their version would not have supported Mr Blakemore.

[40]It follows that in my view the probabilities are that the plaintiff's entitlement to share in 7.5% of the gross profit of the Trichardt branch was not consensually terminated at the meeting of 9 June 2011.

Did the contract contain a tacit term obliging the defendants to account to the plaintiff?

[41]In our law a duty to account is not established by the mere fact that one person potentially owes another an amount of money, and the latter is unable to compute the amount owed.[5] Self-evidently, an agreement to account would establish such an obligation, as would a statutory obligation to render an account. But our law has also recognised that in addition, a fiduciary relationship between two parties may found such a duty.[6]

[42]Our law recognises that there exists between an employer and employee a fiduciary relationship, one incidence of which is that commercially sensitive information passed from the one to the other is protected against general disclosure.[7] Information that would fall into this class would surely include sensitive financial information of the employer.

[43]In this case the plaintiff did not in his pleadings rely on that fiduciary duty as giving rise to a duty to account. Nor did the plaintiff in his pleadings rely on any statutory duty, as was ultimately argued by his counsel at the end of the trial. His case on the pleadings was rather that the duty arose from the employment agreement between them.[8] Since the contract contains no express term to this effect, the duty to account, if it exists, would have to be found in a tacit term.

[44]A tacit term is found, famously, should the contracting parties' response to the officious bystander's enquiry as to the existence of such a term be, *"Of course so and so would*

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[5] Rectifier and Communications Systems (Pty) Ltd v Harrison 1981 (2) SA 283 (C) at 287 ff.
[6] Doyle and Another v Fleet Motors PE (Pty) Ltd, 1971 (3) SA 760 (A) at 762 G to 763 D; Grancy Property Ltd and Another v Seena Marena Investment (Pty) Ltd and Others, [2014] ZASCA 50, [2014] 3 All SA 123 (SCA).
[7] Meter Systems Holdings Ltd v Venter and Another 1993 (1) SA 409 (W) at 426.
[8] Plaintiff's particulars of claim, paragraph 12.

happen; we did not trouble to say that; it is too clear"; or words to this effect.[9] Can that be said of the present contract of employment? In my view it can, for the reasons that now follow.

[45]First, from the evidence that was adduced, it would appear that the books of account of the defendant company were throughout centralised at head office. Specifically, it was not suggested that the plaintiff would do the ordering of the Weg electric motors from the wholesale supplier that the Trichardt branch would selling under the plaintiff's watch as branch manager.

[46]The information concerning wholesale prices, and related thereto, rebates or discounts, would therefore have been located at or at least under the control of the head office accounting staff. This accounting information would be subject to the defendants' annual audit, and the auditors will report to the directors. This is information that was necessary to calculate the gross-profit of the branch.

[47]The plaintiff would thus not have been privy to these. I do not believe, in any event, that to the extent that financial information was (also) located at the Trichardt branch, that served to show that the plaintiff had the information in his possession. Such accounting information as was kept at the Trichardt branch was in the possession not of the plaintiff but of the defendant employer.

[48]Second, in the relationship between employer and employee, the duty of the employee is to render his/her services to the employer. The corollary of that duty is the reciprocal duty of the employer to pay to the employee the agreed remuneration for the services rendered. The employer has no discretion here; it is obliged to pay the 7.5% profit share. Thus, the initiating action in paying the 7.5% of the Trichardt branch gross profit would have to emanate from the employer defendants. It seems self-evidently implicit in that action that, at minimum, the employer would be required to communicate to the employee that it was

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[9] Reigate v Union Manufacturing Co (Ramsbottom), [1918] 1 KB 592 at 605. Compare City of Cape Town (CMC Administration) v Bourbon-Leftley and Another NNO 2006 (3) SA 488 (SCA) at [19], [20].

paying a particular element of the remuneration to the employee, just as it would do with any other element of the employee's remuneration entitlement.

[49]Third, the fact of the existence of the fiduciary relationship between employer and employee underscores that as between the two parties, the standards of openness and transparency, values that found our Constitution, would be expected to apply. The plaintiff and the defendants were obviously not partners in the common law sense, but sharing the profits of the branch does require the two sides to be open, forthcoming and assisting with and of each other. The plaintiff would, on behalf of the defendant employer, have the sales revenue information available and under his control, and the defendant would have the cost of sales information available and under its control.

[50]For these reasons then I conclude that the employer defendants were duty-bound annually to account to the plaintiff, within a reasonable time after the end of each financial year, in respect of the pre-tax gross profits of the Trichardt branch of the employer defendants, and to pay to the plaintiff 7.5% of it.

The form of the order

[51]It follows that the plaintiff must succeed. As indicated the plaintiff accepted, correctly in my view, that his claim in respect of the financial years prior to the year ended December 2012 was extinguished by prescription. The plaintiff is therefore entitled to an account of the pre-tax gross profits of the defendants' Trichardt branch, duly supported by appropriate supporting documentation, in respect of the financial years ended 2012, 2013, 2014, and 2015. The account is to be furnished by the first and second defendants jointly and severally in respect of the first three of those four financial years, and by the second defendant alone in respect of 2015.

[52]The plaintiff is further entitled to debate that account with the defendants and to be paid 7.5% of the aggregate amount of those profits for each of those years, with an appropriate

one month deduction in respect of 2015. If the parties are unable between them to arrive at an agreed amount to be paid to the plaintiff, they are free then to set this matter down for further hearing, the papers having been duly and appropriately supplemented.

[53]In the result there will be judgment for the plaintiff in the following terms:

(a) The first and second defendants are directed, jointly and severally, to render to the plaintiff, before 30 April 2018, an account of the pre-tax gross profits of the Trichardt branch of the first defendant in respect of the financial years ended December 2012, 2013, and 2014;

(b) The second defendant is directed to render to the plaintiff, before 30 April 2018, an account of the pre-tax gross profits of the Trichardt branch of the second defendant in respect of the financial year ended December 2015;

(c) The defendants are directed to debate the above accounts with the plaintiff;

(d) The defendants are directed jointly and severally to pay to the plaintiff 7.5% of the pre-tax gross profits of the Trichardt branch in respect of the financial years ended December 2012, 2013 and 2014;

(e) The second defendant is directed to pay to the plaintiff eleven twelfths of 7.5% of the pre-tax gross profits of the Trichardt branch in respect of the financial year ended December 2015;

(f) The parties are permitted, if they are unable to arrive at an agreed amount to be paid to the plaintiff, to set this matter down for further hearing, the papers having been duly and appropriately supplemented;

(g) Costs of suit.

WHG van der Linde
Judge, High Court
Johannesburg

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Date of trial: 08, 09 and 12 February, 2018.
Date of judgment: 16 February, 2018.