REPUBLIC OF SOUTH AFRICA

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1720/12

In the matter between -

STEVEN GRUP **Applicant**

and

RENAISSANCE BJM SECURITIES

(PROPRIETARY) LIMITED **Respondent**

Heard: **16 August 2013**

Delivered: **25 February 2014**

Summary: Interpretation of the clause in the employment contract dealing with deferred equity compensation. Cancellation and rescission of contract of employment not take away the right to deferred equity compensation. Deferred equity compensation survived the termination of the contract. The right to deferred equity compensation vested upon signature of the contract of employment and determination of the value of the shares the employee would have received but for the recruitment from previous employer by the respondent. Defence of respondent- right to claim deferred equity compensation did not survive cancellation of the contract- employee not entitled to deferred equity compensation in terms of industry practice. Applicant failing to proof existence of practice that deferred equity compensation does not survive cancellation of contract.

LABOUR COURT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application in terms of section 77(3) of the Basic Conditions of Employment Act 75 of 1997, in terms of which the applicant seeks the following order.

> '1.1 Declaring that, in June 2012, I became entitled to an unconditional payment of USD 250 000.00 (two hundred and fifty thousand dollars) in terms of my contract of employment with the Respondent, constituting the second instalment of my deferred equity compensation.'

[2] The application is opposed by the respondent on the following grounds:

> '3.1 that the employment contract was terminated by the respondent through resignation prior to the payment date; and
>
> 3. 2 industry norms and practices regarding the payment of deferred equity compensation of which the applicant was aware and in terms of which employment was conditional upon continued employment.'

Background facts

[3] The applicant was recruited by the respondent to join its employ during November 2010, whilst he was in the employ of Investec Bank Limited (Investec). The applicant was offered and accepted employment as director in investment banking of the respondent.

[4] It is common cause that during the negotiation of the employment contract, the applicant indicated that he had differed equity compensation from Investec in the form of share options. Those equity shares were part of the retention strategy of Investec. The applicant indicated that he stood to lose his shares if he was to resign. According to him the value of the shares was USD 1000 000.00 (one million US Dollars)

[5] The parties concluded an employment contract after addressing the applicant's concern about the equity shares. The concern is addressed through clause 4.5 of the employment contract which reads as follows:

> '4.5 Deferred Equity Compensation

LABOUR COURT

You have told us that you would forfeit deferred equity compensation from your current employer (the "Old Award") as a result of leaving them to join the Group. The current value of the Old Award is currently estimated by you to be USD 750 000, but the precise valuation will be determined by RENCAP BJM in its absolute discretion as at the last day of your employment with your previous employer (and in making that determination RENCAP BJM shall be entitled to take into account the risk of subsequent forfeiture had you not left your current employer (the "Forfeited Value"). Provided that you provide evidence to the reasonable satisfaction of RENCAP BJM of the existence and value of the Old Award and its forfeiture (including any documentation requested by RENCAP BJM) within 30 days of the date on which your employment with RENCAP BJM actually begins, we will procure that you paid cash of the equal value to the Forfeited Value, payable in June 2011, June 2012, and June 2013.'

[6] The applicant says that offer would commence from the date of his employment. Soon after the commencement of his employment, he heard rumours that the respondent had a deferred plan relating to payment of bonuses known as Long Term Incentive Policy (the LTIP). The applicant objected to the application of the policy to him as according to him, the policy was never mentioned during discussions that led to the employment contract. It was for this reason that he addressed and email to the respondent on 27 February 2011 which reads as follows:

> 'The offer, read together with the 17 December e-mail accordingly constituted the Applicant's contract of employment. Accordingly, while the contract of employment is dated 29 November 2010, it was only signed and submitted to the Respondent (together with the e-mail attached as an annexure) on 21 December 2010 after accepting the compensation terms as set out in the attached 17 December e-mail. The Applicant accordingly commenced employment with the Respondent from 1 February 2011.'

[7] In response to the e-mail, Mr Cornthwaite of the respondent indicated to the applicant that he shared the same understanding as his but he should speak to HR about the matter. The applicant engaged in further communication exchange with the respondent to no avail regarding the applicants' LTIP policy. This issue then received attention in an action which the applicant instituted against the respondent in this Court under case number J1582/11. The

LABOUR COURT

applicant was unsuccessful in that claim as the Court found that the LTIP entitled the respondent to defer payment of the guarantee bonus.

[8] On 25 June 2011, the applicant received payment in respect of the guaranteed advance payment and first instalment of the deferred equity compensation payment in the sum of USD 525 000, 00. This according to the applicant was a short payment in the amount of USD 75 000, 00.

[9] The parties could not resolve their differences as to the application of LTIP policy. It was for this reason that the applicant tendered his resignation on 26 September 2011.

LABOUR COURT

The issue/s

[10] The key question to answer in this matter is whether the applicant is entitled to the payment of the deferred equity compensation after he cancelled the contract that made provision for such payment. Put in another way the question is whether the obligation to pay the deferred equity compensation survived the cancellation of the contract. The answer in my view lies in the interpretation of the employment contract.

[11] The applicant contends that the amount USD 750 000,00 vested when he took employment with the respondent. Furthermore the amount of USD 250 000,00 which he claims in these proceedings is part payment of that amount which has become due and owing. He further contends that the fact that he resigned before the payment of the amount was made is irrelevant because the payment was not conditional on him remaining in employment in order to receive the payment in future. The termination of the contract according to him did not take away his right to receive payment which vested upon acceptance of the employment.

[12] In essence, the applicant's case is that the right to receive the payment of the USD 750 000, 00 or part thereof on the due date accrued and vested before the termination of the contract and therefore his dismissal or resignation or cancellation and rescission of the contract is irrelevant.

[13] The essence of the respondent's case on the other hand is that the right of the applicant to claim the amount in question was guaranteed as an incentive for him to leave Investec and thereafter to remain in the employ of the respondent.

[14] The respondent further contends that it was never the intention of the parties that clause 4.5 dealing with the deferred equity compensation was intended to survive termination of the contract. It was contended on behalf of the respondent that had the parties intended clause 4.5 to survive the contract they would in that respect made provision similar to the to the arbitration clause.

[15] As concerning the interpretation of the contract, the respondent contends that it is not necessary to imply anything in the contract as its terms are clear. There is however no dispute that the respondent had in terms of the agreement undertaken to pay the applicant differed equity compensation in the amount of USD 750 000 in three annual instalment. Having paid the first instalment towards the payment of the said amount the respondent contends that the remainder of the instalments were linked directly to the continued employment of the applicant and also on the contract of employment remaining in place. The defence of the respondent is in other words that the applicant was not entitled to receive any payment in terms of the employment contract once the contract was terminated by the resignation.

[16] Furthermore, the respondent contends that the applicant had no right or entitlement to have the right to claim the deferred equity compensation kept alive after the contract was cancelled by the applicant.

<u>Evaluation</u>

[17] It is common cause that the parties concluded an employment contract which was subsequently terminated by the applicant in terms of clause 8 thereof and on the ground that the respondent repudiated the contract by deducting an amount USD 75 000,00 in terms of the LTIP. It is also common cause that the respondent had undertaken to compensate the applicant for the loss of shares which he would have acquired from his previous employer, Investec but for the resignation to join the respondent.

[18] As indicated earlier, the respondent contends that the applicant is not entitled to the deferred equity compensation because of the rescission of the contract by him and in this respect relies on the decision in *Nash v Golden Dumps (Pty) Ltd,*[1] whose facts are very similar to that in the present instance. In that case, the Court dealt with a claim concerning the delivery of shares to the employee after repudiation his employment contract by the employer.

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[1] 1985 (3) SA 1 (SCA).

LABOUR COURT

[19] The general legal principle dealing with the repudiation of contract is dealt with by Cobbett JA in *Nash v Golden Dumps* as follows: --

> 'Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention to no longer to be bounds by the contract, he is said to "repudiate" the contract (see *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 at 845A-B). Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the other party who has repudiated (see Joubert *Law of South Africa* vol 5 para 226). The consequence of this is that the rights and obligations of the parties in regard to the further performance of the contract come to an end and the only forms of relief available to the party aggrieved are, in appropriate cases, claims for restitution and for damages. Where, however, a right to performance under the contract has accrued to one party prior to rescission, this right is not affected by the rescission and may be enforced despite rescission...'[2]

[20] The answer to the key question referred to earlier of whether the applicant is entitled to the differed equity compensation turns on interpretation of clause 4.5 of the contract of employment. In support of his claim, the applicant relies also on the contents of the email he received from the respondent on 17 December. The relevant part of that email reads as follows:

> 'Stock Buyout- $750. 000 – you will need to provide valid proof of forfeiture, usually a letter dated and on Investec company headed paper confirming details of forfeiture.'

[21] In interpreting the provisions of clause 4.5, I find no basis for having regard to the contents of the email of 17 December. The basic rule of interpretation is set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[3] in the following terms:

> '...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 must be given to the language

LABOUR COURT

[2] At 22D-G.
[3] 2012 (4) SA 593 (SCA).

> 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...'[4]

[22] The purpose of clause 4.5 of the employment contract was to attract the applicant to join the employ of the respondent and this was done by the incentive of offering the applicant the value of the shares he would have acquired had he remained with Investec.

[23] At the time of signing the contract whilst the respondent made an undertaking to address the risk of the applicant losing his shares as a result of resigning from Investec, that undertaking was conditional on the applicant producing written proof that the value of the shares was USD 750 000,00. It seems common cause that the applicant was entitled to the equity compensation on condition he resigned from Investec and joined the respondent.

[24] There is no dispute as to the value of the shares being USD 750 000,00, which was to be paid in equal instalment over a period of three years. The first instalment towards payment of the value of the shares/ or deferred equity compensation was made by the respondent in June 2011. The key issue is thus whether the amount in question vested soon after the respondent was satisfied and accepted that the value of the shares were as stated by the applicant. This question has to be answered by giving effect to the meaning of the provisions of the contract and in particular clause 4.5 thereof.

[25] In my view, the simple grammatical reading of clause 4.5 is firstly that it acknowledges the risk faced by the applicant if he was to resign from Investec and join the respondent. And secondly it provides an undertaking by the respondent to make good the loss that the applicant would suffer as a result of resigning from Investec. This undertaking as indicated above is conditional on the applicant producing written proof of the value of the shares he would have received but for resigning his employ with Investec. It seems common cause that that condition was fulfilled as the first instalment towards the payment of the equity compensation was made in June 2011.

[4] At para 18.

LABOUR COURT

[26] It is further my view that except for the condition referred to above there was no other condition attached to the payment of the amount referred to in clause 4.5 of the contract. I agree with the submission made on behalf of the applicant that there is no condition that the amount would only be paid if he remained in the employ of the respondent. What is apparent from the reading of clause 4.5 is that the parties addressed the risk consequent to the applicant resigning from Investec but nothing in the contract seeks to address the possible risk on the part of the respondent in the event the applicant was to resign. There is no necessity to imply anything in the contract as the provision regarding the issue in dispute is very clear. Thus the obligation on the part of the respondent to pay the applicant in three instalments the equity compensation vested on the signing of the employment contract and the exercise of the discretion by the respondent accepting the value of the shares as stated by the applicant.

[27] The other defence raised by the respondent to the applicant's claim is that it could never have been the intention that the applicant would be entitled to the equity compensation after resignation as that does accord with industry norms and practices regarding the payment of deferred equity compensation of which the applicant was aware of. Except for the general averment regarding the practice there is no evidence to substantiate period of its existence, the consistency of its application and its recognition in the industry. In *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd*,[5] in dealing with the evidentiary requirements to prove the existence of custom, it was held that:

> 'It (the evidence) must ...amount something more than mere opinion: instances of the usage having been acted upon should be provided in order to establish the fact of the existence of the usage. No rule can be laid down as to the number of witnesses required. This depends very much upon the nature of the usage in question, the character and quality of the witnesses and the extent to which to which their evidence is placed in issue by the other evidence.'[6]

<u>Conclusion</u>

[28] In summary, I find that the provisions of clause 4.5 of the employment contract gave rise to an enforceable obligation on the part of the respondent to pay the applicant the amount claimed. In other words, the obligation on the part of the respondent arises from the proper interpretation of clause 4.5 of the employment contract which created an unconditional and

[5] 1973 (2) SA 642 (C).
[6] At 646H.

LABOUR COURT

enforceable obligation which survived the cancellation and rescission of the contract by the applicant. There is nothing in the applicant's employment contract that says that the equity compensation was never intended to survive termination of the contract by resignation. There is no dispute that the cancellation of the contract by the applicant was done in terms and in accordance with the provisions of the employment contract.

Order

[29] In the premises, the following order is made:

1. The Applicant became entitled in June 2011, to an unconditional payment of USD 250 000.00 (two hundred and fifty thousand dollars) in terms of the contract of employment with the Respondent, constituting the second instalment of the deferred equity compensation.

2. The Respondent is ordered to pay the Applicant USD 250 000.00 (two hundred and fifty thousand dollars), with interest thereon at 15.5% per annum a *tempore morae,* from 30 June 2012 being the second instalment of the deferred equity compensation.

3. The Respondent is to pay the Applicant's costs.

Molahlehi J

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

FOR THE APPLICANT:	Fritz Malan
	Instructed by: Edward Nathan Sonnenbergs
FOR THE RESPONDENT:	G Fourie
	Instructed by: Haffegee Roskam Savage

LABOUR COURT