

SOUTH AFRICA / JUDGMENT

# Redelinghuys v Adapt IT (Pty) Ltd (C199/2019) [2023] ZALCCT 10; [2023] 7 BLLR 678 (LC); (2023) 44 ILJ 1590 (LC) (27 March 2023) [2023] ZALCCT 10

COURT  
Labour Court Cape Town

BEFORE  
Lagrange

CASE / FILE NUMBER  
C199/2019

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## Source record

### FLYNOTES:

COMMISSION AFTER LEAVING COMPANY  
LABOUR  
– Commission – Payment after employment –  
Dispute as to how commission earned and if only payable  
while  
employed – Commission determined by gross profit when sold –  
Payable once revenue flowed and this could  
be after employee left  
company – Employer failing to prove a contractual term that  
employee forfeited commission because  
she left the company –  
Ordered to pay commission.  
The  
Labour Court of South Africa,  
held  
at Cape Town  
case  
no: c199/2019  
Of interest to other  
judges  
In

the matter between:

NICOLA  
REDELINGHUYS  
Applicant  
and  
ADAPT  
IT (PTY) LTD  
Respondent  
Dates  
of Trial: 14-15 February and 23 March  
2022  
Date  
of Judgment: This judgment was  
handed down electronically by circulation to the parties' legal  
representatives by email, publication on  
the Labour Court website and  
release to SAFLII. The date and time for hand-down is deemed to be 27  
March 2023 at 15h30.

Summary:

(Trial – Employment contract –  
S 77(3) of the Basic Conditions of Employment Act, 75 of 1997 –  
Claim for alleged unpaid commission post employment – terms of  
commission agreement contained in correspondence and  
inferred from  
respondent's failure to dispute or qualify employee's  
version when it would have been expected to)

## JUDGMENT

LAGRANGE J

### Introduction

[1] The applicant, Ms N Redelinghuys ('Redelinghuys'), is a former employee of the respondent, Adapt IT (Pty) Ltd, a company which provides specialised software and business solutions to clients. The applicant's claim against the respondent is for unpaid commission which she claims she is entitled to under the

terms governing her commission payment in her role as New Business Development Executive at the respondent.

[2] In broad terms, she seeks the following relief:

2.1 An order directing the respondent to pay her the commission claimed, which she valued at R372 920.

2.2 An order directing the respondent to pay her interest on the aforementioned amount, to be calculated from 31 January 2020 at the prescribed rate of 10,25% per annum.

2.3 An order to pay her costs.

## 2.4 Any further and/or alternative relief.

- [3] Adapt IT asks for the dismissal of the claim with costs.
- [4] This court has jurisdiction in this matter in terms of s77(3) of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) to determine any matter that concerns a contract of employment, irrespective of whether any basic conditions of employment are implicated.
- [5] The parties agreed that the trial would take place online as the applicant is currently living in Perth, Australia. The hearing was conducted using Zoom.
- [6] Redelinghuys gave evidence on her own behalf and Mr S Abrahams ('Abrahams') gave evidence for the respondent ('the company' or 'the firm'). By agreement between the parties, witness statements were filed for both of them, to shorten their oral evidence.

## Factual background

### Chronology of events

- [7] The applicant and the respondent entered into a contract of employment on 27 June 2016. The applicant was initially employed as 'Global Markets Lead: Oil and Energy'. Subsequently, the applicant's title was changed to 'New Business Development Executive', with effect from 1 May 2018. On 24 April 2018, Mr C Young (then Chief Operation Officer of the respondent) sent a letter to the applicant outlining this new role as follows:

*"The new Business Development Executive role has five key results areas which are detailed in the job specification (attached) as follows:*

- a) Strategy Development and Implementation
- b) Stakeholder Relationships Management
- c) Business market intelligence
- d) Development of Proposals

Each of these key areas have clearly defined key performance indicators of which the absolute targets will be defined and agreed upon with you.

### Key Performance Indicators

- Agreed new business revenue targets are met within defined timeframes.
- On budget GP targets are met on all new sales.
- Market intelligence reports, to be updated quarterly to track targets.
- Number of new leads with detailed opportunity of the solution offering.
- New leads conversion rate of the proposals developed."

(emphasis added)

[8] It is common cause that the applicant was required to find new clients and sell the respondent's services to these clients. She was tasked with compiling a proposal of how much each new project

would cost, with the assistance of internal operational experts' advice, and would put a deal together using the advice provided. The estimation process was detailed and included a gross profit figure. There is a dispute about whether the applicant was required to participate in the delivery of the projects or whether her role was confined to the sales and the conclusion of deals. Redelinghuys

maintains she had no such role once a deal was finalised and handed over for implementation.

[9] Young's letter of 24 April 2018 outlined the "revised revenue target and remuneration structure" terms applicable to the new role. The "new business revenue target" for the new financial year was set at R30,000,000. The applicant was entitled to commission of R1,350,000 of the new business revenue target.

Effectively, the value of the commission mentioned amounts to 4.5% of the R 30 million new business revenue target. The dispute between the parties concerns the extent to which payment of that commission was subject to other conditions.

[10] Based on emails exchanged between Young and Redelinghuys in August 2018, it was recorded in the pre-trial minute as common cause between the parties that in order to qualify for the 4.5% commission, a deal had to achieve a minimum Gross Profit (GP) of 40%. Payment of the commission would be based on milestones achieved and would be paid once per quarter starting in the first month following closure of a quarter[1], upon first revenue flow.

[11] It is necessary to set out this correspondence in a little more detail. On 14 August 2018 the applicant sent an email to Mr Young where she intended to confirm the details regarding her commission if the Vivo deal were to be concluded. In this email she said the following:

*"We agreed to the following when we finalized the attached in May:*

- Based on the target of R30 000 000 revenue sold, commission payable is Redelinghuys 350 000. This equates to 4.5%
- There is no minimum threshold to be met, therefor commission paid on first Rand sold
- Commission paid quarterly, upon first revenue flow

Therefore should we win the Vivo work, at the submitted value of R9 692 880, the commission payable will be R436 179.

Please confirm that my calculation is correct."

[12] Young responded the same day with the following:

*“Thanks for the mail.*

I am happy with the principles, please let us however agree on the following:

1. Confirm that Vivo deal of the R9,692m is a new value and new customer – I would need confirmation from yourself and Seraj on this.
2. We will need to translate the R30,000,000 targeted number to the requisite GP percentage of 40% as per Oil and Gas GP percentage targets – please could we work through this with Aline and if you Aline could provide the deal schedule or structure of the GP percentage. My calculations have been on Redelinghuys2m translating to the Redelinghuys,350,000. Aline, could you work on a commission-claim schedule if it does not exist as yet. This will need to be signed off by yourself Aline.
3. Based on milestones achieved and as revenue is recorded the payment of commission should be once per quarter in the first month following closure of the quarter. Once again please give me insight into your existing processes for commission. I guess important is to track the in year GP and revenue.

Let us outline these principles in parallel to reviewing the other KPI's over and above GP achievement.” [2]

[13] Redelinghuys responded ‘inline’ to the three issues raised by Young in the following terms:

*“...1. Vivo is a new direct customer and a new SAP customer. We have only ever provided FuelFacs work for them as a subcontractor to FMC. This bid relates to an SAP Cloud Platform portal.*

*...2. The deal GP is currently at 41%. I will work with Aline to provide the info to you. Please note that our discussions to date had a 35% GP average target in mind, to allow for scenarios where we would strategically sell at lower GP to win work in a competitive environment. I have followed a process here where Ops signs off on the deal and GP, which confirms that the GP is acceptable. If this process needs to change, then please advise.*

4. ... Agreed. If the proposed timelines are accepted, this project will be delivered fully within this FY, therefor all IYR.”

It is noted that Redelinghuys confirmed that the Operations department signed off both on deal and the GP. Abrahams as head of Operations received copies of the emails and approved the figures.

[14] On 30 August 2018, Redelinghuys gave the company three months’ notice of her resignation, as required by clause 12 of her original contract of employment concluded in 2016. Accordingly, the applicant’s employment with the respondent terminated on 30 November 2018.

[15] It is common cause that, in or about September 2018, the applicant had successfully concluded two deals; the Vivo Site Tools Portal deal ('the Vivo deal') and the Accenture Resourcing deal ('the Accenture deal').

15.1 The Vivo deal was valued at R7 883 903, and so the commission payable, if the deal achieved a minimum GP of 40%, would be R354 776. By 10 September, Redelinghuys had come up with a proposal which reduced the cost of the project to be able to offer a 4 % discount and still show a 42 % profit. It should also be mentioned that the email included a detailed breakdown of the costing estimates of the project. The ultimate figures which were approved by Abrahams and de Witt valued it at R 7868 million with GP of 40.7%. Ultimately it was valued at R 7,883 million, which still exceeded the 40% GP target.

15.2 The Accenture deal, which was concluded in September 2018, was valued at R403 200 and so the commission payable, if the deal achieved a minimum GP of 40%, would be R 18 144.

15.3 Accordingly, the total commission on both projects amounted to R372, 920.

[16] On 6 November 2018, the applicant sent an email to Mr Abrahams where she stated the following:

*"Hi Seraj*

Aline and I discussed 2 options for the commission payment. Please let us know if either would work, so that I can then confirm with payroll."

[17] In the email, Redelinghuys outlined two options for the payment of the commission, which she had discussed with De Witt. She referred to the amount of commission due as "= 4.5% of revenue or R 354 776". The two options were to pay 50 % of the commission at the end of December 2018 and the balance at the end of March 2019 or to pay 100 % at the end of January 2019. Abrahams initially said he would set up a discussion "to align and agree on the way forward" but it was only after further prompting from Redelinghuys for a response that he replied by email on 19 November 2018 where he stated:

*"Hi Nicola,*

I will setup time tomorrow, for us to discuss. Per our last meeting, I have discussed the commission agreement and process with Happy[3] and as a principle, it is not possible to be paid and managed post your last date of employ. Happy will join the discussion tomorrow and explain in further detail."

[18] In Redelinghuys's e-mail of 23 November 2018 addressed to Young and copied to Abrahams, De Witt and Molefe, she set out her understanding as follows:

*"Hi Craig*

I met with Happy and Seraj on Tuesday regarding the payment of the commission earned to date. I was informed for the first time that resignation triggers forfeiture of commission on deals already sold, but which have revenue flow after departure. We agreed that I would raise the issue with yourself. Here are my comments based on my understanding of the issue, and I would greatly appreciate your consideration of these.

1. ....
2. At no point was forfeiture mentioned.
3. There is no evidence of a Group policy related to forfeiture. Happy stated a practice by Board that STIS, be it bonus or commission, is forfeited upon resignation. This is not covered in the Employee Handbook. Furthermore the 'Rules of the Scheme' referenced in my original contract relate to Bonus and these rules are not documented to my knowledge.
4. I believe there is a difference between a performance bonus and commission
  - a. Performance bonus is discretionary...
  - b. Commission is not discretionary, the sale must however meet predetermined criteria to be claimed. It is also earned per deal, 'earn as you sell' and not accumulated during the year to be paid at the end of the year. A deal done or a sale concluded during the time of employment cannot be forfeited.
  - c. What can potentially be forfeited in my view, is the claim to commission for deals initiated and progressed pre departure (pipeline) but concluded post departure.
5. During the meeting on Tuesday, an offer was made to pay commission related to the Vivo VST deal, but only against the customer invoices owed/accrued to date.
  - a. This contradicts the stated position on forfeiture in my view...
  - b. Does this not imply that the balance of the commission (remuneration) earned during my time of employment, is being withheld.
  - c. Another issue cited was that there is no 'mechanism' by which to pay commission post departure. I don't agree that this is a reason to withhold payment of remuneration earned during the time of employment.
  - d. I can cite examples where, to my knowledge, payroll was kept 'active' for an FTC without a valid employment agreement whilst a dispute was being settled, or where commission was paid to a FTC monthly after his FTC contract had expired. If all else fails, a simple agreement between the parties regarding payment in future can be concluded to address this challenge."

[19] Only on 30 November 2018, which was Redelinghuys's last day of employment with the firm, did Young respond sent her an email to the effect that the firm was only prepared to pay commission generated from the Vivo deal up to the end of that month, amounting to R 54, 511.00. His response was expressed in the following terms:

*"Subject: FW : VIVO Commission Options*

Thank you for the email.

Nicola, having reviewed the information, the following is what I believe re the commission claim/final remuneration.

Our agreement was that commission would be based on revenue earned quarterly from new sales generated by you.

The commission would be paid in the period after the quarter the revenue was earned.

In that regard, for the revenue generated, we will provide the following payment for commission for the period to November 30, 2018.

- Revenue: R 1,211 349
- COS : R 652 688
- Gross profit: R 558 661
- Commission % is 4.5%, therefore commission value proposed is R 54 511.

..."

(emphasis added)

[20] On 11 December 2018, the applicant's attorney sent a letter of demand to the respondent for payment of the full commission claimed. Thereafter the parties' respective lawyers engaged in correspondence over the disputed claim.

[21] The parties could not conclude a pre-trial agreement as the firm wished to include another reason why Redelinghuys was not entitled to the commission, namely that the 40 % gross profit condition had not been met. It was subsequently given leave to amend its answering statement to reflect this additional reason for not paying the commission.

Redelinghuys's contested role in the execution of projects

[22] Abrahams presented evidence in an effort to show that Redelinghuys had a continuing role in the rollout of a project even after she had concluded a deal. This, the company contends, demonstrated that it was intended that her commission should be based on GP delivered and not GP sold. It is common cause that the applicant was required to find new clients and sell Adapt IT services to these clients. The respondent alleges that the applicant was supposed to manage the projects after conclusion of the contract and that by implication, she would have only earned her commission once the whole project had been carried out.

The applicant testified that she was not required to participate in the delivery of the services or projects she sold. She claims to have handed over the project for delivery to Mr Young and Mr Abrahams on 3 October 2018. The respondent denies that this handover took place.

- [23] The letter 24 April 2018 notifying Redelinghuys of the change in her role and remuneration structure when her job title was changed to ‘New Business Development Executive’, has already been referred to. Abrahams contended that Redelinghuys’s role required her continued involvement in the actual delivery of the project, and referred to three of her KPI’s mentioned in the letter, namely:

23.1 ‘Stakeholder Relationships Management’

23.2 ‘Agreed new business revenue targets are met within defined timeframes’, and

23.3 ‘On budget GP targets are met on all new sales’

- [24] Abrahams, testified that he understood these KPI’s meant that the applicant was contractually obligated to be involved in the delivery of the projects. Redelinghuys argued that Abrahams was neither responsible for drafting the contract nor participated in its conclusion. Accordingly, his testimony merely reflected his own interpretation of what the parties intended when they agreed on the contents of the letter.

- [25] Evidence was led in an attempt to demonstrate that the actual gross profit achieved on both of the deals in question fell below the 40 % threshold required for payment of the bonus. It was common cause that the GP sold and GP delivered can differ as the sales price is based on informed estimates and expert advice. Factors like unforeseen circumstances, unexpected costs and poor management can reduce actual GP realised. This means GP delivered will not always equal GP sold.

- [26] Abrahams testified that applicant was not entitled to commission as the Vivo deal achieved a GP delivered of 35,09% and the Accenture deal achieved a GP delivered of 24,55%. These below target gross profit figures contended for were strongly disputed by Redelinghuys who argued that it had been derived by adding cost items that did not form part of the original costing of the deal and would not normally be taken into account in the gross profitability calculation.

- [27] According to the applicant, as long as the GP sold achieved a minimum of 40% GP, she was entitled to commission. It is common cause that the Vivo and Accenture deals achieved a minimum of 40% GP sold.

## Evaluation

- [28] Essentially, the court is tasked with deciding whether or not the applicant is contractually entitled to the commission claimed. The crux of the case rests on:

28.1 whether on a proper interpretation of the terms of the agreement governing her commission, commission was based on GP sold or GP delivered, and

28.2 if the respondent also had a policy or practice that it would only pay commission to an employee if they still remained in its employment when payments fell due.

Was the applicant's commission based on GP sold or GP delivered in terms of her employment contract ?

[29] The proper approach to interpretation was detailed in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA). In this case the court said the following about interpretation:

*"[18]...Whatever the nature of the document, consideration 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."*

[30] Redelinghuys's original contract of employment has no bearing on the dispute, as the commission payable only arose out of the new role and remuneration structure which applied to her following Young's letter of 24 April 2018. As the 40% GP requirement was not mentioned in that letter, the subsequent correspondence of the parties must be scrutinised to determine the nature of that requirement.

[31] Young's April letter set out the recommended terms of Redelinghuys's new role and remuneration structure, which she accepted on 4 May 2018. A portion of the remuneration structure included a Short Term Incentive Scheme in the form of commission payments. According to the table in the letter itemising the various elements of her remuneration, the commission portion of her package would amount to R 1,350,000.00 based on a 'new business revenue target' of R 30 million. Accordingly, her commission would be 4.5% of the new business revenue target. Over and above that she was entitled to receive R 250,000 as 'on target overriding commission'. In the letter there is no mention of a gross profit target associated with the R 30 million revenue target. In the email correspondence in August 2018, Young mentioned the 40 % gross profit target, and asked De Witt could provide a deal schedule of the gross profit percentage and a commission-claim schedule.

[32] The applicant was entitled to 4.5% commission on every deal she concluded, as long as the deal achieved a minimum GP of 40%. There was no document issued by the firm stating whether GP referred to GP sold or delivered. As previously mentioned it is common cause that a 40 % gross profit requirement was a condition for payment of the bonus, but the parties differed whether it was sold gross profit or actual gross profit. Which measure of GP was intended by the parties to apply, must be gleaned from their communications on the commission payable. In this regard, it is important in construing the GP term that Redelinghuys set out her understanding in express terms, which the firm did not contradict or dispute, in circumstances when it would have been expected to do so.

[33] In *McWilliams V First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) the Appellate Division held:

*“I accept that “quiescence is not necessarily acquiescence” (see Collen v Rietfontein Engineering Works 1948*

(1) SA 413 (A) at p 422) and that a party’s failure to reply to a letter asserting the existence of an obligation owed by such party

to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party’s silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or

negotiations between the parties relative to the subject-matter of the assertion. (See *Benefit Cycle Works v Atmore* 1927 TPD 524 at pp 530-532; *Seedat v Tucker’s Shoe Co* 1952 (3) SA 513 (T) at pp 517-8; *Poort Sugar Planters (Pty) Ltd v Umfolozi Co-operative Sugar Planters Ltd* 1960 (1) SA 531 (D) at p 541; and of *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at pp 642A-G.)”[4]

[34] Redelinghuys asked Young to confirm that if the Vivo deal were to go through that her commission would amount to 4.5% of the GP sold. He did not dispute her understanding. If Young believed that commission was based on GP delivered he would have been expected to clarify that the percentage GP and commission could only be calculated once the project has actually been completed. Abrahams

testified that paying commission quarterly, based on revenue flow ensured that the necessary corrections could be made as the project

progresses and actual gross profit was quantified. He sought to portray commission payments are being interim in nature, in the manner of provisional payments akin to similar payments in building contracts. This was in turn linked to the argument that Redelinghuys had not achieved all her KPI’s on the deal because she would not play a role in implementing it after she left.

[35] It is clear that Young’s April letter did not spell out all the requirements for qualifying for the commission. It did not deal with the gross profit issue at all. The gross profit requirement was only expressly mentioned in the email exchanges in August 2018. Redelinghuys’s email makes it very clear she is referring to GP sold. Young did not take issue with this principle, but was concerned to confirm that the deal was new. He mentions the R 12 million profit figure as ‘per Oil and GAS[5] GP targets...’, and requested a commission schedule to be drawn up. I agree with the applicant that it is difficult to understand how a schedule would be drawn up in advance, if every payment was subject to achieved gross profit figures. If, as

Abrahams testified, the commission payments would merely be provisional, subject to a final reconciliation once actual profit could be calculated, it is anomalous that there is not a single hint of this in all the correspondence on the commission.

- [36] Likewise, in the third paragraph of Young's email, even though he speaks of 'milestones achieved', he refers to revenue recorded but to not gross profit recorded. If one of the milestones to be achieved was actual profit attained this was the most obvious point at which he would have corrected Redelinghuys's assumption that gross profit was gross profit sold not gross profit realised. The only financial measure he expressly refers to as a pre-requisite for quarterly commission payments is revenue recorded, which accords better with Redelinghuys's understanding that it is this the figure on which commission payment calculations would be based. The two references in his letter to gross profit, do not try to distinguish his meaning from Redelinghuys's express articulation of it as gross profit sold. While he 'guesses' that it 'is important to track the in year GP and revenue' (sic), it is significant he gave no indication that actual GP achieved was essential for the purposes of the calculation of the commission. Once again, if that was his intention, why would Young not have articulated a concern about Redelinghuys's apparent misconception at that juncture?
- [37] In reply to Redelinghuys's email of 23 November 2018, setting out her claim that she did not forfeit her commission on termination, Young's response was that it was based on revenue generated to date and based on new sales generated by her. The emphasis was on revenue generated and received, without any reference to GP profit realised. Likewise, when presented with two alternative proposals for paying out the commission after her departure, Abrahams did not take

issue with her quantification of the commission due calculated on revenue and GP sold. The fact that the firm only articulated the GP delivered principle as a defence much later is also telling.

- [38] Consideration must also be given to the three key results areas in the letter of 24 April 2018, which Abrahams emphasised in support of the firm's interpretation that Redelinghuys had to complete additional tasks to qualify for the commission. The first problem is that the list of her measurable KPI's do not relate to any action to be performed by Redelinghuys in relation to project implementation. Rather, emphasis was placed on achieving revenue targets and that all new sales meet 'on budget' GP targets. It is noteworthy that it was only sales that had to meet the on budget GP target. If it was intended that projects delivered also had to meet those targets, the omission of any reference to the project objectives is odd. The KPI requiring her to meet 'agreed new business revenue targets' 'within defined time frames' is not a measure of successful project delivery, but emphasises new revenue generation as the key performance parameter. The KPI stipulating that 'On budget GP targets are met on all new sales' indicates that the applicant needed to ensure that

certain targets were met on new sales. Accordingly, it concerned reaching a sales target rather than delivering a project on time and on budget.

- [39] It is further telling that, in the contract between the respondent and Vivo, it states that the supplier shall appoint certain key personnel, one being a 'Project Manager'. As Abraham's name was specifically mentioned as supplier manager in the detailed projected costings of the project, it would be natural that Redelinghuys would also have been mentioned in relation to the project manager role. Further, no provision was made for a charge to be levied in respect of any services to be provided by Redelinghuys in the delivery of the project. It is also difficult to imagine why the firm would have wanted Redelinghuys to play both a project implementation role and a new sales role simultaneously. Any time spent on project management would have been to the detriment of her ability to deliver new sales. By contrast, the Operations Department's role in implementing projects was de-emphasised by Abrahams, even though common sense would suggest that it would have far more to do with achieving project implementation than a new business development manager.
- [40] In short, the letter of April 2018 and correspondence between Redelinghuys, Young and Abrahams is more consistent with her interpretation of commission being payable on GP sold than on GP delivered. Moreover, it makes more business sense that she would be measured on her sales performance rather than the project delivery given her job description.

Was commission only due and payable on deals concluded by Redelinghuys, while she remained in the company's employment?

- [41] Reference was made by the parties to certain other cases involving commission payments. In *Zapop (Pty) Ltd v CCMA & others* (2016) 37 ILJ 1882 (LAC), the Labour Appeal Court found that the employer failed to prove a practice of forfeiture of commission after the termination of an employee's service in a situation where the policy governing commission was silent on forfeiture[6]. The LAC also held inter alia that forfeiture of remuneration earned, would require the employee's consent[7]. In *Workerslife Direct (Pty) Ltd v Maloka* (2019) 40 ILJ 841 (LAC) the employee had consistently been paid commission on a certain basis for 13 years and was found to be entitled to post termination payment of commission in terms of an express contractual provision, which is obviously not the situation in casu. In *Emetonjor v Kintetsu World Express SA (Pty) Ltd* C736/16) [2018] ZALCCT 30 (11 September 2018) the court had to interpret what it described as a badly drafted contractual provision governing the commission due to the employee. The court preferred the employer's interpretation of the provision as the 'more plausible and businesslike' one because the employee's interpretation implied she would have qualified for the commission even if she barely covered her own salary[8]. Redelinghuys's lawyer's alluded to the *Zapop*

## judgment

in the letter of demand sent to the firm. In response the firm alluded to the judgment in Emetonjor, which it claimed ‘may have a bearing on the issues in this matter’.

- [42] The interpretation of which GP measure applied has already been dealt with above. On that interpretation Redelinghuys was due to receive commission on GP sold from the time that revenue started to flow from the deal when it was delivered.
- [43] It is noteworthy that the issue of Redelinghuys’s alleged project delivery role was never raised at any stage prior to the termination of her employment. If she had such a role, that is something which would have been foremost in the mind of Abrahams and Young at that time, as a factor which would disqualify her from receiving anything after her termination. Instead reliance was placed on the existence of a supposed company policy of not paying commissions on achieved revenue targets once an employee had left the firm.
- [44] The evidence of the existence of such a policy or practice was little more than tentative, at best. In essence, Abrahams tendered hearsay evidence about what Molefe informed him and conceded he had no personal knowledge of such policy. When Redelinghuys challenged the firm to produce the policy while she was still employed it was not forthcoming. Her own claim that she could cite examples of persons who continued to receive commissions post termination was not taken up or contested when she raised it. Further, no attempt was made to establish a defence that the contract contained an implied term based on trade custom and usage, that commission of this nature is not payable after an employee’s resignation.
- [45] In my view, it is clear that commission determined by GP sold was earned by Redelinghuys when she concluded a deal. It only became payable once the revenue started to flow. It stands to reason that in respect of some deals, that might occur after she left the firm’s employment. On the evidence, she had earned the commission based on the value of revenue sold when she concluded the deal, and the only condition was that it would only be payable as actual revenue from

the deal came in. Obviously, if the revenue did not materialise then payment of the commission would not be made and Redelinghuys readily agreed that was the case. There is nothing to suggest that it was the parties’ understanding that Redelinghuys’s entitlement to her commission ended with her employment and as in Zapop the employer failed to prove there was a contractual term that she forfeited any claim to commission just because she left the firm.

## Conclusion

- [46] In light of the above, I am satisfied that the contractual terms governing the payment of Redelinghuys’s sales’ commission are to be found in the letter of 24 April 2018 and by a businesslike interpretation of the correspondence between Young and Redelinghuys in August that year and the subsequent correspondence between Redelinghuys, Abrahams and Young. As mentioned above, the failure of Young or Abrahams to dispute or query

Redelinghuys's version of the commission being calculated on the revenue value of the deal sold when Redelinghuys pointedly placed her understanding on

record, is telling. The difference between the commission being paid on delivered gross profit and on budget gross profit sold is such an important one, it is untenable that the firm would not have raised it as soon as Redelinghuys recorded it. Moreover, the scenario contended for by the firm, that Redelinghuys had ongoing performance obligations until the project was completed, is neither supported by the evidence nor does it lend itself to a businesslike interpretation of the project. The scenario argued for is that Redelinghuys was given a broad management role embracing both seeking out new business and concluding new sales as well as ongoing project management once sales were concluded, which was not reflected in her title or KPI's and would not have made business sense.

[47] In the circumstances, I am satisfied Redelinghuys has established that the contractual terms governing her entitlement to commission entitled her to payment of the 4.5 % of the revenue generated by new sales deals she concluded which was due and payable from the first quarter after revenue from the deal started to flow.

#### Costs

[48] S162 of the Labour Relations Act 66 of 1995 states that this court may make an order for the payment of costs according to the requirements of the law and fairness. This claim is a contractual one and there is no ongoing employment relationship. There is no reason in my view why costs should not follow the result.

#### Order

1. The Respondent is liable to the Applicant for payment of commission due to her in terms of her contract of employment in the amount of R372 920, which the Respondent must pay to her within 15 days of this order.
2. The Respondent must pay the Applicant interest on the aforementioned amount, calculated from 31 January 2020 at the prescribed rate of 10,25% per annum.
3. The Respondent must pay the Applicant's costs.

Lagrange J

Judge of the Labour Court of South Africa

Representatives - For the Applicant: T Gandidze of Cheadle Thompson & Haysom Inc. For the Respondent: S Harvey instructed by Michalson's Attorneys.

[1] The respondent's financial year is divided into four quarters; 1 January – 31 March (Quarter 1), 1 April – 30 June (Quarter 2), 1 July – 30 September (Quarter 3) and 1 October – 31 December (Quarter 4).

[2] In the email, the names ‘Siraj’ and ‘Aline’ referred to Abrahams and Ms A De Witt (Finance Manager: Energy

Division) respectively.

[3] Ms H Molefe, the firm’s HR manager

[4] At page 10.

[5] Sic

[6] At para [40].

[7] At para [41].

[8] At paras [17] and [18].

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Prepared on 14 October 2026 · Esheria