REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 658/16

In the matter between:

HENDRIK SCHLOEMANN **Applicant**

and

GOLDSTONE RESOURCES LTD **Respondent**

Heard: **29-31 October; 19 November 2018**

Delivered: **13 December 2018**

Summary: Contractual claim – dispute whether employee resigned or was dismissed – claim arising from contract of employment.

JUDGMENT

STEENKAMP J

Introduction

[1] This dispute arises from an extraordinary set of circumstances. It is common cause that the employment relationship between a former director of GoldStone Resources Ltd, Dr Hendrik Schloemann, and the company came to an end – on six months' notice – on 20 November 2014

in Accra, Ghana. He says he was dismissed; the company says he resigned. But neither party put anything in writing at the time. Four years later, two former directors of the company (including the applicant) claim that he was dismissed and is entitled to certain contractual payments; the other two say that he resigned and is entitled to nothing. In other words, two directors of a multimillion Rand international company are not telling the truth. That doesn't say much for corporate governance; but that is the conundrum that the Court faces.

Common cause background facts

[2] Dr Hendrik Schloemann entered into a contract of employment with the respondent, GoldStone Resources Ltd, on 28 November 2013 at Waterval Boven. Schloemann, a geologist, was appointed as exploration director, reporting to the CEO. GoldStone is a public mining exploration company. It is registered in Jersey (Channel Islands) but the parties agreed that they are subjected to this Court's jurisdiction. The company conducts mining exploration internationally, but principally on the Gold Coast of Africa.

[3] The contract of employment recorded that Schloemann's employment had already started in September 2011 and would continue indefinitely, subject to the clauses in the contract. His remuneration was set at $210 000 (US Dollars) per year. Clause 13.1 reads:

> **"TERMINATION OF EMPLOYMENT BY NOTICE**
>
> Save as otherwise provided for herein, either GoldStone or the Exploration Director shall be entitled to terminate this agreement on 3 (three) calendar months' written notice to the other, provided that if the Exploration Director's employment is terminated unfairly or without agreement or he is retrenched, the Exploration Director shall receive all his benefits of employment for a period of 12 months after his employment terminated."

[4] The folly of drafting in the passive voice will become apparent later. But it is further recorded that the contract of employment is the entire agreement between the parties "and save as otherwise provided no amendment, alteration, addition or variation will be of any force of [*sic*] effect unless reduced to writing and signed by the parties to this agreement." It also records:

> "No agreement varying any of the terms and conditions will be of any force or effect unless contained in writing and signed by the parties."

[5] Schloemann and the company did not amend the agreement in writing and sign any such amendment.

[6] A new shareholder, Stratex International PLC – a British company – invested £1,25 million in the company and acquired a 33,45 % shareholding. On 14 October 2014 the company issued a circular regarding a proposed share consolidation. Schloemann was a director at the time. On 9 October 2014 he signed a "responsibility letter" referring to the circular. He acknowledged that, as a director, he was required to take responsibility for the information in the circular. The circular recorded that, with effect from the "date of admission" – being 31 October 2014 – his salary would be reduced from $210 000 to $140 000 per year. Schloemann resigned as a director – but not an employee – with effect from 30 October 2014.

[7] On 20 November 2014 at Accra, Ghana, Dr Schloemann's contract of employment was terminated on six months' notice. Whether he resigned or was dismissed, is the central dispute in this matter. He continued working for GoldStone and was paid a salary (calculated at $140 000 per year) until the end of May 2015.

<u>The claim</u>

[8] Dr Schloemann claims the following in terms of s 77(3) of the BCEA[1]:

8.1 Payment of $35 000, being the balance of his remuneration due to him for the six months from December 2014 to May 2015, on the basis that he had not agreed to a reduction in his salary from $210 000 to $140 000 per year.

8.2 Payment of $210 000, being his annual remuneration, based on clause 13.1 of his contract of employment.

8.3 Interest at the rate of 15,5% *a tempore morae* until date of payment[2].

[1] Basic Conditions of Employment Act 75 of 1997.

[9] The claim of $210 000 is based on the applicant's claim that the company terminated his employment unfairly or retrenched him, activating the clause that he "shall receive all his benefits of employment for a period of 12 months after his employment terminated".

The response

[10] The company's case is that Schloemann agreed that his salary would be reduced to $140 000 per year. With regard to the termination of his employment, it pleaded:

> "Subsequently, and on or about [*sic*] 20 November 2014 and in Ghana, applicant and respondent orally agreed[3] that:
>
> 1. Applicant would resign from respondent's employ, which resignation was accepted by respondent;
> 2. Applicant would, however, continue in the service of respondent for a period of 6 months, *inter alia* in order to assist with the implementation and completion of certain projects in which applicant was at the time involved.
> 3. Applicant was employed by respondent and was paid the remuneration due to him up to the end of May 2015.
> 4. Applicant's employment was accordingly terminated by agreement, within the meaning of clause 13.1 of applicant's employment agreement, and applicant is accordingly not entitled to the 12-month employment benefits stipulated in clause 13.1."

The application to amend

[11] After the current CEO of the company, Ms Emma Priestley, had testified, and after both parties had closed their cases, the company brought an application to amend their statement of response. That was necessitated by Ms Priestley's concession that the parties had not agreed to terminate the employment relationship. Instead, she testified that he had resigned; and that his unilateral resignation had not been discussed at the board

[2] The interest calculation was done at the prescribed rate of interest at the time that the applicant filed his pleadings. It has since changed.

[3] My underlining.

meeting on 20 November 2014. She conceded that the applicant and respondent had not orally agreed that he would resign.

[12] The respondent accordingly applied to amend paragraph 12 of its statement of response as follows:

> "Subsequently, and on or about [*sic*] 20 November 2014 and in Ghana, applicant resigned from respondent's employ. Such resignation did not require the acceptance or concurrence of respondent in order for such resignation to be legally effective but in any event, such resignation was tacitly accepted by respondent."

[13] The applicant objected to the proposed amendment.

[14] I agree with the applicant that, to allow the amendment at this late stage after all the evidence has been led, would be prejudicial to it. The defence that the respondent now wishes to introduce is entirely different to its stance throughout since it filed its previous amended statement of response two years ago, on 13 December 2016, and contrary to the case that the applicant came to meet in his evidence. It is also contrary to the case that the respondent set out in the pre-trial minute that its attorney signed on 8 August 2017.

[15] As Mr *Stelzner* pointed out, to suggest that the belated Priestley defence was supposedly in any event apparent to the applicant is to put the cart before the horse; it may even be begging the question. The respondent's defence must be determined with reference to the case it has pleaded and not the other way round. The pleaded case is not to be determined by the evidence.

[16] The application to amend is refused.

<u>The disputed facts and the evidence</u>

[17] Dr Schloemann started with leading the evidence in support of his claim. He subpoenaed the CEO of GoldStone at the time of termination, Mr Jurie Wessels. The company called two witnesses: A director at the time, Mr Christopher Hall; and the current CEO and then director, Ms Emma Priestley. It did not call the other director, Dr Robert Foster, who came to court from abroad and attended the proceedings throughout. And neither

party called the person who took the minutes at the eventful board meeting on 20 November 2014, Mr Jacques Coetzer.

Dr Schloemann

[18] Herr Dr Schloemann struck the Court as a credible, albeit at times diffident, witness.

[19] He testified that he was, in principle, amenable to a reduction in salary; but he had not finally agreed to a change in his terms and conditions of employment. He did not sign an amended contract of employment; in fact, by the time he left in May 2015, no-one had signed amended contracts. He did agree to resign as a director and he did so in October 2014, shortly before the share consolidation. However, he never intended to resign as an employee.

[20] Dr Schloemann was adamant that he did not resign after the board meeting in Accra on 20 November 2014. Instead, Wessels conveyed to him after the Board meeting and at the pool deck that the new directors wanted him to go on six months' notice. He was "shell shocked". He would not have resigned voluntarily: he had just bought a new house in Camps Bay that was subject to a mortgage bond; he had young children; and the poor state of the mining industry would make it difficult for him to find a new job as a geologist. In cross-examination, he explained that he accepted his fate: it became clear to him that the new directors wanted Peter Turner to take over his role and that he was no longer needed.

[21] Schloemann testified that he was only spurred into action to contest his dismissal after Hall had sent an email to Coetzer in April 2016 referring, for the first time, to his purported resignation. Schloemann had written to Jacques Coetzer, the General Manager, and to Daniel Ellis to enquire about unemployment insurance. Under the subject heading, "UI-19", he wrote:

> "I have been reading on the internet about this. I should have been claiming within six months of my last day, but exceptions can be made and unemployment funds can be paid even if an application is made after six months have expired. In order to enquire if I still qualify I would have to go

> in person to the Labour Department. I would do that once I have a UI – 19 in my hands. Can you issue one to me?"

[22] Almost a month later, Coetzer forwarded the email to Hall. Hall replied on 18 April 2016:

> "Dear Jacques
>
> I have no problem in getting a form to Hendrick [*sic*] if this is possible so long after the event. Clearly this was an admission by Jurie.
>
> My understanding is that Hendrick became uncomfortable with his position and resigned, finishing once his 6 months "protection" expired.
>
> Provided the form says he resigned, and you and/or Emma go ahead please?"

[23] Coetzer forwarded the response to Schloemann and said: "Once Emma is back in South Africa I will ask her to sign on behalf of Christopher". Schloemann replied: "That's great. Keep me in the loop."

[24] As to why he had waited so long before referring this claim to this Court, Schloemann's response was that he had resigned himself to his fate at the time of his dismissal; and it was only once Hall had alleged that he had resigned that he saw fit to seek legal advice. He thought that he had compromised his legal position by agreeing in principle to a new employment contract (that never came to fruition) in the future; it was only once he consulted his attorneys that he was advised otherwise.

Wessels

[25] Jurie Wessels, whom the applicant had subpoenaed to testify, was the CEO of GoldStone before the Stratex share acquisition. He attended the fateful board meeting at the Golden Tulip hotel in Accra, Ghana on 20 November 2014 in that capacity. The other three directors in attendance were the two newly appointed Stratex non-executive directors, Bob Foster and Emma Priestley; and the non-executive chairman, Christopher Hall. Jacques Coetzer recorded the minutes. By that time, Schloemann was no longer a director.

[26] Wessels corroborated Schloemann in all material respects. He testified that Hall had asked him – during the Board meeting -- to convey to

Schloemann that he (Schloemann) had to leave the company by the end of May 2015, i.e. on six months' notice. Hall had also asked Jacques Coetzer not to minute that decision.

[27] After the Board meeting, Wessels approached Schloemann and told him that the Board did not want him any longer. The Board wanted "a new pair of eyes" and they wanted to save costs. Schloemann appeared very stressed when Wessels conveyed this decision to him but it looked like he resigned himself to what had been decided. The "new pair of eyes" referred to Dr Peter Turner, the Australian geologist that the new Stratex directors had brought in as a consultant.

[28] On 6 October 2014 Wessels had sent an email to W H Ireland Ltd, a nominated advisor (colloquially referred to as a Nomad) including a table of employment terms for GoldStone. That table recorded the following:

> "If Hendrik does not want to accept [revised terms of employment]: He will have to work a maximum 3 month notice period (or such reduced period required by the company) and will receive a further 3 month payment as a retrenchment package."

[29] Wessels reiterated that Schloemann did not resign: he never signed an amended contract of employment, and if he had resigned, he would have given three months' notice. Instead, the Board terminated his services on six months' notice.

[30] Wessels also testified about the Circular of 14 October 2014. He pointed out that it referred to "proposed changes" to the management team's terms of employment. Hendrik Schloemann had not agreed to those changes. The Circular also recorded:

> "The existing service agreements of the executive directors are terminable on not less than 3 months' prior written notice given by either the Director or the Company, provided that a director is contractually entitled to continue to receive his salary for a period of 12 months if his employment is terminated unfairly."

> "No amendments have been made to the directors' service contracts within six months of the date of this document, but the following changes are proposed to take effect on admission[4]:
>
> …
>
> Hendrik Schloemann's salary will be reduced to US $140 000 per annum, provided that the Company may not serve notice of termination on Dr Schloemann without cause within the six months following admission."

[31] Under cross-examination Wessels clarified that he was not sure whether it was during the Board meeting or after it had officially adjourned that the decision about Schloemann's termination was conveyed to him; but the directors were still sitting around the table at the hotel. Hall, Foster and Priestley were all present. The decision was not minuted. Hall indicated that it would be "embarrassing" if it had to appear in the minutes. Wessels did not approve of the decision, but he was simply told to convey it to Schloemann. Wessels was astonished when he was told of the decision.

[32] Wessels struck me as an honest and straightforward witness. His evidence that he was "astonished" when Hall conveyed the Board's decision to him, had the ring of truth. Even though he had had his differences with Schloemann in the past, he was clearly embarrassed by the way the new directors had treated Schloemann while he (Wessels) was still the CEO. And it must be borne in mind that Wessels testified under subpoena. He was arguably the most neutral and credible witness before the Court.

Hall

[33] Hall was adamant that Schloemann had resigned, and that the termination of his employment did not form part of the discussions at the board meeting. It was only after the meeting had adjourned that Wessels came to tell him that Schloemann had decided to leave.

[34] Hall made notes on the agenda for the board meeting. On the whole, these corresponded with the brief minute of the meeting: for example, it included annotations regarding a "detailed review by P Turner" on

[4] i.e. on 31 October 2014.

Homase/Akrokerri exploration strategy for the ensuing year; staff requirements; the appointment of a broker; and the remuneration and audit committees. Inexplicably, he had also made the following handwritten note: "Hendrik 6 mths from 1/12". He could not adequately explain why he would make that annotation on the agenda for the board meeting if Schloemann's termination had not been discussed at that meeting; nor does it support the allegation that Schloemann resigned, given that clause 13.1 of the employment contract requires three months' written notice.

[35] Hall was also at a loss to explain why Schloemann's purported resignation was not recorded in the minutes of the next board meeting on 12 February 2015. And the "agreement" that GoldStone relies on is not recorded anywhere, either in the two sets of minutes – or any other minute – or in any contemporaneous correspondence. And Hall's explanation that he made the annotation on the agenda of the Board meeting ("Hendrik 6 mths from 1/12") does not ring true. He had made all the other annotations during the Board meeting. It is improbable that he would make that annotation afterwards, when the meeting had already adjourned, and when Wessels called him aside informally.

[36] In fact, the only noteworthy remotely contemporaneous correspondence is an email from Hall to Schloemann a month after the Accra meeting, on 24 November 2014, under the subject line, "The future":

> "Dear Hendrick
>
> I wanted to thank you personally for your efforts on the recent visit to Ghana.
>
> It was a difficult situation and the outcome will obviously make life difficult for you and your family.
>
> Knowing this, your helpful and professional approach did not go unnoticed let me assure you.
>
> I know you are aware that we have to ensure that the shareholders of Stratex and Goldstone get the maximum benefit out of our investment. In more bullish times this can be less important but it is critical now.

> I am sure we can count on your continued support and assistance while you are still with us and I wish you every success in finding another role where your experience can be put to good use.
>
> I hope you are now well recovered."

[37] The interpretation to be placed on this email will be considered further when dealing with the probabilities.

[38] Hall further testified that they all left for the airport at around 20:00 and that he did not speak to Wessels or Schloemann again on 20 November 2014.

[39] Under cross examination, Hall could not explain why Schloemann's resignation was not recorded in any letter from the Company, nor in the minutes of the next Board meeting, nor in any statement from the Company.

[40] Hall often replied that he "had no recollection" of aspects of the important events of 20 November 2014 – such as his annotation that the meeting adjourned at 16:40, whereas the minutes reflect 16:00 – or that he had "no idea" what was discussed when. He was not an impressive witness.

Priestley

[41] Ms Emma Priestley, the current CEO, was a very confident witness. But her credibility was undermined by her contradicting the respondent's own pleadings.

[42] Ms Priestley conceded that there was no oral agreement between the parties in Accra on 20 November 2014 that Schloemann would resign, and that the resignation was accepted by the respondent. Instead, she relied on Schloemann having resigned unilaterally. She testified that "we didn't receive Hendrik's resignation, nor did the Board accept it". She confirmed that binding agreements and resolutions needed to be taken by all the directors and that without all the directors' buy-in, there could be no agreement concluded on behalf of the company; yet the directors had not reached any such agreement or a solution at the board meeting of 20 November 2014. When she was referred to the statement in the Company's pleadings that the parties had agreed on 20 November 2014 in Accra that Schloemann would resign and that the respondent had

accepted it, she replied: “That is not the truth.” In fact, according to her, Schloemann’s termination was not discussed by the Board at all; Hall had simply informed the two Stratex directors of Schloemann’s purported resignation. His employment was never terminated by agreement.

[43] There is a clear contradiction between evidence of Hall and that of Priestley. Neither Foster – who was present in court throughout – nor Foster, who was present at the board meeting and could have shone light on what had happened there, was called as a witness.

[44] Priestley also instructed two sets of solicitors in the UK to address letters to Schloemann on 19 October and 15 December 2016 respectively, alleging that he had made misleading statements in the circular of October 2014. In those letters, neither firm of attorneys mentions Schloemann’s purported resignation.

Evaluation

[45] If one had to speculate, the following is perhaps the most likely scenario of what happened on that Thursday at the hotel pool in Accra: the board meeting concluded and was adjourned at 1600. Jacques Coetzer left. The other board members remained behind. Hall conveyed to Wessels that Schloemann had to go. He may not have used the word “retrenched”, but the clear message was that Schloemann had to leave. Wessels went to speak to Schloemann at the pool area and conveyed the message to him. Schloemann may not have demurred but “accepted his fate”, as he put it.

[46] The problem is that that is not the evidence of either party before the Court. The Court is faced with contradictory and irreconcilable versions. Either Schloemann and Wessels are telling the truth, or Hall and Priestley are. The only certainty is that not all of them are.

[47] The Court is thus left with the unenviable task of deciding, on the probabilities, where the truth lies. In so doing, the Court is mindful of the oft-quoted technique set out so succinctly by Nienaber JA in *SFW*[5]:

[5] *SFW Group Ltd v Martell et cie* 2003 (1) SA 11 (SCA) par [5].

> "On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[48] And, as stated by Horwitz J in *Garzouzie v Smith*:[6]

> "Waar daar twee verhale voor 'n verhoorhof afgelê is wat regstreeks met mekaar bots, waar nòg die een nòg die ander verhaal teenstrydighede bevat, waar die waarskynlikhede nie die een of ander begunstig nie en waar die een of die ander verhaal nie verwerp word òf op grond van

[6] 1954 (3) SA 22 (O).

> geloofwaardigheid òf om enige ander gegronde redes nie, dan moet die enigste en noodwendige gevolgtrekking wees dat die party wat met 'n bewyslas belas is, hom nie van daardie las gekwyt het nie."

The onus

[49] The onus to prove the contractual entitlement would normally rest on the applicant.[7] In *Kriegler v Minitzer* the Court quoted with approval this *dictum* from *Phipson*[8]:

> "[T]he burden of proof … rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue."
>
> …
>
> "The true meaning of the rule is that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on him."

[50] But, as the Court points out in *Kriegler*, that rule is not absolute, citing *Wigmore*:[9]

> "It is often said that the burden is upon the party having in form the affirmative allegation. But this is not an invariable test, nor even always a significant circumstance; the burden is often on one who has a negative assertion to prove. A common instance is that of a promise alleging non-performance of a contract."

[51] In this case, the wording of the contract of employment is common cause. If it is "terminated unfairly or without agreement or he is retrenched, the Exploration Director [Schloemann] shall receive all his benefits of employment for a period of 12 months after his employment terminated."

[52] GoldStone claims that the contract was terminated by agreement, hence the clause does not apply. On which party does the onus then rest?

[53] Mr *Stelzner* argued that the ultimate onus rests on the respondent, as it essentially raises two special defences:

---

[7] *Kriegler v Minitzer* 1949 (4) SA 821 (A); *Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk* 1976 (3) SA 470 (A) 473C-474C.

[8] Phipson *Evidence* (8 ed) 27.

53.1 Variation of the contract of employment in respect of the remuneration amount; and

53.2 that the parties agreed to the termination of Schloemann's employment.

[54] Mr *Stelzner* relied in this regard on the various meanings of *onus probandi* considered in *Pillay v Krishna*[10]:

> "…the only correct use of the word *onus* is that which I believe to be its true and original sense (cf Dig 31.22), namely, the duty which is cast on the particular litigant, in satisfying the court that he is entitled to succeed on his claim, or defence, as the case may be, and not in the sense merely of his duty to produce evidence to combat a *prima facie* case made by his opponent … where there are several and distinct issues,… then there are several distinct burdens of proof, which have nothing to do with each other, save of course, that the second will not arise until the first has been discharged… The *onus*, in the sense in which I use the word, can never shift from the party upon whom it originally rested. It may have been completely discharged once and for all, not by any evidence which he has led, but by some admission made by his opponent… so that he can never be asked to do anything more in regard thereto; but the *onus* which then rests upon his opponent is not one which has been transferred to him: it is an entirely different *onus*, namely, [that] of establishing any special defence which he may have."

[55] In this case, the applicant bases his claim on the contract of employment. The respondent bases its defence on an agreed termination. I accept that, once the applicant had discharged the onus of proving the contract, the onus rests on the respondent to prove the agreement to terminate as well as the agreed reduced remuneration.

[56] The claim and the defence in this matter seem to me to be analogous to those in *Da Mata v Otto NO.*[11] In that case, the respondent (in the appeal) instituted proceedings against the appellant for non-payment of purchase price in terms of an agreement of sale payable in regular monthly instalments. In his plea the appellant alleged that he had concluded a

[10] 1946 AD 951 – 953.

[11] 1972 (3) SA 858 (A).

verbal agreement in terms of which he was relieved of the obligation to make regular monthly payments in respect of the purchase price. The Appellate Division held[12]:

> "The respondent's case is based on undisputed documentary evidence to which the appellant raised a defence which constitutes a separate and distinct issue from the respondent's claim. The burden of proof of this defence is distinct from the burden which rests on the respondent to prove her claim. The onus is therefore on the appellant to prove his defence."

[57] Mr *Stelzner* also referred the court to *Cotler v Variety Travel Goods (Pty) Ltd*[13] where the appellant shoot the respondents for breach of a written contract in terms of which he was entitled to three months' notice of termination of his employment. In their plea the respondents relied on oral agreement allegedly cancelling the written agreement. The court held that the respondents for the onus of proving the oral agreement that the alleged in their plea, stating:

> "The averment that the plaintiff had contracted out from notice of termination of his employment forms an essential part of Variety's case that the plaintiff's employment was wilfully terminated. No other form of lawful termination is relied upon. In my opinion, therefore, the incidence of onus in relation to the defence pleaded by Variety is governed by the second principle referred to by Davis AJA in *Pillay v Krishna, supra* at 951. The oral agreement relied upon is in effect a special plea, and the onus of proof *quoad* that defence would rest on Variety. The third rule referred to by Davis AJA at 952 of the judgement also lends support to this conclusion. If the onus in regard to the oral agreement with the rest of the plaintiff, he would be required to prove a negative, namely, that he did not conclude the oral agreement in question. This test is, of course, not an absolute one, but in the circumstances of this case it would seem to be appropriate. It was not essential to the plaintiff's case to prove that he did not enter into any agreement affecting his rights in terms of the written agreement with variety. On the contrary, the elected oral agreement is an essential part of Variety's case."

[58] The same principles apply to the case before this Court.

---

[12] At 867G – 868A.

[13] 1974 (3) SA 621 (A) 629 A-E.

[59] The applicant bears the onus of proving the terms of the employment contract. The respondent bears the onus of proving a variation agreement with regard to remuneration; and an agreement to terminate the applicant's employment.

Documentary evidence

[60] The applicant's claim is a contractual claim. Essentially he claims specific performance[14] of his contract of employment that provides for the payment of 12 months' remuneration if it is terminated without agreement.

[61] As set out above, the contract included a non-variation clause. It recorded that it is the entire agreement between the parties "and save as otherwise provided no amendment, alteration, addition or variation will be of any force of [sic] effect unless reduced to writing and signed by the parties to this agreement." It also records:

> "No agreement varying any of the terms and conditions will be of any force or effect unless contained in writing and signed by the parties."

[62] As explained by the SCA in *Brisley v Drotsky*[15], referring to what the late Professor JC de Wet called "die dwangbuis van die *Shifren*[16]-beginsel", a contract that has been entered into freely must be enforced. Cameron JA held:[17]

> "What is evident is that neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of traditionally perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith. On the contrary, the constitutional values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons, as Davis J has pointed out, is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity."

---

[14] Cf *Abrahams v Drake & Scull Facilities Management (SA) (Pty) Ltd* (2012) 33 *ILJ* 1093 (LC).

[15] 2002 (4) SA 1 (SCA) 15G-16F.

[16] *S A Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) 767A.

[17] *Brisley v Drotsky* par [93] – [94] (footnotes omitted).

[63] The documentary evidence must be interpreted in the light of the principles set out by the SCA in *Bothma-Batho*[18] and *Endumeni Municipality*[19]:

> "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 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."

[64] The Constitutional Court further held (when dealing with constitutional interpretation) in *Afriforum v University of the Free State:*[20]

> "Some of those key interpretive aides that have by now become trite are the textual or ordinary grammatical meaning, context, purpose and consistency with the Constitution. Context comes into operation where the ordinary grammatical meaning is not particularly helpful or conclusive. And contextual interpretation requires that regard be had to the setting of the

[18] *Bothma-Batho Transport (Edms) Bpk v Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA).

[19] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par [18].

[20] 2018 (2) SA 185 (CC) par [43] (footnotes omitted).

> word or provision to be interpreted with particular reference to all the words, phrases or expressions around the word or words sought to be interpreted. This exercise might even require that consideration be given to other subsections, sections or the chapter in which the key word, provision or expression to be interpreted is located. The meanings and themes emerging from that reflection would then reveal the overall thrust that cannot justifiably be veered away from."

[65] In this case, it is unfortunate that the parties drafted clause 13.1 of the employment contract. But if the Court has regard to the context and attempts to give a businesslike interpretation to the clause, the phrase "that if the Exploration Director's employment is terminated unfairly or without agreement or he is retrenched" must surely mean that it is the employer who terminates the contract unfairly or without notice. I do not agree that the clause could also mean that the employee – i.e. Dr Schloemann – could also terminate the agreement (i.e. resign) and still claim 12 months' benefit. Not only would that lead to an absurd result, it is also not in line with the other contextual examples, i.e. unfair dismissal and retrenchment.

[66] Mr *Oosthuizen* argued in the alternative that the 12 months' remuneration clause is excessive and in contravention of the Conventional Penalties Act.[21] Section 1 of that Act describes a penalty as a stipulation whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money to another person. But the clause in question is not a penalty or pre-estimate of damages. It is merely an agreement that, if the employer dismisses the employee, it will continue paying him his benefits for a further 12 months. The extent of the prejudice to the employer is not such that the Court should reduce the agreed amount.

The probabilities

[67] In order to consider the probabilities, the Court has to consider the credibility of the witnesses.

[21] Act 15 of 1962.

[68] When one looks at the probabilities, Hall's credibility falters. It is improbable that he would have noted "Hendrik 6 mths from 1/12" on the Board meeting agenda that he was using at the meeting to make other annotations, if Wessels had simply pulled him aside afterwards to told him of Schloemann's own decision to resign. And why would Schloemann resign on 6 months' notice if he only had to give three months' notice? Hall could also not explain why the purported resignation was not recorded anywhere, either at the time or after the fact.

[69] Even when Hall wrote to Schloemann four days afterwards, on 24 November 2014, he did not mention his purported resignation. Instead, he referred to "a difficult situation" and said that "the outcome will obviously make life difficult for you and your family". That does not smack of a senior employee that decides to resign of his own free will. Hall's evidence to the contrary is not credible.

[70] Priestley was also not a credible witness. Her credibility falters at the first hurdle: Having regard to the factors outlined by Nienaber JA in *SFW*, there are internal contradictions in her evidence and external contradictions with what was pleaded on her behalf. She is the CEO. She confirmed that GoldStone litigated on her instructions. Yet she contradicted the pleaded case that the parties agreed on a mutual termination on that fateful day in Accra. The belated application to amend – after she had testified and after both parties had closed their respective cases – only serves to undermine her credibility further. For two years after having delivered the statement of claim and more than a year after having confirmed the "agreement" defence in the pre-trial minute, she did not instruct the company's attorneys to amend; it is only in her evidence before this Court, for the first time, that her evidence changed. And that was after both Schloemann and Wessels had testified, and the "agreement" defence had been put to them.

[71] On the probabilities, the applicant must succeed in the remuneration claim, as set out below. But should that be based on remuneration of $210 000 or $140 000?

The claim for short payment

[72] Did Dr Schloemann agree to a reduction in his annual remuneration from $210 000 to $140 000?

[73] It is common cause that the parties did not amend the contract of employment in writing; nor did they sign an amended contract. Instead, the respondent relies upon the information in the October 2014 circular, and the responsibility letter in which the applicant confirms its accuracy.

[74] The applicant argued that, although he was being paid at eh reduced rate until May 2015 when he left the respondent's employ, he had only agreed thereto in principle. That was part of the ongoing negotiations with a view to reaching agreement to new contracts of employment in their entirety; but it is common cause that Hall had not signed off on the new contracts by the time he left.

[75] Mr *Oosthuizen* relied on the circular and the letter of responsibility for the argument that the parties did agree to a reduction in remuneration, albeit in documents other than the contract of employment. He referred to *Spring Forest Trading*[22] as authority for this argument. In that case, the SCA accepted that, despite a non-variation clause, the parties did effect a "consensual cancellation" by email. On the facts, it concluded[23]:

> "There is no dispute regarding the reliability of the emails, the accuracy of the information communicated or the identities of the persons who appended their names to the emails. On the contrary, as I have found earlier, the emails clearly and unambiguously evinced an intention by the parties to cancel their agreements. It ill-behoves the respondent, which responded to clear questions by email itself, to now rely on the non-variation clauses to escape the consequences of its commitments made at the meeting on 25 February 2013 which were later confirmed by email."

[76] Before considering the facts, Cachalia JA pointed out[24]:

> "Before I consider these it is necessary to remind ourselves that when parties impose restrictions on their own power to vary or cancel a contract –

[22] *Spring Forest Trading cc v Wilberry (Pty) Ltd* 2015 (2) SA 118 (SCA).

[23] Par [29] [per Cachalia JA].

[24] Par [13].

> as they did in this case – they do so to achieve certainty and avoid later disputes. The obligation to reduce the cancellation agreement to writing and have it signed was aimed at preventing disputes regarding the terms of the cancellation and the identity of the parties authorised to effect it. Our courts have confirmed the efficacy of such clauses."

[77] Despite that principle, the Court held – with reference to the provisions of the Electronic Communications and Transactions Act 25 of 2002 – that the parties had cancelled the agreement by way of electronic signatures. The Court added:[25]

> "The approach of the courts to signatures has therefore been pragmatic, not formalistic. They look to whether the method of the signature used fulfils the function of a signature – to authenticate the identity of the signatory – rather than insist on the form of the signature used."

[78] As Mr *Oosthuizen* pointed out, where a contract is required to be in writing, it can be contained in more than one document.[26] Using a pragmatic rather than formalistic approach, I fail to see why the same principle cannot be applied to amendments, as long as it evinces a clear intention by the parties to vary an agreement.

[79] The responsibility letter is signed by the applicant. It incorporates the circular. And it records that various changes are proposed to take effect on admission (i.e. 31 October 2014). One of these proposed changes is that Dr Schloemann's salary "will be reduced to US $140 000 per annum provided that the company may not serve notice of termination on Dr Schloemann without cause within the 6 months following admission". Bizarre as it is that the proposal contemplates termination "without cause", that is what the applicant signed. Does that translate into an agreement to vary his contract of employment?

[80] Apart from the responsibility letter, Schloemann also signed the Board minutes of 13 October 2014. He was still a director at the time. And, referring to the circular, it records:

---

[25] Par [26].

[26] *Brandt v Spies* 1960 (4) SA 14 (E) 17A; *Hersch v Nel* 1948 (3) SA 686 (A); *Meyer v Kirner* 1974 (4) SA 90 (N) 97 E-F.

> "Each director confirms that he had read and carefully considered the Circular and was fully aware of its contents and of the responsibilities which he had in relation to it and confirmed that, to the best of his knowledge, information and belief, having taken all reasonable care to ensure that such is the case, the information contained in the Circular was in accordance with the facts and did not omit anything likely to affect the import of such information. These terms were reflected in the responsibility letter is signed by each director and by each director of Stratex produced to the meeting at minute 5 above."

[81] The proviso – "provided that the company may not serve notice of termination on Dr Schloemann without cause within 6 months after admission" – may well lead to a Catch-22, given that (as will appear below) this Court finds that the company did terminate Dr Schloemann's employment without cause within six months. But I do not think that invalidates the agreement – albeit outside of the four corners of the employment contract – to reduce his remuneration. Not only did he sign off on the circular, the responsibility letter and the minutes, he accepted the reduced remuneration without demur until he left in May 2015. It is only in these proceedings that he challenges it for the first time.

[82] It appears to me on the facts that there was partial agreement to change the terms and conditions of employment, at least with regard to the reduction in remuneration. As Corbett JA remarked in *Pitout v Northern Livestock Cooperative Ltd*[27]:

> "The question which arises, accordingly, is whether the undertaking given as it was during the course of uncompleted negotiations, had, or has been shown to have had, contractual force. Was the undertaking an offer made, *animo contrahendi*, which upon acceptance would give rise to an enforceable contract, or was it merely a proposal made by the appellant while the parties were in the process of negotiating and feeling their way towards a more precise and comprehensive agreement? This is essentially a question to be decided upon the facts of the particular case."

[83] That *dictum* is echoed – Corbett JA, again – in *GKN Sankey*:[28]

---

[27] 1977 (4) SA 842 (A) 850C-D.

[28] *GCEE Alsthom Equipments v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) 90 D-E and 92 A-F.

> "As WATERMEYER ACJ remarked in *Reid Bros (South Africa) Ltd v Fischer Bearings Co Ltd*, 1943 AD 232, at p 241, '...a binding contract is as a rule constituted by the acceptance of an offer'. Despite Mr *Osborn*'s submissions to the contrary, I am satisfied that the tender of 15 June, together with the written addendum of 20 June, constituted an offer made animo contrahendi by the respondent.
>
> …
>
> "There is no doubt that where in the course of negotiating a contract the parties reach an agreement by offer and acceptance, the fact that there are still a number of outstanding matters material to the contract upon which the parties have not yet agreed may well prevent the agreement from having contractual force. A good example of this kind of situation is provided by the case of *OK Bazaars v Bloch, supra* (see also *Pitout v North Cape Livestock Co-operative Ltd, supra*). Where the law denies such an agreement contractual force it is because the evidence shows that the parties contemplated that consensus on the outstanding matters would have to be reached before a binding contract could come into existence (see *Pitout*'s case, supra, at p 851 B-C). The existence of such outstanding matters does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement. If, however, the parties should fail to reach agreement on the outstanding matters, then the original contract would stand. (See generally Christie, *The Law of Contract in South Africa*, pp 27-8.) Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct., the terms of the agreement and the surrounding circumstances (see *Pitout*'s case, supra, at p 851 D-G).

[84] In this case, the parties had not negotiated a new contract of employment to finality. But I find that the parties did agree to the reduction in remuneration. That, in turn, impacts on the remuneration due to him – if any – in terms of clause 13.1 of the contract of employment.

The claim for 12 months' remuneration

[85] In terms of the contract of employment, "if the Exploration Director's employment is terminated unfairly or without agreement or he is retrenched, the Exploration Director shall receive all his benefits of employment for a period of 12 months after his employment terminated."

[86] It is common cause that this agreement was not varied in writing and signed by both parties. The respondent bore at least an evidentiary burden to show that it did not apply because the parties agreed to the termination. On the probabilities, it has not discharged that burden.

[87] I have already touched on the credibility of the witnesses. Ms Priestley was a poor witness, whose credibility was undermined by the respondent's own pleadings. Mr Hall was not impressive either, and the contradictions between his and Priestley's evidence further undermined their credibility. On the other hand, Dr Schloemann – albeit somewhat reticent – made a good impression. He made concessions where needed. He readily conceded, for example, that he did not act timeously; but he explained convincingly that he had "accepted his fate" at the time, until he saw Hall's emailed claim that he had resigned. And as I mentioned earlier, Wessels was perhaps the most objective witness of all. He struck the Court as honest and straightforward, with nothing to lose and nothing to hide. To use the Afrikaans expression, "hy het nie doekies omgedraai nie". And his testimony that he was "astonished" when Hall told him that Schloemann had to go had the ring of truth to it.

[88] Of course, resignation is a unilateral act that does not require the employer's consent.[29] But the respondent's case is that there was an agreement between Dr Schloemann and the Board, not that he resigned unilaterally. And it has not shown that there was such an agreement; in fact, its CEO conceded that there was not.

[89] On the probabilities, Dr Schloemann would not have resigned, even when it became apparent to him that the Stratex directors were critical of him and were favourably disposed to Dr Turner's "new pair of eyes". He had

[29] *Sihlali v SABC* (2010) 31 *ILJ* 1477 (LC) par [11].

just bought a new house. He is a middle aged white male in a competitive industry where it would be difficult to find a new job at comparative remuneration. He had educational commitments to a young family. And it is improbable that he would not have offered his resignation in writing. Hall's email shortly after the events of 20 November in Accra, that "the outcome" would "make life difficult" for Schloemann and his family also points, on the probabilities, to him having been dismissed rather than having resigned voluntarily. And, had he resigned, it is more probable that the company would have confirmed that in writing.

Conclusion

[90] I find that the respondent terminated the applicant's employment. The applicant's claim for 12 months' remuneration, based on clause 13.1 of his contract of employment, succeeds. But that amount must be calculated on the basis of an annual agreed salary of US $140 000, 00.

[91] Both parties asked for costs to follow the result. I see no reason in law or fairness to differ. The applicant has, on the whole, been successful. I deem it fair to order the respondent to pay his costs.

Order

[92] I therefore make the following order:

92.1 The respondent's application to amend its statement of response is refused.

92.2 The respondent is ordered to pay the applicant US $140 000, which was due on a month to month basis from 1 June 2015 to 31 May 2016; together with interest *a temporae morae* at the rate of 10% per annum calculated from the date on which each of the payments was due until date of payment.

92.3 The respondent is ordered to pay the applicant's costs.

_____

Anton J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	R G L Stelzner SC Instructed by Ockie Kruger of MacGregor Stanford Kruger.
RESPONDENT:	A C Oosthuizen SC Instructed by Gillian Lumb of Cliffe Dekker Hofmeyr Inc.