IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO J2216/98

In the matter between:

LEWIS, M First Applicant

LEWIS, R Second Applicant

and

CONTRACT INTERIORS CC Respondent

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JUDGMENT

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JAMMY AJ

1. The Applicants, Mrs Marilyn Lewis and Mr Richard Lewis, seek an order from this Court declaring that they were employees of the Respondent from 1 July 1997 until what they contend were their respective dismissals on 3 September 1997 and 8 August 1997.

2. The Respondent's initial ground of opposition to those claims was that neither of the Applicants was at any time employed by it and that, *a fortiori,* neither of them was ever dismissed. That response was however augmented by a late unopposed amendment to the Statement of Defence, the result of which was to include two further alternative grounds. These are that if it is found that there was a contract of employment between the Applicants and the Respondent, that contract was conditional upon the conclusion of a written agreement for the sale of the Respondent's business as a going concern to another company (to which comprehensive reference will be made later in this judgment) or to the Applicants themselves. If no such agreement was concluded, the contracts of employment would either *ipso facto* terminate or be of no force or effect. Alternatively, it is submitted, if it is found that the Applicants were dismissed

by the Respondent, such dismissals were fair in the circumstances.

3. It will be apparent that the cardinal issue for determination by this Court is whether the Applicants were employed by the Respondent. It is a trite principle of employment law that the onus of proof of such a relationship lies with them, as it does, in terms of s192(1) of the Labour Relations Act 1995 ("the Act"), of establishing that they were dismissed.

The Material Facts

4. At all times material to this dispute, the members of the Respondent close corporation were Mrs Lynne Watney ("Watney") and Mr Brian Klass ("Klass"). Both were socially friendly with the Applicants and in or about May 1997, and at Watney's initiative, they commenced discussions with the Applicants directed towards the eventual acquisition by the Applicants of the Respondent's business as a going concern. In the context of developments in her employment relationship with her then employers, Holiday Holdings International (Pty) Ltd, of which she was the financial director, the timing of this approach was opportune for Marilyn Lewis. Richard Lewis, at the time a sales executive at Nashua Ltd, was equally receptive.

5. In a series of meetings between the early part of May and the end of June 1997, and with the peripheral involvement of their respective Attorneys, the parties sought consensus regarding the broad framework and ultimate basis of the proposed acquisition which, in that context, became to some extent of changed structure. Inter alia, whereas it was initially contemplated that the Applicants would become the sole shareholders in an available shelf company, Manetrade (Pty) Ltd ("Manetrade"), into which the business would be sold, that proposal, by mutual agreement, was amended on the basis that Watney and Klass would retain the beneficial ownership of 50% of the enterprise. The intention remained that the business would be purchased by Manetrade, in which the equity would be held by the Applicants on the one hand and Watney and Klass on the other in those proportions and what, from the evidence, emerges as the clear intention of the parties, was that each of them, once the

deal was consummated and the business transferred, would be employees of Manetrade in individually defined capacities. Of material significance was their further agreement that, irrespective of the date upon which the transaction was finally concluded, its effective date would be deemed to have been 1 July 1997.

6. It is common cause that on that date, Marilyn Lewis and Richard Lewis entered the business of the Respondent. It is the basis upon which they did so which is the kernel of this dispute and which was the issue regarding which the testimony of the respective parties was intensively examined and cross-examined during the four days of this trial. It is submitted on behalf of the Applicants that, from that date and unless and until the contemplated acquisition agreement was concluded and put into effect, they were required to, and in fact did, render services to the Respondent for which they were remunerated on a basis which unequivocally constituted them employees of the Respondent, with all the legal ramifications of that relationship. The Respondent, on the other hand, rejects that concept and contends emphatically that the purpose of the Applicants' presence in the business from 1 July 1997 was, in effect, to acquaint themselves with its systems and practices in anticipation of their acquisition of a beneficial interest therein. Having regard to the tenor of their relationship and the substance and objective of the negotiations, they argue, it could not have been intended or even contemplated by any of the parties that the relationship between the Applicants and the Respondent could in any respect have been one of employment.

7. A number of undisputed factual aspects of the matter bear directly on this issue. They are the following:

7.1 With effect from 1 July 1997 all the business activities engaged in by the Respondent were deemed to be for the account of Manetrade which, once the transfer of the Respondent's business had been effected, would change its name to Contract Interiors (Pty) Ltd. For that purpose a special and independent account was created against which all expenses of the business were debited, including the payment to each of the Applicants, as well as to

Klass and Watney, of the sum of R15 000,00 per month, as well as expenses incurred by the Applicants.

7.2 With effect from 1 July 1997 Marilyn Lewis had a staff of five employees of the Respondent reporting directly to her and had the use of a furnished and equipped office, with access to all of the Respondent's facilities, at no cost to herself. In the context of her work within the company, Marilyn Lewis was answerable to both Watney and Klass in respect of the responsibilities assumed by or conferred upon her within the ambit of the Respondent's business.

7.3 With effect from 1 July 1997 Marilyn Lewis represented the Respondent in her dealings with clients of and suppliers to the Respondent.

7.4 Both Marilyn Lewis and Richard Lewis attended a two-week training programme conducted by Klass with effect from 1 July 1997.

8. Each of these factors, the Applicants contend, was indicative of a relationship of employer and employees as between the Respondent and themselves. Each of them, the Respondent submits, was established or conducted in contemplation of their acquisition, in the form of an equity share in the new company, of a beneficial interest in the business of the Respondent to be transferred to it as a going concern and with regard to which ultimate objective negotiations were, at all material times during this period, being pursued.

9. It is common cause that those negotiations eventually failed and for reasons which will become apparent in the context of the legal issues to be determined in this matter, I do not consider it necessary to traverse in any detail the perceptions of the respective parties as to the reasons for and circumstances surrounding that collapse. The core issue for determination, I reiterate, is the nature and character of the relationship between them to the point of final breakdown.

The Legal Issues

10. The nature and meaning of employment has, over time, been the subject of exhaustive academic and juristic analysis. Section 213 of the Act defines the term "employee" as follows:

"Employee" means -

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer."

11. The Appellate Division (as it then was), in a line of cases, has concluded that the expression "working for" was applicable to a person working in terms of a conventional contract of employment, necessarily bound to render personal services to another.

See **R v Amca Services (Pty) Ltd & another 1959 (4) SA207 (A)** and **S v Amca Services (Pty) Ltd 1962 (4) SA537 (A).**

12. In the Industrial Conciliation Act, to be known later as the Labour Relations Act 28 of 1956, an employee was defined as -

"Any person ..... employed by, or working for an employer and receiving, or being entitled to receive any remuneration, and any other person whatsoever .....who in any manner assists in the carrying on or conducting of the business of an employer."

This, it will be noted, is substantially the same definition as that in the current Act, though differently structured.

13. Whilst the Courts have been at pains to differentiate the concept of an employee from that of an independent contractor, the Labour Appeal Court has emphasised the existence of relationships in which one person works for or with another but which are not classified as employment relationships. See for example **Oosthuizen v C A N Mining and Engineering Supplies CC (1999) 20 ILJ 910 (LAC) AT 914.**

14. The concept was critically and comprehensively examined by the Labour Appeal Court in -

S A Broadcasting Corporation v McKenzie (1999) 20 ILJ 585 (LAC).

Pertinent to the present dispute is the following comment at page 591:E-H:

"**The legal relationship between the parties must be gathered primarily from a construction of the contract which they concluded (*Smit v Workmen's Compensation Commissioner at 64B; Liberty Life Association of Africa Ltd v Niselow* at 683D-E), 'although the parties' own perception of their relationship and the manner in which the contract is carried out in practice may, in areas not covered by the strict terms of the contract, assist in determining the relationship' (*Borcherds v C W Pearce & J Sheward t/a Lubrite Distributors* at 1277H-I). In seeking to discover the true relationship between the parties, the court must have regard to the realities of the relationship and not regard itself as bound by what they have chosen to call it (*Goldberg v Durban City Council 1970 (3) SA 325 (N)* at 331B-C. As Brassey 'The Nature of Employment' at 921 points out, the label is of no assistance if it was chosen to disguise the real relationship between the parties, 'but when they are bona fide it surely sheds light on what they intended.'**

15. The fact that there was no contract between the parties in this matter is not in dispute. The nature of the conflict between them is also indicative of the fact that, on one side or the other, and as vigorously contested by their respective Counsel, there was an evident lack of bona fides. The "label" to be attached to their relationship between 1 July and the breakdown of the negotiations is ostensibly differently classified, but one factor, to my mind, is of overriding relevance and that is, that whatever their respective perceptions of that interim relationship might have been, neither the Applicants on the one hand, nor Watney and Klass on the other, perceived it as one of employment.

16. Clearly, Watney and Klass did not do so. Microscopically examined under cross-examination, their evidence on that issue remained consistent. As regards the Applicants, the following exchanges between Mr Kennedy, Counsel

for the Respondent and Marilyn Lewis are illustrative:

Mr Kennedy: You were not coming there as an employee to be employed by Contract Interiors, you were coming to be employed as managing director of a business of which you would be the owner, not so? --- That I would become the owner or part-owner, yes.

Mr Kennedy: And that course (the training course) was considered to be appropriate in the case of yourself and Richard not only because it was necessary that you should become acquainted with the business but also that you were to become the owners of the business, not so? --- Correct.

Mr Kennedy: You would be employed by the new business..... and so too would Lynne and Brian be employed with effect from 1 July 1997. It would be backdated to that, not so? --- Yes.

Mr Kennedy: Right. Your employment too would be as managing director and sales director, you and your husband, but as the managing director and sales director of the new company with effect from 1 July 1997, not so? --- Correct.

Mr Kennedy: What I put to you is that the agreement was not that you would be employed by the CC. It was never the agreement. In fact the draft agreement, all three of the draft agreements, make it quite clear that everybody was going to be employed by the new owner of the business, not so?

Mrs Lewis: Being the (Pty) Ltd?

Mr Kennedy: Yes

Mrs Lewis: That was the intention.

17. None of the averments and concessions made by Watney in the course of cross-examination which, in essence, was directed to the substance of the negotiations between the parties, reflected in any respect, in my view, an intention on the part either of herself or of Klass that, whatever the Applicants' activities and functions in the close corporation in the intervening period might have been, they were perceived as being, or were intended to be, performed in their capacity as employees. It was never open to question that the costs attendant upon their presence and activities there were costs which, in the end result, would be for the account of Manetrade or its successor in title, as the owner of the ongoing business which was to be transferred. Their contribution to the welfare and fortunes of the business to be acquired for their partial benefit was, to all intents and purposes, in the nature of a business investment with attendant commercial risk. That much was conceded by Richard Lewis who, acknowledging that he was "a man of the business world", agreed that he had gone into the business with his "eyes open". The fact that a written

agreement might not be concluded, was, he said, "something that was always a possibility, but in terms of Brians' reassurances, we went ahead."

18. A mutual intention to conclude a contract of employment may not be necessary to create one. A proved intention by one of the two parties to that effect may well be sufficient if the factual trappings and legal ingredients of an employment relationship are sufficiently in evidence. A contractual employment relationship can never however, in my opinion, be established where neither party intended that that should be the case.

19. I am left in no doubt, on the *conspectus* of the evidence presented in this matter, that no such intention, whether mutual or one-sided, existed on the part of any of the protagonists in this dispute and that being the case, no actual dispute of fact exists which needs to be determined either on a balance of probabilities or otherwise. The Applicants, in my view, have failed to discharge the primary onus upon them to prove that they were employed. Accordingly, no question of their dismissal, whether fair or otherwise, arises.

20. In the result, the order that I make is the following:

The application is dismissed.

The Applicants are ordered jointly and severally to pay the Respondent's costs.

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B M JAMMY
Acting Judge of the Labour Court

Date of Judgment: 2 November 2000

Representation:
For the Applicants: Adv C E Watt-Pringle, instructed by Perrott, Van Niekerk and Woodhouse Inc

For the Respondent: Adv P Kennedy, instructed by McLaren & Associates