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IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case no. J 1470/99

In the matter between:

Applicant

AND

Respondent

JUDGMENT

MOLAHLEHI AJ.

INTRODUCTION

1.The applicant in this matter sought an order setting aside that writ of execution issued by this Court on the 4 June 1999 and the consequent attachment by the Deputy Sheriff on the 18 June 1999.

BACKGROUND

2.The respondent, Mr Michael Bernard, a former employee of the applicant referred a dispute concerning his dismissal to the Commission for Mediation Conciliation and Arbitration (CCMA). The dispute was settled through an agreement which was signed by both parties at the CCMA, the terms of which are as follows:

“1. This settlement shall be in full and final settlement of all disputes between the parties.

2.The Shellard Media (Pty) Ltd shall pay to Michael within 30 days (thirty days) the sum of R 65 000, 00 (sixty-five thousand Rand).

3.Payment of the said sum of R 65 000, 00 shall be made directly into Michael’s Bank Account held at Nedbank Strydompark, A/C No. 152100207.”

2.It is common cause that on 13 April 1999, the applicant deposited the sum of R 42 156, 68, into the account of the respondent. This amount was R 22 809, 32 less the amount stipulated in the settlement agreement. The reason for this is that the sum of R 22 809, 32 was deducted and paid to the South African Revenue Services ("SARS") as part of the employee tax.

3.The respondent was clearly unhappy with the deduction and accordingly brought an application in terms of section 158(1)(c) to have the settlement agreement made an order of Court. The application was brought on the basis that the applicant had failed to comply with the terms of the settlement agreement. The applicant consented to the order but reserved its rights in relation to the allegation that it did not comply with the terms of the settlement agreement.

4.Pursuant to a writ of execution from this court, the Deputy Sheriff attached the movable goods of the applicant with the view to realising from the sale thereof the sum of R 22 843, 32.

5.In essence the case of the applicant is that it complied with the terms of the settlement agreement by:

6.1 deducting the sum of R 22 843, 32 and paying it as employee tax to the SARS.

6.2 depositing in the account of the respondent the sum of R 42 156, 68.

6.According to the applicant the tax deduction was effected further to the telephonic advice it obtained from SARS. Subsequent to this advice the applicant received a fax transmission from SARS which set-out the correct amount to be deducted from the settlement amount. It transpired from this fax that the applicant over deducted by R34. 00.

7.The respondent argued that the applicant was not entitled to deduct tax from the settlement amount as there was no common intention to make the incidence of Income Tax applicable to this settlement agreement. In the absence of an express term, the incidence of tax cannot be implied into settlement agreement. The settlement agreement amount was, according to the respondent, for damages and accordingly does not fall under the definition of "gross-income" in terms of the Income Tax Act no. 58, of 1962 ("the ITA"). The respondent further argued that the settlement agreement novated the employer/employee relationship and created a different contractual relationship.

8.I do not with respect agree with the respondent's argument. There is nothing in the reading of the settlement agreement that suggest that the intention of the parties was to change the nature of the dispute that existed before the settlement agreement. Even his founding affidavit does not support his version. At paragraph 5.3 of the opposing affidavit the respondent states:

"It was agreed between myself and the applicant on the 12 March 1999 at the offices of the CCMA that such sum would be in "full and final settlement of all disputes between the parties". The dispute that existed between me and the applicant related to inter alia, to my unfair dismissal, to my claim for reinstatement, my lost travel allowance, to the damages suffered by myself as result of the applicant unilaterally removing me from medical aid scheme, and to damages suffered by me from the reduction in my income."

THE LAW

10.In support of its argument that the incidence of income tax should not be implied in the settlement agreement the respondent referred to the cases of **Union Government (Minister of Railways & Harbours) v Faux, Ltd 1916 AD 105** at 112 and **Techni-pak Sales (Pty) Ltd v Hall 1968 (3) SA 231 (W)** at 236. In the Union Government case it was held that the Court does not have the right to imply a term into a contract unless "in a reasonable and business manner" it is necessary to do so. These cases are distinguishable from the present case in that they dealt with terms implied by facts whereas the present case the issue concerns a term implied by law.

11.A term implied by the law into an agreement as stated in **Alfred McAlpine & Son (Pty) Ltd v Tvl Provincial Administration 1974 (SA) 531 A,** is "an unexpressed provision of the contract which the law imports therein, general as a matter of course, without reference to the actual intention of the parties." (See also **Christie, Law of Contract in South Africa, 2nd edition , p 184).** In other words a term implied into an agreement by the law is in essence nothing but a legal rule read into the contract as one of its naturalia without any reference to the parties' intentions.

12.Having regard to the express term of the settlement agreement the issue I now proceed to determine is whether the law import into the settlement agreement as a matter of course an implied term that the employer is obliged to deduct tax from the settlement amount. The answer will depend on whether or not the settlement amount falls within the definition of gross -income as envisaged in section 1(d) of the ITA.

13.In terms of Schedule 4 Item 2(1) of the ITA, an employer who pays "*any amount by way of remuneration to an employee...shall deduct or withhold from that amount by way of employee's tax an amount which shall be*

determined as provided in paragraph 9, 10, 11 and 12, whichever is applicable, in respect of liability for normal tax of that employee..."

14.It is clear that the obligation arises when the employer pays or becomes liable to pay "remuneration" to an employee, unless a commissioner of SARS has "*granted authority to the contrary"*. Remuneration includes *"gross - income"* as defined in section 1 of the ITA. Section 1(d) of the ITA defines "gross -income" as: "Any amount, including any voluntary award, received or accrued in respect of the relinquishment, termination, loss, repudiation, cancellation or variation of any office or employment or of any appointment (or right to be appointed) to any office or employment..."

15.In **Frank Michael Eckhard v Filpro Industrial Filters (Pty) Ltd and Others** (1999) 8 BLLR 804 (LC)Landman J held:

"Generally a payment accruing in respect of termination of employment constitutes income in terms of the definition of gross - income in terms of section 1 of the Income Tax Act no 58 of 1962. The Act places a duty on the employer to obtain a direction regarding the employee's liability and to deduct this from the payment due to the employee."

16.In my view the unexpressed term relating to deduction of tax is imported into this agreement by Schedule 4 of the ITA. In general in cases of this nature, the provisions of the ITA nullifies any attempt by parties to exclude in their agreements tax obligations. Accordingly I find that the settlement amount of R 65 000, 00 constituted, gross-income in the hands of the respondent employee and the applicant was obliged in law to effect the tax deductions. It is unnecessary for me to decide on the issue of over deduction. It suffices to mention that item 8 of schedule 4 of the ITA prohibits an employee from recovering any amount deducted as tax from the employer.

17.In the circumstances I find that by depositing the sum of R 42 156, 68 into the bank account of the respondent and paying the sum of R 22 843, 32 to SARS, the applicant complied fully with the terms of the settlement agreement. It is for this reason that the writ of execution falls to be set aside.

18.The circumstances of this matter do not call for costs.

CONCLUSION

19.In the circumstances it is ordered:

1.The writ of execution issued out of the Labour Court in this matter on the 4 June 1999 and the consequent attachment effected by the Deputy Sheriff for the district of Randburg on the 18 June 1999 is set aside.

2.There is no order as to costs.

Molahlehi AJ

g: 24 May 2000

ment: 28 June 2000

ant: Kevin Mulligan from Kevin Mulligan Attorneys.

ndent: Wayne Van Niekerk from Wayne Van Niekerk Inc.