IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO J1796/99**

In the matter between:

ALOYSIUS NDHLABOLE SHONGWE Applicant

and

FEDSURE MEDWAY (PTY) LTD Respondent

JUDGMENT

JAMMY AJ

There is a dispute on the papers before this Court regarding the name of the company by which the Applicant was originally employed on or about 1 February 1995. The Applicant states that it was known as Medway Healthcare Marketing North (Pty) Ltd. The Respondent contends that the company was known as Medway Fund Managers North (Pty) Ltd. That lack of consensus is immaterial to the fact that, following certain corporate acquisitions and revisions, the company alleged by the Applicant to have been his employer became known and traded as Fedsure Medway (Pty) Ltd, the cited Respondent herein.

On or about 1 July 1997, some two years after the inception of his employment, the

Applicant was appointed as the Respondent's Marketing Director, a position which he held until 30 December 1997. It is common cause that on or about 1 January 1998 the Applicant concluded what was described as an Independent Contractor Agreement with the holding company of the Respondent, Medway Holdings (Pty) Ltd, in which that company was described as **"the client"** and the Applicant as **"the contractor"**. The Agreement was expressed to be for a period of six months from 1 January 1998 but it is not disputed that, when it expired on 30 June 1998, it was extended by mutual agreement between the parties for a further period of six months.

The agreement, as is not uncommon in contracts of this nature, contained certain carefully worded provisions which are relevant to the issues to be determined in this dispute. The nature of the relationship between the contractor and the client was emphasised as being **"that of an independent contractor, in terms of which the contractor will provide the client with the product of his services, being the objectives as set out ….."**. The contractor would be paid a retainer of R210 000 for the initial six month period, divided into six equal instalments payable monthly. Those payments, it was provided, would **"not amount to remuneration, salary or emoluments or any like payment arising out of employment, and shall amount to a contractual amount due by the client to the contractor for services supplied by the contractor to the client in terms of this agreement".** The client would not be liable for any tax or other statutory obligations to the contractor who would however **"be entitled to make reasonable use of office space, stationery and other office consumables, in order to effectively perform and obtain the objectives ….. in terms of this agreement"**. A concluding provision reads as follows:

> **"Should the client invoke its right not to renew this contract, such action shall not be construed as a retrenchment, redundancy or a dismissal".**

The Applicant contends, on his papers and in his evidence, that it was an express condition precedent to the conclusion of that agreement that it would operate as **"an interim and/or alternative solution conditional upon the Respondent finding the Applicant a suitable permanent position"**, alternatively that it was expressly warranted by the Respondent **"that the agreement would lapse upon the**

Respondent finding a suitable and permanent position for the Applicant". In these circumstances, the Applicant contends, it was further warranted that he would have continuing employment notwithstanding the lapse of the agreement.

In that context, the Applicant testified, he continued to receive what he described as his **"salary and all employment benefits"** whilst the agreement was in force and to perform the marketing functions expressly defined therein. It was his inability to discharge the prescribed objectives within the initial six month period that necessitated the extension of the contract for a further six months. During that period he carried out sales, marketing and human resources functions for the whole company from its Pretoria offices as directed to do so in the context of the objectives of the contract and instructions from the Chairman of the company, Mr D W Jackson.

He was on leave, said the Applicant, during the last two weeks of December 1998 but immediately prior to his departure, held discussions with Mr Jackson and Mr B Kelly, a senior member of management, regarding his future with the company. The Respondent by that time had been acquired by Fedsure Holdings (Pty) Ltd. Jackson felt that in the context of his ability to communicate in African languages and because he would be dealing, *inter alia*, with Trade Unions, he should remain with the company after the expiry of the Independent Contractor Agreement and he was offered a proposed newly-created position of Worksite Marketing Manager. It was agreed that the terms of a formal letter of appointment would be drawn by Mr Kelly in conjunction with himself on his return from leave. He was in the interim requested to **"apply my mind"** to proposals for a marketing drive which he would present to management at that time.

When he went on leave, said the Applicant, he was clear regarding his future. The Independent Contract would terminate on its expiry date, 31 December 1998, and his position would then be developed as discussed.

It is unnecessary in my view for me to traverse in detail the Applicant's evidence as to what transpired on his return from leave. He had received a telefax whilst on holiday to the effect that he was to attend a meeting in Cape Town on Monday 11 January 1999. On

the flight there from Johannesburg he was informed by Mr Kelly that Mr Jackson had been placed under pressure by Fedsure regarding the Respondent's performance and the necessity radically to reduce its operating costs. Whilst still on holiday he had received by telefax an action plan to be discussed at the Cape Town meeting. Nowhere in that plan did his own name appear as a participant. He assumed that this was because he was still on leave but his functions and duties as the newly designated **"Worksite Marketing Manager"** were defined. He had been furnished with an agenda for the Cape Town meeting which was scheduled to commence at 10:30 that day but which was in fact delayed until approximately 12:00 whilst Mr Jackson met with Mr Kelly and other management. When Mr Jackson and Mr Kelly emerged at approximately 12:00, Mr Jackson emphasised the necessity to reduce costs and indicated that he had expected that reports and proposals would have been received from the Applicant and other Regional Managers. In the light of the cost constraints and lack of progress in that regard, they were informed that **"their positions were being made redundant immediately"**. Mr Jackson then left and discussions continued with Mr Kelly who advised him to apply for a vacant position at Fedsure in Johannesburg which would however carry a salary of approximately one half of his current earnings, which was unacceptable. A further meeting which Mr Kelly suggested should be held between him and Mr Jackson was however declined by Mr Jackson who however, through Kelly, conveyed to him an offer to pay him three months salary as a termination package. He declined, said the Applicant, to accept this.

He was then instructed by Mr Kelly to fly back to Johannesburg and to shut down his office. He left the following afternoon in order to do so. There had been no further discussions and attempts by him to reach either Mr Jackson or Mr Kelly for that purpose before he left were unsuccessful.

. He learned through a subordinate that the Respondent then commenced to implement a retrenchment programme and that staff had been circulated to that effect. He himself however had by that time left the premises and had consulted his legal advisers regarding his position. A letter was addressed to the Respondent on his behalf by Advocate O J La Grange, (representing him in this hearing) recording the purported termination of his employment and his perception that the trust relationship between him

and the company had broken down. A without prejudice proposal for settlement was incorporated.

. What the Applicant perceived as a significant reply was then addressed to him by Mr Kelly on 22 January 1999. Reference was made to Mr La Grange's letter, with the Respondent's right reserved to respond thereto at a later stage. What Mr Kelly was doing however, the letter expressly stated, was **"addressing this letter to you as an employee of the company."** The letter continued thus -

> **"Your representative makes the point that you consider that the trust relationship between you and the company has broken down irretrievably. Whilst we do not agree with you, we obviously cannot force you to continue with an employment relationship where you contend that there is no basis for such a relationship.**
>
> **Accordingly this letter constitutes notice to you of the termination of your contract of employment".**

. The letter called upon him to return certain company property and then recorded that he would be **"paid the equivalent of your February remuneration in lieu of notice as well as all other amounts due to you in terms of your contract. We intend to take advice as to whether you are entitled to severance pay in the circumstances in which your employment has terminated and will revert to you in this regard early next week. In the event that your are, we intend to consult fully with you as contemplated in Section 189 of the Labour Relations Act 1995 read with the policies of the company in this regard".**

. He was subsequently paid an amount, said the Applicant, supposedly in respect of his retrenchment and based on one year's service. There were no further meetings, consultations or discussions in that regard and the letter advising him of the **"**separation package", expressly recorded that -

> **…… no suitable position has been found for you in the new company structure. It is with**

regret that your services have been terminated due to the restructuring process and therefore please understand that it is a no-fault separation".

. It was in that context, the Applicant concluded, that the legal proceedings culminating in the hearing before this Court were launched by him and it is appropriate that the relief which he seeks be here recorded –

In the premises aforesaid the Applicant's services were instantly terminated on 11 January 1999 on an arbitrary ground; alternatively;

2 For operational reasons unbeknown to the Applicant".

The Respondent's alleged failure, neglect and/or refusal to follow a fair and proper procedure as required by Section 189 of the Labour Relations Act 1995 is then pleaded and the Applicant seeks compensation **"equivalent to twenty-four months remuneration calculated at the Applicant's rate of remuneration on the date of dismissal on 11 January 1999".**

. No material disputes bearing upon the factual background described by the Applicant in his testimony, emerged in the evidence given by the only witness called by the Respondent, Mr B N Kelly. The Respondent's financial position was steadily deteriorating and it was obvious that a radical restructuring was necessary.

. The Applicant was a valuable employee but it was necessary, said Mr Kelly, **"to focus him"**. It was accordingly determined that he should be retained thenceforth as an independent contractor and this proposal, which was put to him towards the end of 1997, met with his approval. Whilst the Applicant had, to that stage, been employed by Fedsure Medway (Pty) Ltd, the Independent Contract, in terms agreed upon, was prepared and concluded between him and the Respondent's holding company Medway Holdings (Pty) Ltd.

. When, as the expiry date of the first six month period of the contract approached in June

1998, it was apparent that its objectives had not yet been achieved by the Applicant, it was determined that the contract should be renewed and, writing under the letterhead of Medway Holdings (Pty) Ltd in his capacity as Managing Director, he addressed a letter to the Applicant, said Mr Kelly, in the following terms:

> **"I refer to our agreement entered into and signed on 2 February 1998.**
>
> **In terms of paragraph 7.2 of the said agreement, I wish to confirm that we have consulted with you and both parties have agreed to extend the contract for a further six month period commencing 1 July 1998 – 31 December 1998 under the same terms and conditions.**
>
> **Kindly confirm, in writing, if the conditions are acceptable to you".**
>
> The Applicant signed acceptance of that letter on 9 June 1998.

8. Shortly before the Applicant's departure on leave in December, said Mr Kelly, he and Mr Jackson met with him and the lack of progress by the Respondent's Regional Managers in generating new business was discussed. It was decided that, once the extended period of the Independent Contractor Agreement expired at the end of December, the Regional Managers, of whom Mr Shongwe had been one prior to the conclusion of that contract, would be repositioned, and would be asked, in the interim, and in anticipation of that restructuring, to submit to a meeting in Cape Town at the end of the second week in January business plans and feasibility studies regarding the future development of the company. The position which would be offered to the Applicant, it was suggested, would be the newly constituted position of Worksite Marketing Manager. At that stage in December however this was merely a proposal and no formal offer of employment in that regard was either made or accepted. Mr Shongwe's evidence that he had sent to him whilst he was on holiday a congratulatory e-mail message to the contrary, was not true and it was significant, Mr Kelly suggested, that the Applicant had been unable to produce that message in evidence.

9. Prior to the scheduled meeting in Cape Town on 11 January, said Mr Kelly, Mr Jackson had

contacted him and informed him of the pressure which had been brought to bear upon him by Fedsure. Management was top heavy and it was necessary to downsize the company. The business plans submitted by the Regional Managers, were wholly unsatisfactory. No plan, feasibility study or report in any form had been presented by the Applicant. It was apparent that the position of Regional Managers could not be sustained and that their retrenchment was inevitable.

. He was concerned, Mr Kelly testified, at the **"unprofessional way in which this was being done"** but could make no progress with Mr Jackson in that context. He met on the evening of 11 January with the Applicant and raised the possibility of a further three to six month Independent Contract. The Applicant was not however interested and he then conveyed to him Mr Jackson's offer of three month's salary.

. He considered that the Respondent was now in a serious human resources situation and that proper procedures should be implemented immediately. Terms of settlement were arranged with the other Regional Mangers but the Applicant sought legal advice. His definition of the Applicant as an **"employee"** in his final letter of termination on 22 January 1999 was clearly an error. Letters in similar terms had been addressed to all four managers and he had simply not addressed his mind to Mr Shongwe's different status. The fact of the matter was that following the expiry of the Independent Contractor Agreement at the end of December 1998, Mr Shongwe had at no time been formally re-employed, either in the proposed position of Worksite Marketing Manager or otherwise.

. Cross-examined by Mr La Grange, Mr Kelly conceded that in the context of the duties defined for Mr Shongwe in the action plan prepared for discussion on 11 January 1999, he would have assisted in the retrenchment programme to be implemented by the Respondent. He would however, Mr Kelly attempted to explain, do so as an independent contractor. The Respondent's entire human resources function would be outsourced.

. It was not true, said Mr Kelly, that the Independent Contractor Agreement had been devised as a means of retaining the Applicant's services in a retrenchment environment and justifying his remuneration and other benefits. It was not, as the Applicant

suggested, a means of disguising this cost to the Respondent by elevating him to another status. There had been a blurring of the Applicant's position when the contract expired on 31 December 1998 with that of an employee but this was a bad management process and incorrect terminology had been used in the drafting of letters which he, Mr Kelly, had signed but which had been prepared by other persons in the human resources division who were not aware of the specific factual details. The submission that what occurred at that time was the Applicant's employment from the beginning of 1999 in a new position – Worksite Marketing Manager in accordance with the action plan, was not correct. Had the relationship continued, it would have done so on the basis of a new Independent Contract in that context.

ANALYSIS AND CONCLUSION

4. It has, in my opinion, been necessary for me to review to the extent which I have done so, the evidence adduced in this matter, in order to illustrate what emerges as a pattern of confusion and contradiction on the part of both parties. The inference which it seems to me that I am asked by the Applicant to draw from the undisputed fact that an Independent Contractor Agreement was concluded by him with the Respondent's holding company, is that this was not, in reality, what it was intended to be. It was in essence simply a vehicle to justify the continued cost of retaining his key services in the Respondent's situation of financial constraint which was already necessitating staff retrenchments. There was never an intention on the part of either party, he in effect contends, that his employment relationship with the company should end. It was in that context that the Worksite Marketing Manager proposal was formulated prior to the expiry of the contract.

5. What the Applicant has failed to do however in my view, is to explain why, if the retention of his services was so important to the Respondent, he was not simply retained in its employ at the end of 1997. The cost implications to the Respondent would have been the

same and the retention of his services in the retrenchment context, could presumably have been justified on the basis of his particular skills and experience. In fact, the Applicant alleges in his statement of case, this is precisely what occurred in or about July 1998 and while the purported contract still subsisted at that time he says, he **"accepted the position of Regional Manager, Gauteng …. and became a permanent employee of the Respondent as defined in the Labour Relations Act No. 66 of 1995".**

6. This allegation is not surprisingly denied by the Respondent by which, however, this denial is strangely pleaded. The services rendered by the Applicant until the end of December 1998, it contends, were performed in terms of the agreement. This contention however is immediately followed in the pleadings by a remarkable and incompatible submission -

> **"… alternatively, Applicant was employed on a temporary basis which employment would terminate as soon as the contemplated restructuring of the Respondent which would result in the position of Regional Manager falling way, took place".**

7. What then appears to occur is that, at the Cape Town meeting on 11 January 1999, the Applicant is informed that no employment is to be offered to him. His own contrary perception, again as pleaded by him, is that on that day his employment was arbitrarily and summarily terminated. This confusion is then further exacerbated by the Respondent's letter to him of 22 January 1999 purporting to terminate his services by way of retrenchment – the attempted explanation for which by Mr Kelly being to my mind not entirely satisfactory.

8. Whatever remains as an absolute factor in this saga however, is the uncontested existence of the Independent Contractor's Agreement and in the circumstances, this Court must of necessity seek to determine this matter by reference to the substance and wording of the contract itself.

9. I have already made reference to specific provisions therein which, in their wording, are

clear and unambiguous. It is a contract evidencing in every material respect, what it purports to be – one of *locatio conductio operis.* The fundamental rule relating to parol evidence precludes, in the circumstances which I have outlined, its interpretation on any other basis. That principle was emphatically enunciated in the seminal case of

Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd 1941 AD 43 at 47 where Watermeyer J A said this

"Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence".

. Interpreted on that basis, the effect of the contract was, from its inception, to alter the status of the Applicant from one of an employee to that of an independent contractor. That remained the position at least until 31 December 1998 when, following an equally plain, unambiguous and consensual extension of its initial period of operation, the contract expired.

. Although, for unexplained reasons Jackson himself did not testify in these proceedings, I have concluded on the probabilities of the matter, gleaned from all the prevailing circumstances, not the least the undisputed pressure from Fedsure under which he was labouring at the time, that any re-employment of the Applicant was subject to his establishing, in the form of a business plan, report or other proposals, that he was indispensable and that in the end result, he did not do so. Notwithstanding the confused correspondence emanating from or on behalf of Mr Kelly thereafter, I am prepared to accept that this was made clear to him by Mr Jackson on 11 January and again by Mr Kelly that evening when the proposal was made to him that he should consider a further extension of the Independent Contractor Agreement. The conclusion which I have reached therefore from the convoluted evidence before the Court, is that at the time that he alleges that he was dismissed, the Applicant was not employed by the Respondent

and is not entitled to compensation or any other form of relief.

. No submissions have been made to me as why an award of costs in this matter should not conventionally follow the result and the order which I accordingly make is the following:

The application is dismissed with costs.

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B M JAMMY

Acting Judge of the Labour Court

23May 2001

Representation:

For the Applicant: Adv O J La Grange

ndent: Adv S C Kirk-Cohen instructed by Murphy Wallace Slabbert Inc.