

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

REPORTABLE

CASE NO: D1055/2001

Date heard: 19/05/03

Date delivered: 21/05/03

In the matter between:

WILLIAM RUMBLES

APPLICANT

and

KWA BAT MARKETING (PTY) LTD

RESPONDENT

J U D G M E N T

A. VAN NIEKERK, A.J.

1. The applicant contends that at the time the relationship between him and the respondent was terminated, he was an employee of the respondent in

terms of the Labour Relations Act 66 of 1995 (“the LRA”), and that he was unfairly dismissed by the respondent for reasons related to its operational requirements. The respondent disputes the status of the applicant. It also disputes the unfairness of the termination of his employment in the event that he is found to be an employee. It was agreed that the point *in limine* to the effect that the applicant was not an “employee” as defined by the LRA be determined by way of a preliminary hearing, and that the matter be set down on a later date for hearing on the merits if the point *in limine* is dismissed.

2. The facts in relation to the jurisdictional issue are largely common cause. On 18 June 1999, an agreement was concluded between the applicant, Daniel O’Connell and Free Start Battery CC. The three parties to the agreement agreed to establish a close corporation, to be known as Kwa Bat Marketing CC. The applicant was to acquire 25% of the interest in the CC for a sum of R125 000. This amount was not immediately payable by the applicant. Clause 6 of the agreement provided that the purchase price was to be paid in full within 5 years of the effective date of the agreement. On payment of the purchase price, the agreed membership interest in the CC would be transferred to the applicant, and he would then become a member of the CC.

3. The agreement provided further that until the applicant became a member of the CC, he would be entitled to a 25% share of the CC's profits. This was to be credited to an account generated in the books of the CC, and if after the 5-year period the total sum to his credit amounted to a sum not less than the agreed purchase price, the applicant would be deemed to have paid for his interest in the CC.
4. In terms of the agreement, Free Start Battery CC was to provide the infrastructure and stock for the new venture. It was also to fund the business.
5. The agreement provided that Free Start Battery CC was entitled to terminate its obligations to the CC at any time after 6 months, in its sole and absolute discretion. In an ancillary undertaking, the applicant undertook to show a profit within 6 months.
6. Clause 7 of the agreement required Free Start Battery CC to provide premises and administrative facilities. Clause 7.4 of the agreement required Free Start to *"provide for the payment of a gross salary for the Purchaser (defined to mean the applicant) at the rate of R15 000, 00 (Fifteen Thousand Rands) each month."* Free Start Batteries CC was further required to provide for *"the payment of the salaries of the other staff*

members and employees of the close corporation”.

7. The terms of the agreement required the applicant to manage the day to day affairs of the close corporation, to engage himself fully and exclusively in the sales of batteries, and notwithstanding the fact that the 25% members interest was not registered in his name, to *“act in a fiduciary manner required of a member of a close corporation, in relation to the close corporation and its affairs.”*
8. It is common cause that on 9 November 1999 the CC that was the subject of the agreement referred to was converted to a company, Kwa Bat Marketing (Pty) Ltd., cited as the respondent in these proceedings. The applicant alleged that the conversion was effected without his knowledge.
9. The relationship established by the agreement continued until 28 February 2001. On that date, Danny O’Connell, a Director of the respondent, addressed a letter to the applicant. The letter stated inter alia:

“From the management accounts presented to the end of January 2001 there is a large loss, which as we discussed is attributable to low sales and increased overheads. I cannot see any improvement in the situation as it currently stands in terms of increasing turnover drastically.

In consideration of the above I have decided to close Kwabat Marketing KZN (Pty) Ltd. Free Start Battery will service existing Kwabat customers. Kwabat staff will have the option to be absorbed into Free Start. Unfortunately, there will not be a position available for you in this structure. Although our agreement does not make provision for notice pay, I will ensure that you receive a months (sic) salary and benefits as goodwill. It is unfortunate that Kwabat was not a success as we had anticipated. I take this opportunity to wish you the best in your future endeavours."

The applicant disputes the rationale for the closure, and contends that the letter constitutes an unfair termination of his employment.

10. It is common cause that the applicant and the respondent did not enter into a written contract of employment. The applicant *inter alia* relied on the terms of the agreement concluded on 18 June 1999 to establish an employment relationship with the respondent.
11. In his evidence, the applicant stated that First National Battery had employed him for some 35 years when O'Connell proposed the establishment of a new company to market batteries, in which he would have a 25% share. At the time, he was close to retirement age, and conceded in cross-examination that he viewed the proposal as a venture in which he would be able to increase his income, notwithstanding his resigning from his existing employment. The applicant stated that he had been earning R15 000 per month at the time, and that he did not wish to be

worse off in this sense by agreeing to join the new venture. The purchase price for his share of the equity in the respondent was never paid, and he had never received transfer of the member's interest or shares in the respondent. The applicant stated further that pending his taking transfer of the member's interest, he regarded himself as an employee, although in his view, once he had taken transfer of the member's interest he would become a member of the CC and relinquish his status of employment.

12. The applicant referred to payslips issued to him by the respondent. These are printed in standard format and in a column described as "earnings" record what is termed a "basic salary" of R15 000, 00. The applicant's payslip for the month of January 2001 records a basic salary of R16 500,00, the difference being what the applicant referred to as an "increment". The payslip also records deductions effected for income tax.
13. The applicant testified that he had been a member of a provident fund, and that the respondent had paid contributions to that fund on his behalf. He had also been a member of a medical aid scheme, on similar terms.
14. In so far as his working environment was concerned, the applicant testified that he occupied an office with other employees of the respondent and that they shared facilities. He took 3 weeks annual leave after advising

O'Connell that he intended to do so. On one occasion during his engagement he was ill, and he telephoned the office to advise the switchboard operator accordingly.

15. In so far as the day to day management of the business was concerned, the applicant testified that his main contact with O'Connell was a monthly manufacturing meeting. These were of little relevance to him, since production rather than sales matters were discussed, but he attended the meetings nevertheless.
16. Mr. Snyman, who appeared for the respondent, submitted that the agreement between the parties was one in terms of which a member's interest in a close corporation was sold to the Applicant. The Applicant had agreed to participate in a joint venture, and to contribute his expertise and experience. In return, he would become a member of the CC once the purchase price for his share of the member's interest had been paid. In essence, his submission was that the applicant had abandoned the comfort and security of employment in pursuit of an entrepreneurial venture. That venture having turned sour, it was not for the applicant now to claim the existence of an employment relationship, even less so the statutory benefits that flow from that relationship, and in particular, the protection against unfair dismissal conferred on employees by Chapter VIII of the LRA. The

contract between the parties had arisen in the context of a commercial rather than an employment relationship, it was not a contract of employment. If the applicant had any remedies, these were in respect of claims for breach of a contract in respect of which the Labour Court had no jurisdiction.

17. The LRA defines an “employee” in section 213 as:

“(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...”

That part of the definition contained in paragraph (a) is generally agreed as referring to the common law contract of service (*locatio conductio operarum*). Whether the second leg of the definition, that contained in paragraph (b), implies that a person may be employed by another within the meaning of the Act even in the absence of a contract of employment between them remains a contentious issue (see Du Toit *et al* “The Labour Relations Act of 1995,” 3rd edition at 70, and Church of the Province of Southern Africa (Division of Cape Town) v CCMA [2001] 11 BLLR 1213

(LC) at 1224). It should be recalled though that a contract of employment may be in writing or oral, and its terms may be express or tacit. There are no formalities required for the formation of a contract of employment. Section 29 of the Basic Conditions of Employment Act 75 of 1997 requires “written particulars of employment,” to be given to an employee, it does not require a written contract. What is required therefore is a conspectus of all the relevant facts including any relevant contractual terms, and a determination whether these holistically viewed establish a relationship of employment as contemplated by the statutory definition.

18. On this basis, the crisp question that the Court is required to determine is whether the applicant was an employee of the respondent on 28 February 2001, when O’Connell terminated the relationship between them.
19. An appropriate point of departure in inquiries of this nature is the terms of any agreement between the parties. It is well established that a construction of any contract that the parties concluded is the primary source from which the legal relationship between them must be gathered. (See SA Broadcasting Corporation v McKenzie (1999) 20 ILJ 585 (LAC) at 591 E and Liberty Life Association of Africa Ltd. v Niselow (1996) 17 ILJ 673 (LAC)). However, contractual terms are not definitive of the nature of any legal relationships that might exist. The courts will have regard to the

realities of the relationship between the parties to determine the true nature of the relationship between them. This is particularly so when a party is induced into entering into a contract that deprives that party of the protections granted by the status of employment. (See Building Bargaining Council (Southern and Eastern Cape) v Melmons Cabinets CC & Another [2001] 3 BLLR 329 (LC)). The parties own perception of their relationship and the manner in which the contract is carried out in practice are also relevant factors in a determination of the nature of that relationship, particularly in those areas not covered by the strict terms of the contract (see Borcherds v CW Pearce & J Sheward t/a Lubrite Distributors (1993) 14 ILJ 1262 (LAC)).

20. Turning for a moment to the preamble to the memorandum of agreement concluded between the parties on 18 June 1999, it records the respective motives of the parties in concluding the contract. Free Start Battery CC is recorded as being *“desirous of setting up the close corporation which shall be concerned only with marketing and sales of the products of Free Start”*. The seller (O’Connell) is recorded as desiring *“the establishment of a business corporation concerned only with the sales of the product of Free Start Battery cc”*. The purchaser (the applicant in these proceedings) represented *“that he has the skill and expertise required to successfully operate a business concerned with the sale of batteries”*. The respective

interests are clear. Free Start Batteries CC, as the manufacturer, sought to have its product marketed and distributed. O'Connell had a similar interest, which is not surprising since he and his family were the effective owners of Free Start Battery CC. The applicant was to contribute his sales experience and what is colloquially termed "sweat equity".

21. The primary purpose of the agreement was clearly the sale of 25% of the member's interest in the close corporation to be formed by O'Connell. But the agreement, as noted above, also establishes obligations on Free Start Battery CC to form the close corporation, to *"provide for the payment of a gross salary for the Purchaser at the rate of R15 000, 00 (Fifteen Thousand Rands) per month"*, to *"provide for the payment of the salaries of the other staff members and employees of the close corporation"*. The applicant was further required to manage the day to day business of the close corporation, to engage himself fully and exclusively in the sales of batteries and to act in a fiduciary manner required of a member of a close corporation.

22. Mr Snyman submitted that the agreement was not a contract of employment and that none of the elements traditionally associated with such a contract were regulated by the terms of the agreement. Even if that is so (and I doubt that it is) the relevant enquiry is not confined to the terms of the contract. What is at issue is whether the applicant was an employee on the

date that the relationship between him and the respondent was terminated. That obviously requires a consideration of the terms of the agreement and any intention that can be divined from those terms. But it also requires consideration to be given to the manner in which the agreement was implemented, and the nature and extent of any indications of employment manifested by that implementation.

23. None of the provisions of the agreement reached in June 1999 is inconsistent with a conclusion that the parties to the sale agreement intended that a relationship of employment would be established between the applicant and the close corporation to be formed. On the contrary, the language adopted by the parties, and in particular, the reference to the applicant's right to a salary and the agreement on the nature and extent of his obligations all indicate that he would place his productive capacity exclusively at the disposal of the respondent and that he would receive remuneration in return. The manner in which the agreement was implemented is similarly consistent with this conclusion. The applicant devoted his full time and attention during working hours to the business of the respondent, he was paid what was termed a 'salary', his 'salary' was increased, he was a member of a medical aid fund to which the respondent contributed, and he was a member of a provident fund to which the respondent contributed. These are all factors that are consistent with the

existence of a relationship of employment.

24. The fact that the applicant had a financial stake in the respondent cannot be ignored. Sharing in the profits and losses of a business would, in the normal course, be a significant factor indicating a relationship other than one of employment. However, in this instance, I am satisfied that this is not a conclusive factor. The applicant was not a member of the close corporation that was formed pursuant to the agreement concluded with O'Connell and Free Start CC, nor was he a shareholder or director of the respondent when the close corporation envisaged by the agreement was converted and the respondent registered. At best, he was a putative shareholder, entitled to the transfer of shares on payment of the purchase price and subject to the satisfaction of the conditions established by the terms of the agreement. Although a notional share of the profits was to be credited to the applicant for the purpose of payment in due course of the purchase price for his shares, the R15 000,00 paid to him each month (later increased to R16 500,00) was not brought into account. In other words, what was described by the respondent itself as a "salary" did not amount to an advance, a "drawing" or some similar payment which ultimately would be accounted for when the applicant's share of the profits was determined. The applicant was paid a salary each month irrespective of the fortunes of the business and irrespective of the value of his contribution to the business in any

month.

25. The indications derived both from the terms of the agreement and the manner of its implementation are consistent with a conclusion that the parties intended that the applicant was to be employed by the respondent on its formation, and that a relationship of employment was in fact established.

26. I am satisfied that the applicant has discharged the burden of proving that he was an employee of the respondent on 28 February 2001. During argument, Mr. Parmanand, who appeared for the applicant, submitted that Free Start Batteries was the alter ego of the respondent, and that the real employment relationship was one between the applicant and that entity. On the evidence before me, I make no finding in this regard. The applicant is, of course, not precluded from pursuing that submission at any hearing on the merits of this dispute.

27. I make the following order:

The point *in limine* is dismissed, with costs.

A. VAN NIEKERK A.J.

APPEARANCES:

FOR THE APPLICANT : ADVOCATE S.K. PARMANAND
INSTRUCTED BY : VIJAY KOOBLAL & ASSOCIATES

FOR THE RESPONDENT : S. SNYMAN OF SNYMAN VAN DER
HEEVER HEYNS