IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NO J1264/08

In the matter between:

INSPEKTEX MMAMAILE CONSTRUCTION & FIRE PROOFING (PTY) LIMITED	Applicant
and	
JACOBUS COETZEE	First Respondent
JACOBUS COETZEE NO	Second Respondent
LYNETTE COETZEE NO	Third Respondent
THE KOLARUCH FAMILY TRUST	Fourth Respondent
COMMISSIONER GLEN CORMACK NO	Fifth Respondent
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION (WITBANK)	Sixth Respondent

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JUDGMENT

FREUND AJ:

Introduction

1 The applicant, a private company, applies for a declaratory order that a written settlement agreement which it entered into with the first respondent, its former general manager, is void *ab initio*, alternatively voidable at its instance. The applicant's case is that it was induced to

conclude the settlement agreement on the basis of a misrepresentation made to it by the first respondent.

2 The first respondent was dismissed by the applicant. He referred a dispute to the CCMA alleging that his dismissal had been unfair. The fifth respondent, a commissioner of the CCMA, conciliated the dispute. The conciliation was successful and resulted in the conclusion of a written settlement agreement, which is the subject of the present application.

3 The settlement agreement recorded the terms on which the parties had agreed to settle the dispute between them. It provided that the applicant was, in instalments, to pay the first respondent R520,000.00. It recorded that, in the event of the applicant failing to comply with its obligations in terms of the agreement, the applicant consented to the agreement being made an order of Court by the Labour Court in terms of section 158(1)(c) of the Labour Relations Act No 66 of 1995 ("the LRA"). It provided for the transfer of certain properties to the first respondent; for continued use by the first respondent of his "company vehicle"; and for certain related matters.

4 Of particular importance for present purposes is clause 4 of the agreement, which provided as follows:

> "*The* [first respondent] *will cede <u>his shares</u> in* [the applicant] *company (Inspektex / Mmamaile) on receipt of the first payment as in clause 1.1 as above.*" (my emphasis)

5 It is common cause that:

5.1 at the time that the agreement was concluded, the first respondent did not own any shares in the applicant;

5.2 at the relevant time, each of the following three parties, namely Mr SHP Mmamaile ("Mmamaile"), Mr FG Fourie ("Fourie") and the Kolaruch Trust ("the Trust"), owned one third (33.33%) of the shares in the applicant, Mmamaile and Fourie being directors of the applicant;

5.3 the founder ("oprigter") of the Trust was the first respondent. Its trustees are the first respondent and his wife, Lynette. The beneficiaries of the Trust are the first respondent, his wife and his two children; when the Trust is wound up, the beneficiaries are the same, save that the first respondent will be precluded from benefiting.

6 The gist of the applicant's case is that the settlement agreement is void or voidable because the first respondent allegedly misrepresented to it that he was the owner of shares in the applicant.

Jurisdiction

7 Mr van der Merwe, who appeared on behalf of the first respondent, submitted that this Court lacks jurisdiction to entertain the application, the only body having such jurisdiction being the CCMA. As I understood his argument, this was because the settlement agreement settled a dismissal claim falling within the exclusive jurisdiction of the

CCMA and, if the settlement agreement is not valid, that dispute will still fall to be determined by the CCMA. Mr van der Merwe also referred to the power of the CCMA, in terms of section 142A of the LRA, to make an agreement between the parties an arbitration award, and submitted that the power to declare a settlement agreement invalid was incidental to the CCMA's power in terms of section 142A.

8 The issue in this case is, in my view, not whether the CCMA has jurisdiction to determine the validity or otherwise of the present settlement agreement, but whether the Labour Court has jurisdiction to entertain the applicant's application for the declaratory relief which it seeks. For the reasons which follow, I have concluded that the Labour Court does have the necessary jurisdiction:

8.1 In my view, the Labour Court has jurisdiction to entertain the application in terms of section 77(3) of the Basic Conditions of Employment Act No 75 of 1997 (the "BCEA). That subsection provides:

> "*The Labour Court has concurrent jurisdiction with the civil courts to hear and determine <u>any matter concerning a contract of employment</u>, irrespective of whether any basic condition of employment constitutes a term of that contract.*" (my emphasis)

In my view, this case is comparable to <u>University of the North v Franks and Others</u> (2002) 23 ILJ 1252 (LAC), in which the Labour Appeal Court held that the Labour Court had jurisdiction to entertain a case regarding whether an offer by an employer of a voluntary retrenchment agreement remained open for

acceptance by employees. The Court held (at para [30]) as follows:

> "*The termination of an employment contract and the terms and conditions upon which this is to occur are clearly matters concerning such a contract. The Labour Court correctly held that it had jurisdiction.*"

If the dispute in Franks was a "*matter concerning a contract of employment*", I believe the same applies to the present dispute. The first respondent disputed the fairness of his dismissal, and reinstatement was a potential remedy for his claim. That claim was compromised by the settlement agreement, which (if valid) brought about a final termination of the employment relationship. If the agreement is not valid, the dispute about the fairness of the dismissal and the resultant claim for reinstatement remain to be determined. In my view, a dispute about whether an agreement ostensibly bringing about an agreed termination of a contract of employment is valid is a "*matter concerning*" a contract of employment, as contemplated in section 77(3) of the BCEA.

8.2 There is a second independent basis upon which I believe that this Court also has jurisdiction, namely section 158(1)(j) of the LRA, which provides that the Labour Court may "*deal with all matters necessary or incidental to performing its functions in terms of this Act or any other law*". There are various situations in which it may be necessary for this Court to determine whether or not a settlement agreement is valid in the course of

determining matters manifestly within its jurisdiction. Two examples will suffice. First, in terms of section 158(1)(c) of the LRA, the Labour Court may make a settlement agreement an order of the Court. Nduli v SA Commercial Catering & Allied Workers Union (2001) 22 ILJ 198 (LC) illustrates that, in exercising this power, the Court is entitled to determine whether a settlement agreement which it is asked to make an order of Court is a valid agreement. In that case, the Court held that the person who purported to represent one of the parties to a settlement agreement was not authorised to do so and accordingly declined to make the agreement an order of Court. A second example would be where, in an unfair dismissal claim before the Labour Court, an employer raises a defence that the dispute between it and the dismissed employee has been resolved by a settlement agreement. If the employee were to assert the invalidity of the agreement, the Court would plainly be empowered to determine whether the settlement agreement was valid and binding.

8.3 The Labour Court has the power, in terms of section 158(1)(a)(iv) of the LRA, to make a declaratory order. Such an order may in my view be made in respect of any matter over which the Labour Court has jurisdiction. Where an issue, such as the validity of an agreement settling a dismissal dispute, is relevant to issues over which the Labour Court has jurisdiction, it is my view that determining such an issue is "*necessary or incidental*

> *to*" the performance by this Court of its functions (as contemplated in section 158(1)(j)). Had the first respondent sought a declaratory order that the agreement is binding, coupled with an application that, if so, it should be made an order of Court, the Court would in my view have had jurisdiction. I do not think that the mere fact that the declaratory order is sought on its own, without being coupled directly to an application for other relief falling within the jurisdiction of the Court, has the consequence that the Court lacks jurisdiction.

9 In my view, it is not necessary to determine whether the CCMA might also have jurisdiction to entertain a claim by the applicant for the relief sought from this Court.

The merits

10 The case for the applicant is that the first respondent represented to it that he had shares in the applicant and that it was induced by this representation to conclude the settlement agreement.

11 I am not persuaded by the applicant's argument. The case made out in the founding affidavit is essentially that the consultant who represented the applicant in negotiating (but not signing) the settlement agreement at the offices of the CCMA laboured under a misapprehension that the first respondent owned one-third of the shares in the applicant. He alleges that the failure to disclose <u>to him</u> that the first respondent did

not hold any shares at all in the applicant and that the Trust held one-third of the shares in the applicant constituted a misrepresentation. He alleges further (in paragraph 14.5 of the founding affidavit):

> "*As a result of the failure by first respondent to disclose the aforementioned information to me, I advised Mr Fourie telephonically that the first respondent was prepared to cede all 'his shares' to the applicant's directors. The aforementioned misrepresentation resulted in the settlement agreement which is prejudicial to the applicant and its directors.*"

12 However, quite a different picture emerges from the first respondent's answering affidavit. This being an opposed application for final relief, disputes of fact fall to be determined in accordance with the well-known principles laid down in Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited 1984 (3) SA 623 (A) at 634E-635C. There is in my view nothing in those portions of the answering affidavit referred to below that is so farfetched or clearly untenable that the Court would be justified in rejecting them. On the contrary, since no replying affidavit was filed by the applicant, they must be taken to have been admitted.

13 In his answering affidavit, the first respondent alleges that, at the time of the establishment of the applicant, he agreed with Messrs Fourie and Mmamaile, ie the other two shareholders, that his and his wife's shares in the applicant would be transferred to the Trust. He accordingly alleges that Messrs Fourie and Mmamaile were at all relevant times aware of this fact. He adds that Mr Fourie indicated that he also wanted to transfer his shares to a trust.

14 The first respondent also states that, when the settlement agreement was negotiated, the parties did not deal directly with each other; they were in different rooms, with the fifth respondent acting as a go-between. He states that, at one stage during the negotiations, his wife pertinently asked the fifth respondent: "*Wat van haar aandele?*" The fifth respondent left the room to consult with the applicant's consultant and returned saying: "*I could not understand, but they are not interested in her shares but only in yours*" (referring to the first respondent's shares).

15 The first respondent also alleges in his affidavit that the applicant was at all times aware that his and his wife's shares "*deur die vierde respondent* [ie the Trust] *gehou word*", and alleges that a reference to "*his*" shares in the agreement had to be construed as a reference to his shares which had been transferred to the Trust.

16 The founding affidavit annexes a copy of a document signed by Messrs Mmamaile and Fourie on behalf of the applicant, which represented that the shares in the applicant were held by Messrs Mmamaile (33.33%), Fourie (33.33%) and by the Trust (broken down into shares in the name of the first respondent (16.667%) and of his wife (also 16.667%). The founding affidavit states that this document was a representation to Sasol for "BEE" purposes. Although this is not explicitly stated, it seems that this document may have been signed by Messrs Mmamaile and Fourie before the date of the settlement agreement. If that is the case, I fail to understand how it can be

suggested that Messrs Mmamaile or Fourie were misled by any representation allegedly made by the first respondent when undertaking in the agreement to transfer "*his shares*".

17 It is, in any event, common cause that the applicant's share register reflects Messrs Fourie, Mmamaile and the Trust as the Company's three shareholders, each holding 33.33% of the shares. It is the applicant company which was the relevant party to the settlement agreement, not its consultant, Mr Pretorius, nor even Mr Fourie (who signed the agreement on behalf of the applicant). Since the applicant's share register correctly reflects the identity of its shareholders, I do not accept that the applicant could have been or was misled by any misrepresentation from the first respondent that he was a shareholder in his personal capacity.

18 In order to succeed, the applicant had to show that it had been induced to enter into the settlement agreement by a misrepresentation of an existing fact which was material, was intended to induce it to enter into the contract and did so induce it. See Karroo & Eastern Board of Executors & Trust Company v Farr and Others 1921 AD 413 at 415; Novick and Another v Comair Holdings Limited and Others 1979 (2) SA 116 (W) at 149C-150D. I am not persuaded that these requirements have been shown by the applicant. In particular, I am not persuaded that it has been shown that the third respondent intended to induce the applicant to conclude the settlement agreement by making a misrepresentation. It appears to me that, if the applicant laboured

under any misapprehension as to whether the first respondent personally owned any shares in it, it had only itself to blame.

19 I should make clear that it is common cause that, after the settlement agreement was concluded, and in compliance with what he contends to be his obligation under the settlement agreement, the first respondent instructed auditors that, upon receipt of the first payment provided for in the agreement, they should transfer from the Trust to the relevant parties "his" 16.667% shareholding in the applicant. It appears to me that the applicant's real complaint is that it was also entitled to the further 16.667% shareholding transferred to the Trust by the first respondent's wife. In my view, the real dispute pertains to what shares the first respondent is obliged to cede in terms of clause 4 of the agreement; ie what does clause 4 mean when it provides that the first respondent will cede "his" shares in the applicant? Do these shares include those originally held by the first respondent's wife? Nothing said in this judgment is intended to influence a decision on that question.

20 In my view, there is no merit in the argument advanced on behalf of the applicant that, because the first respondent does not directly own any shares in the applicant, this shows that he made a material misrepresentation when agreeing in clause 4 of the agreement to cede "his" shares. It is my view that, in agreeing to cede "his" shares, the first respondent consented to a term that was legally inaccurate, since the relevant shares were not strictly speaking "his", but I do not accept

that the term itself amounts to a misrepresentation by the first respondent. The argument for the applicant that the term proves the misrepresentation relied upon rests, in my view, on the legally erroneous view that a party cannot contractually bind himself to transfer what he does not own. It is trite that a seller need not be the owner of the thing he sells – see LAWSA Volume 24 (1st reissue) para 82, and the authorities there cited. I can see no reason why the first respondent could not lawfully undertake, in the settlement agreement, to transfer such of the shares owned by the Trust as the parties had in mind when they agreed that he would transfer "his" shares.

21 I am accordingly of the view that the applicant has not made out a case entitling it to the relief it claims.

Conclusion

22 For the reasons set out above, I make the following order:

1. The application is dismissed.

2. The applicant is to pay the costs of the application.

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AJ FREUND
Acting Judge of the Labour Court

Date of argument:	15 July 2009
Date of judgment:	1 September 2009
For applicant:	Mr CJ Geldenhuys of Geldenhuys CJ at Law Inc
For respondents :	Adv CdeW van der Merwe
Instructed by:	MD Swanepoel