REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 708/10

In the matter between:

Clinton George William FERGUSON **Applicant**

and

BASIL READ (PTY) LTD **Respondent**

Heard: **20-23 August 2012**

Delivered: **29 August 2012**

Summary: Operational requirements – parties entering into settlement agreement – agreement not induced by misrepresentation -- employee not dismissed.

JUDGMENT

STEENKAMP J

Introduction

1] Confronted with the spectre of possible dismissal for operational requirements, the applicant (Ferguson) entered into an agreement in full and final settlement with the respondent (Basil Read). In terms of that

agreement, the applicant was paid severance pay; one month's notice pay; and an *ex gratia* payment. He waived any claim that he might have regarding the termination of his service.

2] Subsequently, the applicant learnt that the respondent had commenced a new building project at Saldanha. He claims that he entered into the settlement agreement based on a misrepresentation by the respondent and that the agreement is null and void. He claims that he was dismissed; that it was substantively and procedurally unfair; and that he is entitled to compensation equivalent to 12 months' remuneration.

3] The pertinent question to be decided is whether the parties entered into a valid agreement in full and final settlement of the termination of the applicant's services; if so, he was not dismissed and fairness does not arise. If, however, the applicant was induced to enter into the agreement by misrepresentation, the question arises whether the agreement is void or voidable; if so, whether he had been dismissed; and if so, whether the dismissal was fair.

Background facts

4] Much of the background to the dispute is common cause. The applicant started working for Basil Read on 21 November 2007 as a foreman, grade 10. At the time when the parties signed the settlement agreement on 26 February 2010, he had been promoted to grade 12. His monthly remuneration package at that time was R17 500, 00.

5] The applicant received good performance reports during the currency of his employment. He was initially employed as a foreman at the building of the West Coast Mall in Vredenburg, where he lived. When that project came to an end, he was transferred to Paarl on 8 February 2010 to assist in the building of the Paarl hospital.

6] The applicant was unhappy with the accommodation that was provided for him in Paarl. However, he only spent eight days in total on the Paarl site. He was on sick leave from 11 to 15 February 2010 and on annual leave

from 16 to 21 February 2010. The accommodation was refurbished and repainted on 22 or 23 February 2010. On 26 February 2010, the applicant signed the agreement with the respondent.

7] The agreement reads as follows (*verbatim*):

"**Full and Final Settlement**

between

Clinton Ferguson

(the employee)

and

BASIL READ (PTY) LTD

(the company)

Both parties agree:

1. The services of the employee being fairly terminated upon mutual agreement based on the company's operational requirements.

2. Monies due being:

   The company shall pay the employee the amount of **R30 583,00 (less PAYE).**

   This amount consists of:

1 Month Notice	:R17 500, 00
Ex Gratia Payment	:R5 000, 00
Leave Pay	: R0 (write off)
Severance Pay (2 weeks)	:R 8 083, 00

   This amount being inclusive of any statutory monies due to the employee.

3. The employee, wavering [*sic*] any claim that he might have a really is

services and/or termination of services.

4. By signing this agreement, the employee confirms that he understands the contents of this agreement, that the contents of the agreement has been interpreted to him, that he sided of his own free will and that such agreement is legally binding."

   The agreement was signed by the applicant; Mtshali, the employee relations manager; and two witnesses.

8] The respondent was awarded a contract to build a reverse osmosis plant at Saldanha ("the Saldanha project"). However, at the time that the applicant's employment came to an end, work on the Saldanha project had not commenced. The respondent was waiting on the results of an environmental impact assessment at the record of decision had not been signed. A "kick off meeting" was held at Saldanha on 26 March 2010 and it was recorded that construction work was due to commence on 13 April 2010.

Disputed facts: the evidence before the Court

9] The applicant testified and called one further witness, Mr Julian Swartz. The respondent called three witnesses: Messrs De Bruin, Mtshali and De Sousa.

10] Apart from the common cause facts, the applicant testified that De Sousa, the contracts director, phoned him on 26 February 2010 and told him that the Saldanha project had been cancelled and that he would, therefore, be retrenched. He also testified that Mtshali, the Employee Relations Manager, told him in their meeting on 26 February 2010 that the Saldanha project had been cancelled. This is why he signed the termination agreement. He believed that the real reason why he was earmarked for retrenchment was because he had complained about his living conditions.

11] Julian Swartz was a senior site manager. He was employed by Basil Read but was dismissed for misconduct. He worked with the applicant and De

Sousa on the West Coast Mall project. When the project came to an end, he was transferred to KwaZulu Natal. In mid-March 2010 he was recalled to Cape Town for the Saldanha project. He was initially deployed to the respondent's office in Bellville, but started working on the West Coast from 6 April 2010.

12] The respondent's first witness, Phillip de Bruin, was the contract manager in charge of the Paarl Hospital site. He met Ferguson in February 2010, when De Sousa asked him to accommodate Ferguson on the Paarl site as there was no more work for him at the West Coast Mall. He acknowledged that there were problems with Ferguson's accommodation. He gave instructions for the flat to be cleaned and repainted. That was eventually done. Du Plessis testified that he no longer required a foreman's daily diary to be used at the Paarl site. The format was more suited to civils work than to the building industry. Instead, he developed a daily activity sheet in a different format that could be used by the quantity surveyor to do costings. He provided examples to the court. He could not dispute that Ferguson may have continued to make annotations in his own foreman's diary, but he stressed that it was not a requirement; that copies of the daily entries were not given to him; and that there was no need for Ferguson to keep such a diary. He saw Ferguson's entries for the first time the week before trial when Ferguson's attorney provided them to the respondent's attorney. De Bruin was not involved in the respondent's retrenchment exercise and was merely informed that the parties had entered into a mutual separation agreement.

13] The respondent's employee relations manager, Mandla Mtshali, met the applicant on 26 February 2010 after he had been advised by the respondent's building director that Ferguson could be affected by retrenchment. At that stage, the only projects that remained for the respondent were Paarl Hospital – where the applicant was not needed – and the Gautrain. Mtshali travelled to Paarl from Johannesburg in order to consult Ferguson on the perceived need for dismissal due to operational requirements; possible alternatives; and possible ways to avoid dismissal. He denied that he told Ferguson that the Saldanha RO project had been

cancelled. Ferguson understood that there was no work for him and he elected to sign the termination agreement in full and final settlement of all claims, instead of proceeding with a consultation process as envisaged by s 189 of the Labour Relations Act.[1] Apart from the statutory severance pay and a month's notice pay, the respondent paid Ferguson an *ex gratia* amount of R5000 and agreed to write off the leave that Ferguson owed the respondent.

14] The respondent's building contracts director, George de Sousa, worked with the applicant at the West Coast Mall. He described Ferguson as diligent and tried to accommodate him when the project came to an end by asking De Bruin to use him at Paarl while he could. He conceded that he may have told Ferguson and others that there may be work for them at the Saldanha project in order to motivate them when the West Coast Mall project came to an end; however, by February 2010 – when it became apparent that there was no more work available for Ferguson – the Saldanha project had not started. The respondent had been awarded the contract, but they were waiting for the environmental impact assessment to be concluded and could not enter into a record of decision. The respondent had no building work in the Western Cape left. On 26 February 2010 he did telephone the applicant as he knew that Mtshali was going to meet with him and he wanted to wish him well; however, he did not tell him that the Saldanha project had been cancelled.

Evaluation/ Analysis

Credibility and probabilities

15] The main dispute of fact between the parties is whether or not De Sousa and Mtshali pertinently told the applicant that the Saldanha project had been cancelled.

16] The technique to be employed by courts in resolving factual disputes when

1Act 66 of 1995 ("the LRA").

confronted with two irreconcilable versions was summarised by the SCA in *Stellenbosch Farmers' Winery Group Ltd v Martell et cie*[2]*:*

> "To come to a conclusion on the disputed issues a court must make findings on *(a)* the credibility of the various factual witnesses; *(b)* their reliability; and *(c)* the probabilities. As to *(a)*, the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to *(b)*, a witness's reliability will depend, apart from the factors mentioned under *(a)*(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to *(c)*, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of *(a)*, *(b)* and *(c)* the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. Thehard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

17] In order to assess the respective parties' credibility, reliability and the probabilities, the court will have to consider the contradictory versions with regard to the daily activity sheets or foreman's daily diary; and what Mtshali and De Sousa told the applicant.

18] Much was initially made by Ms *Duvenage,* who appeared for the respondent, about the fact that the applicant's legal representatives only discovered the daily diary allegedly kept by the applicant the week before

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22003 (1) SA 11 (A) para [5].

trial. This is despite the fact that the parties – represented by the same attorneys – had had a pre-trial meeting more than a year earlier in which the discovery and exchange of documents was pertinently addressed. Ms *Duvenage* went so far as to describe the diary as a "fabrication". In the end, though, much of the dispute around the diary turned out to be a red herring.

19] De Bruin and De Sousa were both adamant that the use of the diary – in the format used by the applicant – had been discontinued by February 2010. On the probabilities, I find that to be more probable than not. De Bruin made the daily activity sheets that were subsequently used by the respondent available to the court. De Bruin and De Sousa acknowledged that they had initially disagreed about the phasing out of the foreman's diary, but De Bruin had persuaded De Sousa. The annotations made by Ferguson in February 2010 differed markedly from the notes he kept at the West Coast Mall – in the latter case, it dealt with the lack of tools and labour and other foreman's concerns; at Paarl, it centred mainly on his initial unhappiness with his accommodation and musings on his own feelings and activities, such as going to see movies in Cape Town..

20] It cannot be discounted that the applicant did keep a diary at the time, even if it was not necessary and even if the daily sheets were not given to De Bruin. It appears from the entry on 24 February 2010 that Swartz gave him the impression that he would be used at Saldanha; however, it is common cause that the project had not started by then and it could have created no more than a *spes*.

21] The more pertinent entry is the very last one in the diary, where the applicant states:

> "George (de Sousa) called this morning to say Mr Mandla Mtshali from HR is on his way to retrench me. He said it was good working with me and that which are only told him last night and that he did not want to phone me, after work. I asking what happened to Saldanha job and he said they lost it and would have to re-tender for the job. I thank him and he wishes me well. Meet Mr Mtshali and he gives me package to sign. I ask him what happened to Saldanha job and he tells me the same thing as George that

> they would have to re-tender. So I signed package. He promised to give me my money by the 03/03/10. I was on my way to sending my CV to power in December 19, 2000 and told me I had new jobs in Saldanha, but now I have to look for work."

22] Although this purports to be a contemporaneous note, I find the version of events that the applicant recorded there improbable in the light of the evidence tendered by Mtshali and De Sousa. It is common cause that the Saldanha project had not, in fact, been cancelled. It is also common cause that the project only – literally – got off the ground in mid-April 2010. Even when the respondent had a kick-off meeting with the contractor on 26 March 2010, although the contract had been signed, they could not commence with the building work as the environmental specifications still had to be approved. Both Mtshali and De Sousa struck me as credible witnesses. They made concessions when needed and never overstated their case. The applicant knew many of the people working on the Saldanha project. It is highly unlikely that either Mtshali or De Sousa would blatantly have lied to the applicant, telling him that the Saldanha project had been cancelled, when it would have been very simple to establish that this was not the case. Given the common cause facts relating to the Saldanha project that only commenced after the applicant had signed the termination agreement, it is more likely that Mtshali and De Sousa would simply have told the applicant that Basil Read had to consider his retrenchment because there was no more work available in the Western Cape at that time. (It should be noted that the applicantstated in court that he was only prepared to work in the Western Cape, and not on any available projects in, for example, KwaZulu-Natal, Gauteng or Mpumalanga).

23] The applicant's credibility is further stretched by his adamant submission that the only reason that he was earmarked for retrenchment was because he had complained about his accommodation. When he complained, De Bruin made sure that the accommodation was made habitable, even though it took a while. It is also apparent from the applicant's notes in his foreman's diary at the West Coast Mall and his own evidence that he was not afraid of speaking his mind and that he confronted his superiors when

he thought it necessary. Despite that, De Sousa valued him as a diligent foreman and prevailed upon De Bruin to accommodate him at Paarl. The simple fact is that the respondent's operational requirements necessitated, at the very least, that it consult with the applicant on the possibility of his dismissal for operational requirements; but the applicant elected to enter into a mutual separation agreement instead.

Misrepresentation?

24] The applicant's claim is based on an allegation that the settlement agreement is void and unenforceable because it was based on misrepresentation by the respondent.

25] The legal principles regarding a plea of misrepresentation were summarised in *Novick & ano v Comair Holdings & ors*[3]*.* The applicant would have to show that:

25.1 The representation relied upon was made;

25.2 It was a representation as to a fact;

25.3 It was false;

25.4 It was material, in a sense that it would have induced a reasonable person to enter into the agreement; and

25.5 It was intended to induce the person to whom it was made to enter into the agreement sought to be avoided.

26] The basis for the applicant's claim shifted somewhat during the trial: during argument, Mr *Chitando*also submitted that there could have been misrepresentation by omission, in that neither Mtshali nor De Sousa told the applicant that the Saldanha project would still go ahead at a later stage, even if they did not pertinently tell him that it was cancelled.

27] The applicant cannot have his cake and eat it. Either he was able to establish that his version – that he was pertinently told the project was

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31979 (2) SA 116 (W).

cancelled – was true, or he was not. On the probabilities, I have found that neither Mtshali nor De Sousa would have made that patently false allegation. Given that finding, there was no misrepresentation upon which the applicant acted when he elected to enter into the settlement agreement.

28] And even if the alternative claim – that had not been pleaded – were to be considered, the simple question would then be why the applicant did not enter into a consultation process during which he could have raised any questions he had about the Saldanha project; if and when it would commence; whether he could be accommodated there; and if not, why not.

29] The consultation process envisaged by s189 of the LRA is meant to be a joint consensus-seeking exercise. The applicant elected not to take part in such an exercise. In my view, given the evidence and the probabilities, he entered into the settlement agreement with open eyes. It was not based upon misrepresentation and the respondent did not dismiss him; the question of fairness, therefore, does not arise.

Conclusion

30] The applicant entered into a termination agreement with the respondent in full and final settlement of any disputes arising from his employment. He did so voluntarily, waiving the opportunity to engage in a consultation process in which he could have requested the respondent to consider alternatives to dismissal, such as future employment at the Saldanha project once it commenced. He was not induced to enter into the agreement by misrepresentation. Hence he was not dismissed.

31] With regard to costs, I take into account that the applicant lost his employment through no fault of his own, but because of the operational requirements of the respondent and the downturn in the building trade. It will no doubt be difficult for him to find employment in that industry in the

near future, given the continued economic difficulties that the industry faces. He was not acting frivolously in continuing with the litigation; it may well be that he subjectively felt that he had been treated unfairly when he saw the Saldanha project proceeding, as it were, next door to him after he had agreed to a mutual termination and severance package. In law and fairness, though he was not the successful party, he should not be held liable for the respondent's costs.

Order

32] The applicant's claim is dismissed. There is no order as to costs.

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Steenkamp J

APPLICANT:	S Chitando
	Instructed by Parker attorneys, Cape Town.
RESPONDENT:	ME Duvenage attorney, Pretoria.