

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 40557/17

DELETE WHICHEVER IS NOT APPLICABLE

A handwritten signature in black ink, appearing to read "Siwendu J".

- (1) REPORTABLE:
- (2) OF INTEREST TO OTHER JUDGES:
- (3) REVISED:

In the matter between:

JOHAN ROSS MACKAY

Applicant

And

BIDCORP FOOD AFRICA (PTY) Ltd

1st Respondent

LIBSTAR OPERATIONS (PTY) Ltd

2nd Respondent

PATLEYS (PTY) Ltd

3rd Respondent

JUDGMENT

SIWENDU J

INTRODUCTION

[1] The Applicant, Johan Ross Mackay (Mackay) claims payment of an amount of R 2 345 904.40 plus interest at the rate of 10.25% per annum from 30 June 2017 to the date of payment and the costs of the suit from the first respondent, Bidcorp Food Africa (Pty) Ltd (Bidcorp). Mackay was the MD of Patleys, (Patleys) which was a division and/ or a subsidiary of Bidcorp until it was sold to the second respondent, Libstar Operations (Pty) (Ltd) (Libstar) at the end of May 2015. Libstar and Patleys, the second and third respondent are cited because they are interested parties in the application. No relief is sought against them.

[2] The background to the claim is that in May 2012, because of Mackay's employment with Patleys, then a division/ subsidiary of Bidcorp, he was invited to partake in the Bidvest Incentive Option Scheme (the scheme). Share options, which he accepted were granted to him over a period from 15th April 2013, 13th of March 2014 and October 2014.

[3] The sale of the Patleys business by Bidcorp to Libstar in May 2015 meant Mackay was disqualified from participating in the scheme. As consideration for the loss of the benefit of the share options that had not yet vested as at 30 June 2015, Bidcorp agreed to compensate him for the non-vested share options, then valued at R 3 440 660.00¹ in terms of a Consideration Agreement concluded between Mackay and Bidcorp.

¹ The consideration payable to him in respect of the non-vested shares, was calculated based on: the closing price of the Bidvest Shares as at 30 June 2015, less the predetermined strike price per non-

[4] Mackay was to have remained employed by Patleys for a duration of two years after the effective date of the sale of the Patleys business, namely July 2015. On 4 December 2015 Mackay and his new employers entered into a Separation Agreement and agreed to terminate his employment with effect from 31 January 2016. On 29 February 2016, they concluded a Supplementary Agreement to the Separation Agreement dated 29 February 2016 was concluded thereafter which recorded that Mackay had been retrenched from Patleys. At present, Mackay is employed by Super Group Trading (Supergroup) as a Group Executive, Marketing and New Business.

[5] Mackay claims that on 17 May 2017, the Bidcorp paid him the gross amount of R 1 094 775.40, and R 602 115 25 net after deductions. It was calculated on the basis that he resigned from his employment. He disputes that he resigned from his employment. He alleges that he was entitled to the full consideration of R 3 440 660.00 agreed to in terms of the consideration agreement.

[6] Bidcorp opposes the claim by Mackay in an affidavit executed by Mr Herculaas Petrus Havenga, the Chief Executive (Havenga) It claims that the supplementary agreement was signed *ex post facto* to reclassify Mackay's resignation as a retrenchment. It states that the purpose of the supplementary agreement was to assist Mackay to obtain a tax benefit from the South African Receiver of Revenue (SARS) so that his salary is reflected as severance pay when it was not. It alleges that the supplementary agreement was a disguised, simulated agreement, contrived to assist Mackay to create an impression that he was retrenched and for him to claim the full R3.4m from Bidcorp. It argues that there is a dispute of facts on whether Mackay

vesting share option multiplied by the number of the of the non-vested shares. The amount was payable to him net of statutory deductions.

resigned, and the supplementary agreement was contrived not capable of resolution on the papers.

[7] The issue in dispute is whether Bidcorp has successfully established the dispute of fact, pertaining to Mackay's resignation from Patleys and, whether the Supplementary agreement was simulated as alleged. Should Bidcorp, fail, Mackay would be entitled to the payment claimed.

BACKGROUND AND THE VARIOUS AGREEMENTS

[8] The dispute can best be understood against the backdrop of the various agreements and their terms, starting with the Bidcorp Share Option Scheme. Clause 3.3 of the salient features of the Scheme states that:

"On termination of services for whatever reason, other than contemplation in 3.4 and 3.5 below, employees are only eligible to exercise those options that have matured at the date of such termination. These matured options must be exercised within a period of 180 days of such termination date or else they will lapse. All other options which have not matured on the date of termination shall lapse".

[9] The conditions of clauses 3.4 were that he would forfeit the options if found guilty of fraud or misconduct. They are not material to the facts of the application.

[10] The second agreement is the Consideration Agreement signed by Mackay and Bidcorp. The terms of the Consideration Agreement were first embodied in a draft letter of June 2015. The only term of the Draft Consideration Agreement linking Mackay and Bidcorp to aspects of an employer and employee relationship and conduct was that Mackay was not to be summarily dismissed and/ or found guilty of conduct that brings him or the company or Bidvest into disrepute prior to 31 December 2016.

[11] The draft letter of June 2016 was subsequently incorporated in a written letter dated 6 November 2015. It differed from the June draft letter in that the date for evaluating his conduct (presumably to trigger entitlement to the full payment) was altered from 31 December 2016 to 4 May 2017. The condition for calculating the consideration amount was altered and the date for reckoning what was due extended to 4 May 2017. He signed the letter on 10 November 2015. This is reflected in clause 2.3.2 which states:

In circumstances where you resign from the Company before 4 May 2017, the Consideration payable to you by no later than 31 May 2017 shall be an amount calculated in accordance with the following formula:

$$A = B \times \underline{C}$$

22²

[12] At the time of signing the reconsideration letter, Mackay had already signed a new contract of employment with Patleys dated 29 June 2015. Clause 3.1 of the employment contract dealing with the duration of his employment reads as follows:

“Whilst Patleys and Mackay accept that employment relationships are dynamic, and subject to change on account of numerous variables, it is their intention that Mackay shall remain in Patleys employ for a period of at least 2 (two) years with effect from 1 July 2015. Accordingly, Mackay and Patleys agree that Mackay's contract of employment may not be terminated prior to 2 (two) years after 1 July 2015, unless Patleys and Mackay specifically agree that such earlier termination will be allowed. In that instance, Mackay and Patleys will enter into a separate agreement recording the

² A = the adjusted consideration; B = the stipulated Consideration of R 3 444. 660; C = the number of completed months you were in the employ of the Company between 1 July 2015 and your last working day.

circumstances, terms and conditions of such earlier termination of Mackay's employment with Patleys."

[13] Mackay alleges that it was a condition of the sale of the Patleys business that he remains in the employ of Patleys for two years after 30 June 2015, the effective date of the sale. This was to ensure the integration of the business as an operating division of the acquirer, Libstar. He became an Executive Director reporting to Mr Andries Van Rensburg from 1 July 2015. He alleges that his position was made redundant following the restructuring. His role was reduced from a Managing Director of an enterprise of R 780m with an employee compliment of more than 500 people to a relationship manager with no direct reports.

[14] Mackay claims he initiated discussions with Conradie, the Human Resources Executive of Libstar on a mutual separation agreement because he believed that his contract of employment had been repudiated. His new contract of employment did not provide for a notice period. This is evident from Clause 3.1 of the employment contract that the termination of his employment before the agreed duration had to be by agreement. Mackay claims that he had intended to remain at Patleys for the duration of the contract, however it became clear the restructure effectively "worked him out of a job" hence why he approached Mr Conradie for a separation agreement.

[15] He alleges that Libstar agreed to the mutual termination because they could not offer him employment under similar terms and they had no option but to retrench him. For this contention, he relies on correspondence from Conradie dated 16 November 2015 as well as the agreement dated 14 December 2015. The latter agreement was signed by Mr Andries van Rensburg (Van Rensburg) to whom he reported on behalf

of Patleys. There is nothing contentious and it is not necessary to repeat the terms in the judgment. Mackay claims to have made representatives of Libstar aware of the share option scheme and the terms thereof in what he refers to as “retrenchment discussions”.

[16] The further supplementary agreement, at issue, dated 29 February 2016 was signed by Mr Niel van Heerden (Van Heerden) on behalf of Patleys. It records the operational requirements as the grounds for the mutual separation. The agreement states that:

“PREAMBLE

- 1.1 On 14 December 2015, the employee entered into an agreement (the agreement) with the Company, the purpose of which was to regulate the terms and conditions of his separation from the Company. A copy of the Agreement is appended hereto and marked “Annexure A”*
- 1.2 subsequent to the date referred to in 1.1 above the employee however made additional representations to the company to the effect that his separation from the company was to be treated as a retrenchment, for the reason that his position at the company had become redundant when the interests of the company merged with that of Rialto Foods, a Division of Libstar Operations (PTY) Ltd. In addition, neither the company nor Rialto Foods was able to offer the employee a position identical to or similar to his former position at the company.*
- 1.3. both the company and Libstar Operations (PTY) Ltd are in agreement with the facts as outlined in 1.2 above.*

- 1.4 *the parties therefore intended for this agreement to supplement the agreement appended hereto as Annexure A for the purpose of specifically providing for the retrenchment of the employee with effect from 1 January 2016.*

AGREEMENT

- 2.1 *The parties are agreed that the termination of the Employees contract of employment was occasioned by the operational requirements of the business*
- 2.2 *It is furthermore agreed between the parties that the Employee had effected the handover required per the Agreement during the month of December 2015 and therefore will be paid the month of January's salary by way of severance pay, in lieu of a physical tender of service during the month.*
- 2.3 *It was agreed that the company will furnish the Employee with a U19 form indicating that his services were terminated pursuant to a retrenchment."*

[17] Mackay submits that he complied with all the obligations under the agreement and is entitled to the payment of the full amount less statutory deductions.

[18] Bidcorp submits there is a dispute of facts on whether Mackay was retrenched, or he resigned. It contends that the matter is not capable of resolution from the papers. For its contentions it relies on a confirmatory affidavit of Mr Leon Conradie, the Executive Human Resources of Libstar Operations (Pty) Ltd. The mainstay of the opposition is that although the documents refer to a "retrenchment" to support the version by Mackay, Patleys agreed to formulate and describe the agreement as such for this purpose to arrive at a mutually acceptable separation even though he was not

retrenched. Therefore, the supplementary agreement did not reflect the true position and was entered after the employment was already terminated.

COMMON CAUSE FACTS

[19] The following is common cause on the papers, namely that:

[19.1] After the acquisition, Patleys was restructured in 2015, with its warehousing and distribution business outsourced to Imperial. An integrated business known as Libstar Food Solutions was announced and planned to be operational from 1 December 2015.

[19.2] The new contract of employment already envisaged that Mackay would no longer be the MD of Patleys but would take up the position of Trading Head: Agency Brands of an Executive reporting to Mr Van Rensburg.

[19.3] Mackay had agreed to be employed for a period of not less than two years after 30 June 2015. Bidcorp disputes that the applicant's role was reduced or that the contract was repudiated.

[19.4] When Mackay initiated the discussions, Patleys was amenable to enter into an agreement of separation.

[19.5] The first letter regulating the terms of the consideration agreement and payment was sent to Mackay in June albeit unsigned. Other than in respect of the amended period of separation from 31 December 2016 to 4 May 2017 and the reference to his resignation, the terms of the agreement sent to him in November were largely the same as the Draft Letter sent to him in June.

[20] The assertion by Mackay that the consideration agreement was part of the suspensive conditions of the sale between Libstar and Bidvest Group, was not disputed. I observe that given the sale of the business to Libstar, a third party, it is evident that the only nexus between Bidcorp and Mackay was through the consideration agreement. Other than the term of the provision of Clause 2.3.2 referred to in paragraph 11 above, the consideration agreement was no longer connected to a direct employment relationship with Bidcorp, which would have been the case had Patleys remained part of Bidvest Food Africa group or as a division thereof.

[21] It is against this factual background, that the contentions of resignation and simulation creating the alleged dispute of fact are to be examined.

DID MACKAY RESIGN OR WAS HE RETRENCHED?

[22] The contention by Mackay is that the contract of employment was repudiated. On the other hand, Bidcorp contends that the position offered to Mackay after the restructure was not a demotion or reduction of his role. In *Nash v Golden Dumps (Pty) Ltd*³ Corbett JA explained that a repudiation occurred:

‘Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract’. When there is a repudiation the aggrieved party may elect to cancel and sue for damages, in which case he or she will inevitably be

³ 1985 (3) SA 1 (A) at 22D-H

bound by that election, or elect to abide by the contract and claim performance.

Once the contract is cancelled it cannot be revived.

[23] Bidcorp places much weight on the fact that Mackay had initiated the discussions to support the contention that he was not retrenched. Mackay on the other hand contends that the restructuring rendered his position redundant. In *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*⁴ Nienaber JA observed that in determining whether there was an unequivocal intention not to fulfil contractual obligations, the

'emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party.'

[24] It is not disputed that Mackay had been unhappy with what he viewed as a diminished role in the newly restructured business. In addition, he does not dispute that the restructuring was contemplated. His contention is based on the results thereof. The nature and scope of the new role following the restructure can best be understood by Mackay and Patleys' first-hand knowledge in my view. I deal with the evidence tendered by Bidcorp to support this later in the judgment.

⁴ 2000] ZASCA 82; 2001 (2) SA 284 (SCA) at para 16

[25] The nature of resignation is aptly described by Van Niekerk J in *Vodacom (Pty) Ltd v Motsa and Another*⁵ where he states that:

*“The principles that regulate resignation are well established. Resignation is the unilateral act (see Sihlali v SA Broadcasting Corporation Ltd (2010) 31 ILJ 1477(LC)...). When an employee gives the required notice, the contract terminates at the end of the notice period. When an employee leaves his or her employment without giving the required period of notice, the employee breaches the contract. Ordinary contractual rules dictate that the employer may hold the employee to the contract and seek an order of specific performance requiring the employee to serve the period of notice. Alternatively, the employer may elect to accept the employee's repudiation, cancel the contract and claim damages. Of course, it is always open to the parties to terminate an employment contract on agreed terms and for either of them to waive whatever rights they might otherwise have enjoyed.”*⁶

[26] There is no evidence that Mackay either verbally or in written correspondence tendered a resignation. Contrary to the contention by Bidcorp, the details point to the fact Mackay did not leave unilaterally. After the discussions he initiated with Executives at Patleys and with Mr Conradie (Conradie), the Human Resource Director at Libstar, Conradie had recorded in a letter dated 16 November 2015 the views about the terms of the applicant's departure. Excerpts from the letter read as follows:

⁵ 2016 (3) SA 116 (LC)

⁶ Ibid para 19

“Bidvest is desirous of the success of Patleys following the acquisition of the business by Libstar.

You are equally desirous of leaving Patleys in good standing (as well as to remain in the good standing following the termination of your employment relationship with Patleys) inter alia so as not to in any way jeopardise the encashment of your share options at Bidvest in 2017

In order to demonstrate to Bidvest the termination of your employment in good standing and on a “no -fault basis, you had requested to be retrenched by Patleys

it is confirmed that Patleys will agree to such retrenchment against the execution by you or for voluntary separation agreement subsequently to be drafted and which agreement will inter alia embody the terms and conditions of the aforementioned restraint (Such Agreement will furthermore serve to satisfy the requirements of Clause 3.1 of the Side Agreement).”

[27] The letter is consistent with the terms of his employment that he would not leave Patleys’ employ unless by agreement. It is also consistent with parties negotiating acceptable terms of mutual separation. Initiating a mutual separation must be seen in the context of the terms of his employment contract. It is not tantamount to resignation. Mackay stated that he had been open with all the parties about ensuring that he does not place his entitlement to the consideration in jeopardy. This would have been the case had he been dismissed for misconduct for example.

WAS THE SUPPLEMENTARY AGREEMENT A SIMULATED AGREEMENT?

[28] I now turn to the question whether the supplementary agreement is simulated.

The starting point as stated in *Investec Bank Ltd and Another v Lefkowitz*⁷ is that:

“the law ‘concerns itself with the external manifestations, and not the workings, of the minds of parties to a contract.’ (Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis[1992] ZASCA 56; 1992 (3) SA 234 (A) at 238I-J”⁸

[29] Citing the *locus classicus* decision in *Zandberg v Van Zyl*⁹ 1901 AD 302 (at 309) in *Maizeboard v John Jackson*¹⁰, Ponna JA observes the legal position as follows:

“ This court recently held (per Scott JA) in Michau v Maize Board 2003 (6) SA 459 para 4: ‘[I]t has long since been established in cases such as Zandberg v Van Zyl 1910 AD 302 Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530, Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd 1941 AD 369 and more recently affirmed in Erf 3183/1Ladysmith (Pty) Ltd and Another v Commissioner of Inland Revenue [1996] ZASCA 35; 1996(3) SA 942 (A) that parties are free to arrange their affairs so as to remain outside the provisions of a particular statute. Merely because those provisions would not have been avoided had the parties structured their transaction in a different and perhaps more convenient way does not render the transaction objectionable. What they may not do is conceal the true nature of their transaction or in the words of Innes JA in Zandberg's case, supra, at 309, “call it

⁷ 1997 (3) SA 1 SCA

⁸ Ibid at 8I-9A

⁹ 1910 AD 302

¹⁰ 3 All SA 511 (SCA) para 7

by a name, or give it a shape, intended not to express but to disguise its true nature". In such event a court will strip off its ostensible form and give effect to what the transaction really is. But, while the principle is easy enough to state in the abstract, its application in practice may sometimes give rise to considerable difficulty. Each case will depend upon its own facts. A Court will seek to ascertain the true intention of the parties from all the relevant circumstances, including the manner in which the contract is implemented. The onus is upon the party who alleges that the transaction is simulated.'

[30] More recently, Lewis JA in *Commissioner for the South African Revenue Service v NWK Ltd*¹¹ formulated the two- fold test for determining simulation as follows

*"In my view the test to determine **simulation cannot simply be whether there is an intention to give effect to a contract** in accordance with its terms. Invariably where parties structure a transaction to achieve an objective other than the one ostensibly achieved they will intend to give effect to the transaction on the terms agreed. The test should thus go further and **require an examination of the commercial sense of the transaction:** of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. **And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation.**"¹² [emphasis added]*

¹¹ 2011 (2) SA 67 (SCA)

¹² Ibid para 55

[31] Wallis JA states in *Roshcon (Pty) Ltd v Anchor Auto Body Builders CC & Others*¹³ that the question is whether the transaction is genuine, for a simulated transaction is a dishonest one. According to *NWK*, the performance of the terms of the transaction may or may not change its simulated nature because a charade of performance is generally meant to give credence to the simulation. The transaction must make commercial sense and the facts before and after the agreement may require examination to establish whether there is a real and sensible commercial purpose to it other than a tax advantage. If the transaction fails to make commercial sense, then it could be set aside as “a sham”.

[32] Having regards to the onus which rests on it, the question is whether the Bidcorp has successfully established the simulation and the dispute of facts as alleged. Bidcorp contends that I must apply the principles in *Plascon v Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹⁴, where the court held that :-

“...[relief in] motion proceedings should only be granted if the facts as stated by the respondents together with the admitted facts in the applicant’s affidavits justify such an order. ...Where it is clear that facts though not formally admitted cannot be denied they must be regarded as admitted.”¹⁵

However, in *Buffalo Freight Systems (Pty)(Ltd) v Crestleigh Trading (Pty) Ltd & Another*¹⁶, then went further than *Plascon Evans* and held that:

¹³ 2014 (4) SA 319 (SCA)

¹⁴ 1984 (3) SA 623 (A)

¹⁵ Ibid at 634

¹⁶ 2011 (1) SA 8 (SCA)

“The court should be prepared to undertake an objective analysis of such disputes when required to do so. In Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)[2008] 2 All SA 512) it was suggested how that might be done in appropriate circumstances”¹⁷

The authorities invite a dissection of all the agreements¹⁸ and the surrounding circumstances before and after the conclusion of the supplementary agreement. The dominant tenure of the terms of the consideration agreement, part of which required Mackay to remain in Patley’s employ must be examined in the context of the sale of that business to Libstar. The following is apparent:

[32.1] The term relating to the retention of Mackay for a defined duration, though signed by him was predominantly for the benefit of Libstar as new owners of Patleys.

[32.2] The benefit to Libstar (*qua* purchaser) was to ensure that the acquired business is integrated as a division of its operations. Mackay had been its MD and would have had intimate knowledge of its operations.

[32.3] Viewed in the context of the suspensive conditions of the sale of the business, part of the terms were to secure some of Bidcorp’s warranties (*qua* seller) to the purchaser, Libstar. This is evident from the reference to claims not being instituted by Libstar in the amount up R3.5m. by 31 December 2016.

¹⁷ Ibid at 14B-D

¹⁸ Consideration Agreement, Separation Agreement and Supplementary Agreement

[33] Bidcorp in exchange for locking Mackay in the employment contract for the predetermined period procured that the payment of the R 3 440 660 *in lieu* of the option scheme which he had forfeited because of the sale would accrue to him.

[34] There are two difficulties for Bidcorp in my view. The first is that by concluding the separation agreement, regardless of the label attached to the separation, Patleys, acting through Van Rensburg whom Mackay reported to, accepted that Mackay would be released early from the employment contract. In the context of the sale, Patleys could not be heard to complain to Bidcorp that, that term of the suspensive condition of the sale pertaining to Mackay has not been fulfilled. They would be estopped from doing so.

[35] The second difficulty amplifies the first, and, demonstrates that who initiated the separation is not a dispositive factor in determining either the retrenchment or the simulation¹⁹. For example, a voluntary retrenchment which was put to Mr Lamprecht for the Bidcorp during argument is a legitimate means of terminating an employment relationship. In this instance, had Patley's or Libstar initiated the separation discussion, Bidcorp would not be heard to say to Mackay, "*No, stay right there and tender your services for we hold you to the consideration contract*" because he would have no employer.

[36] *Pari passu* with the emphasis on substance over form, and to establish whether the supplementary agreement was "a dressed-up contract" to disguise its true nature - the letter dated 16 November 2015 directly implicates the simulation alleged. Even though it is a statement made before the contract and not binding, it forms a part of

¹⁹ See *Vodacom supra* note 3 and 4: "Of course, it is always open to the parties to terminate an employment contract on agreed terms and for either of them to waive whatever rights they might otherwise have enjoyed."

the consideration of the material known to those involved and the circumstances surrounding the disputed supplementary agreement²⁰.. Having regards to the substance of the separation, regardless of whether I apply the “real object test” or “the true intention test”:

[36.1] The reference to Mackay’s “retrenchment” commenced during negotiations as referred to in the letter. It is not a matter that arose only in the Supplementary Agreement. The letter culminated in the negotiated separation agreement. The supplementary agreement was not a “reclassification” as contended because it was already referred to in earlier negotiations. The assertion by Bidcorp is not factually correct.

[36.2] There was a commercial benefit for Mackay to preserve the rights he enjoyed given the release from his employment obligations. There is no reason why he would agree to forego the benefit of the consideration if he was negotiating a mutually acceptable exit for himself. I am unable to find on the papers or to conclude that doing so was dishonest as it was not disputed he had been candid about the need to preserve the benefit.

[36.3] It is a legitimate commercial rationale to negotiate commercially sensible terms of separation, therefore, I am unable to conclude that there was a charade of performance. Mackay left the employ of Patleys as agreed as all the parties acted on the agreement.

²⁰ *Roschon* supra note 11 para 27

[37] Turning to the evidence tendered, to establish the dispute of fact and the simulation, there are difficulties with the evidence presented. In the light of the authorities referred to above, in the case of *Room Hire Co (Pty) Ltd v Jesper Street Mansions (Pty) Ltd*²¹ Murray AJP had this to say about the disputed facts and the quality of the denial of the suit:

. “Enough must be stated by the respondent to enable the court to conduct a preliminary examination and to ascertain whether denials are not fictitious intended merely to delay the hearing”²² [emphasis added]

[38] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*²³ the court had this to say:

“There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”²⁴

[39] The court in the *Buffalo Freights* also refers to *Da Matta v Otto No*²⁵ and the proof of the facts in issue where there are contradictions. The requirement is that the disputed issues must be direct and obvious.

²¹ 1949 (3) SA 1155 (T)

²² Ibid at 1165

²³ 2008 (3) SA 371 (SCA)

²⁴ Ibid para 13

²⁵ 1972(3) SA 858 (A) at 869 D-E

[40] There is no dispute that Conradie was amongst the people with whom Mackay first consulted to secure the mutual separation. It is common cause that Havenga for Bidcorp had no personal knowledge of the facts leading to the conclusion of the separation and supplementary agreements. For this he relies on the confirmatory affidavit by Conradie. Havenga's affidavit fails to explain why Conradie's affidavit is the best available evidence which the court must take account of pending the trial. Mackay takes issue with the confirmatory affidavit. He contends that it constitutes hearsay. It also fails to explain why the allegations of simulation were not obtained from the personnel who signed the agreements, namely van Rensburg and van Heerden. The allegation that Patley's own documents submitted to SARS are fraudulent was not clearly established and supported.

[41] It is material for the court that given the direct knowledge Conradie had of the facts leading up to the signing of the two agreements, the confirmatory wholly fails to provide a pertinent explanation about the diametrically opposed view he adopted to the question of Mackay's "retrenchment" after he sent the letter dated the 16th of November 2015. He was best placed to assist establish whether there was a genuine dispute of facts before the court but failed to do so. Accordingly, Bidcorp has failed to establish that there was no intention to conclude the supplementary agreement.

[42] It is nevertheless clear that Bidcorp was not consulted on the separation because Bidcorp was no longer Mackay's employer. It was not argued that the consideration agreement created a duty to do so. In addition, given that the consideration agreement was a conversion of the right that accrued in terms of an option scheme, it was not argued that the fulfilment of the consideration agreement

depended on the timing of the vesting of the overall option scheme which prevented the payment. It was not Bidcorp's case that the consideration agreement juristically, created an independent set of obligations between Mackay and Bidcorp either. These issues were not the basis of the opposition of the claim either.

[43] Accordingly, Mackay succeeds because Bidcorp has failed to establish the dispute of facts in respect to the simulation and the retrenchment.

ORDER

[44] In the result, I make the following order:

- (i) Bidcorp is ordered to make payment of the amount of R 2 345 904.40 less statutory deductions to the applicant;
- (ii) Interest in the aforesaid amount at the rate of 10.25% per annum from 30 June 2017 to date of payment;
- (iii) The cost of the application.



T. SIWENDU

JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

For the Applicant: Adv C Humphries
Instructed by: Loxton Attorneys
For the first respondent: Adv Lamprecht
Instructed by: Attorneys Werksmens
Date of Hearing: 18 May 2018
Delivered on: 28 June 2018