IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU – NATAL, DURBAN

CASE: 4112/2010

In the matters between:

ALESSANDRO NICOLA ANTONIO NICOLOSI **PLAINTIFF**

vs

VULINDLELA LOGISTICS (PTY) LIMITED **DEFENDANT**

and **CASE: 4114/2010**

JOHN ROBERT LAISTER **PLAINTIFF**

vs

VULINDLELA LOGISTICS (PTY) LIMITED **DEFENDANT**

JUDGMENT

Delivered on 3 February 2011

Ntshangase J:

[1] The plaintiffs Alessandro Nicola Antonio Nicolosi ("Alessandro") and John Robert Laister ("Laister") claim provisional sentence in cases 4112/2010 and 4114/2010 for payment of the amounts of R229 990.39 and R202 163.10 respectively. The claims are founded on acknowledgements of debt executed in their favour purportedly by the defendant.

[2] The circumstances in which Nicolosi and Laister brought the present proceedings against the defendant are the same. The affidavits deposed to by Wayne Diner ("Wayne") opposing provisional sentence are in essence identical in both cases. The cases were set down to be heard together. By agreement between both parties the affidavit of Wayne serves in both cases; the affidavit of Laister also serves as the plaintiffs' replies in both cases. On that basis the matters were argued before me on the basis of case 4114/2010.

[3] The following encapsulates the basis upon which the authority of the plaintiffs to execute the acknowledgements of debt is placed in dispute:

> "Both such acknowledgements of debt are contrived and the defendant disputes that they are either authorised or genuinely intended … (T)he plaintiff and Alessandro were in effect entering into agreements with the defendant which they purported to represent at the time, in circumstances where there was a clear conflict of interest and in breach of fiduciary duties owed by them to the defendant at the time."

The authority of the plaintiffs is also challenged on the grounds that they were virtually concluding agreements with themselves and that when they concluded the agreements with regard to their retrenchment they had already been summarily dismissed.

[4] What appears to have precipitated matters into the present state was the purported summary dismissal of the plaintiffs as employees and their removal as directors of the defendant company on 18 February 2010. Shorn of acrimony alleged in the version of Laister, on that date Wayne served him with a letter[1] which conveyed the release of both plaintiffs from their duties, which required them to remove themselves from the defendant's property and to return all property owned by the defendant in their possession and control. Alessandro who had been absent when Wayne came, later arrived and was also informed of their dismissal and removal.

[5] In the opposing affidavit Wayne states that the plaintiffs' employment was terminated by himself and the defendant's ultimate controlling holding companies of which he is a director, known as M & W Diner Investments (Pty) Limited ("M & W") and its subsidiary Ben Jacobs Iron & Steel (Pty) Limited ("Ben Jacobs"). This is incorrect. The letter Wayne served to dismiss the plaintiffs was signed by him –

> "for and on behalf of Ben Jacobs Iron & Steel (Pty) Limited"

It bears letter heads of Ben Jacobs and makes no reference to M & W.

[6] I do not find it necessary to delve in detail into the hierarchical relationship of M & W and Ben Jacobs with the defendant and other companies in the structure of the group of companies depicted on the organogram,[2] to determine their competence to dismiss and remove the plaintiffs as the process of the purported dismissal was flawed by reason of its defiance of the provisions s 220 of the Companies Act 61 of 1973 ("the Act").

[7] The organogram shows Metaltrade (Pty) Ltd ("Metaltrade") at the pinnacle

1 Annexure "WD26"
2 Annexure "JL1"

of the group, Metvul Holdings (Pty) Ltd ("Metvul") as its 100 per cent subsidiary, Vulindlela Maritime (Pty) Ltd ("Maritime") as a subsidiary of Metvul to 91 per cent of the shares with 9 per cent of the shares held by "others". Further down is Vulindlela Logistics (Pty) Ltd ("the defendant"), a wholly owned subsidiary of Maritime. I fail to see how Ben Jacobs, a subsidiary of M & W which owned 100 per cent shares in it would have had authority to remove directors of a company at the hierarchical position of the defendant in the group of companies. Ben Jacobs owned no shares in any of the companies in the group, I may mention that Metaltrade was, with effect from 14 December 2009, in provisional liquidation. The effect thereof was that its shareholders no longer had the power to act through Metaltrade.

[8] Wayne describes the dismissal simply as follows:

> "On the same day, ie 18 February 2010, I travelled to Durban to summarily dismiss plaintiff and Alessandro as employees of defendant and to hand them Annexure "WD26" hereto".

He then effected the purported dismissal:

> "I … arrived at the premises of the defendant. Laister was there. I handed him a copy of the letter, told him he was summarily dismissed and asked him to remove himself form the defendant's premises; this he agreed to do."

He states that when Alessandro arrived and was handed the letter he said he was aware of his dismissal and had come to collect his things and

> "(h)e too accepted his summary dismissal …"

This implies that he too, as did Laister, accepted his dismissal.

[9] As will appear from what follows, the purport of the dismissal "as employees" was intended to extend and in fact extended to their removal as directors of the defendant. They were barred from the assets and business of the defendant and from exercising any powers as directors. In terms of the defied provisions of s 220 of the Act earlier referred to, the process towards removal of the plaintiffs as directors should have commenced by lodgement of a special notice with the company for delivery to the plaintiffs who were entitled to be heard at the meeting for the proposed resolution for their removal. Fluxmans who represented Ben Jacobs was alive to this. In his e–mail of 12 February 2010 [3] he alludes to s 220 as provisions under which a process would be initiated to remove the plaintiffs as directors of the defendant should they refuse to resign. There was never a resolution to remove the plaintiffs as directors of the defendant.

3 Annexure "WD 21"

[10] The assertion that the plaintiffs accepted their dismissal is belied by what occurred at the time of the purported dismissal and thereafter. Wayne was flanked by security guards when he "told (Laister) he was summarily dismissed." Rather than having accepted dismissal, the plaintiffs appear to have been cowed into submission by the perceived futility of any attempt to resist the order to remove themselves. This must have been born of apprehension. Even in terms of Wayne's account, the plaintiffs were given neither an option nor an opportunity to be heard. The first encounter was with Laister. The encounter with Alessandro was just as abrupt. What also belies the assertion that the plaintiffs accepted their dismissal is the fact that on the very day of the purported dismissal, Mr V O'Connell, acting on instructions of the plaintiffs, wrote to Fluxmans to protest against the purported dismissals, an action he described as "completely unlawful and (which) may even constitute a criminal offence". The letter called upon Fluxmans to prevail upon their client to immediately restore the plaintiffs' possession of the property of the defendant. It is improbable that a dismissal process in a climate conducive to an acceptance of dismissal and consensual departure would have called for the protective presence of the Police which attended at the plaintiffs' instance.

[11] The plaintiffs were not legally divested of control as directors; nor did they divest themselves of such control. The fact that they took retrenchment cannot be held to be acquiescence to their dismissal and removal. As explained by the plaintiffs, while they were barred from physical control over the assets and business of the defendant, they would have remained a liability by reason of the continued escalation of claims for remuneration as employees and directors who brought no value to the company. Far from a situation of a conflict of interest, it was to the benefit of the defendant that they terminated their employment and directorship. They acted *bona fide* in the interest of the company. It would have been foolhardy to say, as was suggested by Mr Subel for the defendant, "I am staying, I am not going to leave, it is unlawful …" in a situation clearly pregnant with a potential for disturbance of the peace.

[12] Much has been made of the fact that Michael, Wayne and Chait took *de facto* control of the business. This does not assist the defendant as the Court is only concerned with the legal position in this matter in terms whereof the plaintiffs, notwithstanding the purported dismissal and removal, legally remained employees and directors of the defendant.

[13] A circular on defendant's letterhead dated 19 February 2010 [4] on which the names of the plaintiffs as directors had been deleted, untruthfully proclaims:

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4 Annexure "JL3"

"Our director is now Wayne Diner"

For their part, Fluxmans, on 6 April 2010, proclaimed, also untruthfully, Michael Diner ("Michael") and Wayne as "the two new directors at Vulindlela (the defendant) and Vulindlela Maritime (Pty) Limited".[5] Fluxmans backtracked later when they, on 26 April 2010, requested Posemann, for the plaintiffs, to confirm the appointments of Wayne, Michael and Anthony Chait ("Chait") as directors of the defendant and Maritime.[6] On the same date Norman Klein, the joint liquidator of Metaltrade requested Mr Posemann to arrange for the appointment of Wayne, Michael and Chait as directors of the defendant and that the plaintiffs resign as directors of Maritime for Wayne, Michael and Chait to be appointed as its directors.[7] Wayne, by letter on Metvul letterhead dated 18 May 2010 [8] lodged notice of a proposed resolution to remove the plaintiffs as directors of Maritime and to appoint, in their stead, himself, Michael and Chait and, for that purpose, for a special general meeting to be convened.

[14] A curious feature in the defence case is that while it asserts that the plaintiffs had been summarily dismissed as employees and removed as directors of the defendant and thus had no authority to conclude agreements with regard to retrenchment, it, in the same breath charges that the plaintiffs entered into agreements with the defendant in circumstances where there was a conflict of interest and in breach of fiduciary duties owed by them to the defendant at the time. It is a charge which acknowledges the continued directorship of the plaintiffs.

[15] There is no material dispute in regard to the facts of this matter. The defence on the premise that the plaintiffs lacked authority to conclude agreements on their retrenchments on the proposition that they had, at the time, already been dismissed as employees and removed as directors of the defendant must fail. In all the circumstances, there is no support for the assertion that the plaintiffs had been (effectively) summarily dismissed as employees and removed as directors of the defendant.

[16] The plaintiffs as directors discussed with the shareholder the intention of the directors of the defendant to terminate their employment on operational grounds and in accordance with the provisions of the Labour Relations Act and to furnish acknowledgements of debt in respect of the amounts owing and, on 9 March 2010, resolved to ratify and approve such course of action.[9]

5 Annexure "WD 37"
6 Annexure "WD 43"
7 Annexure "WD 45"
8 Annexure "JL4"
9 Annexure "WD 32(a)"

[17] On the same date, having discussed the situation confronting the defendant company, the plaintiffs, as the only directors of the defendant resolved to terminate their employment on operational grounds and in accordance with the provisions of the Labour Relations Act and to conclude acknowledgements of debt in respect of the amounts owing.[10]

[18] On the same day, the defendant issued notices of retrenchment to each plaintiff, one to Laister signed by Allessandro and the other to Allessandro signed by Laister [11] to which were annexed calculations of the retrenchment packages. An acknowledgement of debt in favour of Laister in respect of which he now sues, signed by Alessandro was issued on the same day, ie 9 March 2010. Another, in favour of Alessandro in respect of which he also now sues, signed by Laister was issued on no recorded date in March 2010.[12] Both were signed by them in their capacities as directors. This was followed by letters of resignation by the plaintiffs as directors of the defendant, their employment having been terminated on retrenchment.

[19] It is now necessary to view the occurrences of 9 March in the light of the defence that when the plaintiffs entered into agreements with the defendant they did so in circumstances where there was a conflict of interest and in breach of fiduciary duties owed by them to the defendant at the time.

[20] It is contended that the plaintiffs concluded agreements with themselves on the one hand and on the other, the defendant, as represented by themselves, and that a conflict of interest prevailed even at the level of Maritime. The correct position is that the agreements were concluded by the directors of Maritime with Maritime, the shareholder of the defendant. The source of authority for the execution of acknowledgements of debt was the shareholder of the defendant and not the defendant. The plaintiffs discussed as representatives of the shareholder of the defendant and not as directors of the defendant, the intention of the directors of the defendant to terminate their employment and to furnish acknowledgements of debt in respect of the amounts owing. Incidentally Wayne also contemplated "payments in terms of salary and accrued dues being effected to (plaintiffs)" in the purported dismissal and removal communication. [13]

[22] There was, in my view, no legal bar to the directors in Maritime dealing with any issue with regard to the management of its subsidiary within its (Maritime's) province of duties and responsibilities. There is no identifiable

10 Annexure "WD 32(b)"
11 Annexure "WD 32 (c)" and "WD 32 (d)"
12 Annexure "WD 32(e)" and "WD 32 (f)"
13 Annexure "WD26" para 7

conflict of interest with Maritime. Even if I be wrong in this conclusion, the position is that, without steps taken to avoid the resolution, its binding force prevails.

[23] The act decried by the defence, akin though it may be to concluding agreements with oneself, is no unknown legal phenomenon. Commenting on *Gutman NO v Standard General Insurance Co Ltd* [14] *Harms JA in Vaal Reefs exploration and Mining Co Ltd v Burger* [15] stated:

> "Die bevinding in Gutman dat vanweë die feit dat die eienaar ook namens sy maatskappy opgetree het die kontrak nietig is, is onrealisties. Die behoeftes van die regsverkeer is nie in ag geneem nie."

The Court raised questions which would arise in practical situations:

> "Hoe leen 'n alleen-aandeelhouer en enkeldirekteur geld aan sy maatskappy of omgekeerd? Hoe word bates tussen sulke partye vervreem? Hoe geskied transaksies tussen verwante maatskappye? Dis immers 'n alledaagse verskynsel dat 'n persoon in twee hoedanighede optree"

In regard to acts in representative capacity he stated:

> "Die wil van die verteenwoordiger is, van regsweë, die wil van die sg prinsipaal en nie sy eie nie."

[24] The plaintiffs have overcome the hurdle of authority of the signatories to execute the acknowledgements of debt. The defendant has failed to demonstrate on a balance of probabilities that it will succeed in the principal case.

[25] Accordingly, judgment is granted as follows:

25.1In case no. 4112/2010:

a) Provisional sentence in the sum of R229,990.39 plus interest thereon at the rate of 15.5 % per annum from 19 March 2010 to date of payment;

b) the costs of suit including the costs of senior counsel.

25.2 In case no. 4114/2010:

a) Provisional sentence in the sum of R202,163.10 plus interest thereon at the rate of 15.5 % per annum from 19 March 2010 to date of payment;

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14 1981 (4) SA 114 (C)

15 1999 (4) SA 1161 (SCA) para 8

b) the costs of suit including the costs of senior counsel.

APPEARANCES

For Plaintiffs: Adv A M Stewart SC

Instructed by Cox Yeats,
c/o Messenger King, Durban.

For Defendant:	Adv A Subel SC Instructed by Fluxmans Incorporated, c/o Legator McKenna Incorporated, Durban.