IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: CA8/2017

PAUL BAISE **Appellant**

and

MIANZO ASSET MANAGEMENT (PTY) LTD **Respondent**

Held: **11 September 2018**

Delivered: **13 June 2019**

Coram: Phatshoane ADJP, Sutherland JA and Murphy AJA

JUDGMENT

Sutherland JA:

Introduction

[1] On 11 October 2013, the appellant (the applicant *a quo*) and the respondent company, concluded an agreement in terms whereof the applicant's employment with the respondent ceased. The applicant was to be paid certain money in terms of that agreement.

[2] Several months later, the appellant brought an application seeking an order that the agreement be set aside as void. Ancillary relief was sought to "appoint" the appellant as a director of respondent with effect from the date of termination of employment and "appoint" the appellant as a trustee of the respondent's

Employees Trust. (The latter appointment is no longer sought.) The Labour Court dismissed the application. The appeal lies against that dismissal. The Labour Court did not award costs to the respondent who cross-appeals for such a costs order in its favour.

[3] The origin of the controversy is the allegation that the agreement was induced by a fraudulent misrepresentation by Tyandela, the managing director of the respondent. The alleged misrepresentation is that the appellant's post was redundant because the Equity Platform of the operation, which he managed, was to be shut down. The only witnesses, the appellant and Tyandela, give wholly contradictory versions about the existence of the alleged misrepresentation. As to the rest of the circumstances giving rise to the breakdown of their relationship, a common cause fact, there are no material disputes relevant for the purposes of the judgment.

[4] The matter came before the Labour Court on application and owing to the dispute of fact about whether the misrepresentation had been made, the matter was referred to trial. The affidavits were to stand as pleadings.

[5] This case is a good illustration of the questionable wisdom of letting affidavits stand as pleadings. A veritable muddle needs to be unravelled.

<u>What is the appellant's cause of action?</u>

[6] What is the nature of the claim, as pleaded? The Founding Affidavit states that the application is brought in terms of the provisions of Section 158(1)(a)(iv) of the Labour Relations Act 66 of 1995 (LRA). That section of the LRA empowers the Labour Court to make a declaratory order within its equitable jurisdiction in terms of the LRA. No other jurisdictional competence of the Labour Court is invoked in this application. Accordingly, no more than that declarator could have been ordered. The ancillary relief which was prayed for is incompetent and could not have been granted.

[7] Moreover, having invoked the LRA as the source of the claim to declare the agreement void, what right in terms of the LRA can be invoked to sustain that claim? The Founding Affidavit does not reveal an answer. If the appellant meant to complain that the retrenchment was unfair, relying on the provisions of section 189 not having been observed, it would first have had to refer a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. However, that cause of action is not invoked. The case is not about an unfair retrenchment.

[8] Did the appellant mean to lodge a claim in contract in respect of which the Labour Court in terms of section 77(3) of the Basic Conditions of Employment 75 of 1997 (BCEA) could exercise civil jurisdiction? No express invocation of that power is made either.

[9] The Labour Court, without expressly saying so, treated the case as a contractual dispute. By so doing, in my view, it was generous, for otherwise the application should have been dismissed out of hand for incoherence. The incoherence is patent. Several questions arise. In the absence of expressly alleging that the Labour Court was to exercise civil jurisdiction pursuant to section 77(3) could the Labour Court properly do so? Is it appropriate for the Labour Court to peel away the husk of the allegations and deal with the *real dispute,* as is required of commissioners of the CCMA? Can such an approach be competent where unlike in the CCMA the parties before the Labour Court are required to plead? More especially, if section 158(1) (a)(iv) is expressly alleged as the competence of the Labour Court which is invoked, is it appropriate or even competent to treat this matter as a civil claim? In my view, it seems doubtful. After all, civil claims are entertained because of the concurrent jurisdiction of the Labour Court with the High Court and that competence is not susceptible to being blended with remedies sought under the LRA. Claims under both regimes can indeed be heard in a single hearing, but the claims themselves remain distinct, along with the need to discern distinct causes of action.

[10] On appeal, if we are to adopt the Labour Court's stance, ie, treat the matter as if it is a civil claim in contract, it nevertheless remains necessary to discern what is the cause of action in contract that is alleged.

[11] The matter was articulated as the contracting parties not achieving true consensus because the respondent, deliberately, misrepresented a material fact; ie the redundancy of the appellant's post, which, in turn, induced the appellant to conclude an agreement which, but for the misrepresentation, the appellant would not have concluded.

[12] Ordinarily, when pleading that sort of case in a contractual dispute, such a contention would be the foundation for a cancellation of the agreement and a tender of the return of any performance received by the aggrieved party in order to re-establish the *status quo ante.* This would be typically an action for *restitutio in integrum*.[1] This is not how the appellant chose to articulate his claim. He seeks a declarator that the agreement is void. He does not allege that he has elected to *resile* for good cause. He does not unequivocally tender a return of the respondent's performance. That performance was the payment of money. The appellant does not allege that it is impossible to repay the sums, though he alludes to a set-off of future receipts of salary upon reinstatement of his employment, a tender that must, therefore, be contingent on an order of specific performance of the initial employment contract, a remedy which is itself discretionary.[2] Indeed, none of the ordinary languages of a contractual cause of action is evident. The Labour Court noted the omission to properly tender a return of performance, and in consequence, held that the appellant's case fell on that ground alone. Because of the view we have taken of the matter, it is unnecessary to make definitive findings on this aspect of the case. The case is decided on the misrepresentation question, the true dispute between the parties.

[1] See: L A Lambiris, Orders of Specific Performance and *Restitutio in Integrum* in South African Law (1989) Butterworths, Durban., p182. The remedy is an exercise of equitable jurisdiction. It has three elements: A *justa causa*, sustaining of material damage and may require restoration of benefits received.
[2] *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A).

<u>Was there a misrepresentation as alleged?</u>

[13] If the Court must decide the misrepresentation issue *per se*, the question must be decided by a credibility finding and that in turn is informed by an assessment of the probabilities. The Labour Court concluded that there was no misrepresentation that the appellant's post was rendered redundant and even had there been such a misrepresentation, that it did not induce the agreement. Why should that finding be held to be wrong?

The Agreement

[14] The proper place to begin an assessment is the agreement itself. The text of that document says variously the following:

> '..whereas the operational requirements of Mianzo have changed, and whereas BAISE, in recognition of the change in operational requirements of Mianzo has agreed to the termination of his services based on the operational requirements of Mianzo….by signature hereto Baise agrees to his termination effective 1 September 2013 based on the operational requirements of Mianzo….'

Later, provision is made for payment of *inter alia*:

> 'severance pay' of R347,000 '….as compensation for loss of office.'

Added to that is this: "Mianzo undertakes to assist Baise in applying for a suitable tax directive to enable Baise to receive the amount … on as tax-free a basis as possible as directed by SARS."

Payments were to be made over 11 months. A restraint of trade was waived.

Lastly, it is provided:

> 'By signature hereto Baise acknowledges that he accepts the severance pay as set out above in full and final settlement of all claims arising out of the termination of his services with Mianzo, whether such claims arise in law or any other sources.'

[15] It is notable that there is an absence in the text of any reference to "redundancy" *per se*, as a rationale. There is not even a mention of "retrenchment", or even to "dismissal". Moreover, by contrast, reference is made copiously to a termination and a settlement as between the parties and to "changed operational requirements" a deliberately vague choice of words.[3] If redundancy was the trigger for the "changed operational requirements" termination, why not say so?

[16] The document, manifestly, is the product of negotiation not consultation. The document contemplates an overture to SARS to treat the termination as deserving of benign tax treatment; in effect, SARS is asked to exercise a discretion to determine if the agreement qualifies the appellant for any tax- free dispensation. That dispensation is premised on a no-fault loss of employment.

The "Pleadings"

[17] What exactly is the misrepresentation relied upon? As alluded to, the founding affidavit constitutes the particulars of claim. The misrepresentation is alleged to have been made on 26 September 2013.[4] The substance was that the appellant's position as sole manager of the Equity Funds platform of the respondent's business was to become redundant.

[18] In amplification, the rationale for that redundancy is alleged to have been communicated to the appellant as being:

> '...the company was not following the strategy of building its equity team as it was too expensive an exercise".

[19] In further amplification, it was communicated to the appellant that Fatima Vadwa, a Funds administrator and an important client, was "pulling" all her mandates from the respondent, being in effect the total equity business of the respondent.

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[3] The term "operational requirements" is defined in the LRA as: "…requirements based on the economic, technological, structural or similar needs of an employer" It must be taken that the parties intended to use the words consistently with the definition.

[4] FA Vol 1/para 8.3 and 8.4

An e-mail from Tyandela to appellant in this regard of 26 September stated, *inter alia*:

> 'Contract work – the offer is R1000, per month, for three months. With Fatima is pulling the active Equity Fund there will not be a need for equity related research. (sic)This will amount to R22K pm." [5]

[20] The case of the respondent in the answering affidavit sets out the acrimony between Tyandela and appellant. At the relevant time, appellant was to face a disciplinary enquiry that contemplated a dismissal. As is apparent from the charges laid on 6 September, among other accusations, it was alleged that Baise's conduct had caused an "irretrievable breakdown" in the working relationship with Tyandela, [p124/para 4.2] and that Baise had insulted Vadwa so as to make her threaten to withdraw all her work thereby eviscerating the equity platform as she was the sole client. [p125/para 4.3]

[21] It is further alleged by the respondent that an agreement of termination was negotiated as an alternative to the disciplinary enquiry which had been postponed three times to facilitate the negotiations. The agreement was allegedly reached on the basis of "operational requirements". The appellant's role was primarily a researcher and partly an Equity platform manager. That research function was outsourced. [record 3/195] Accordingly it is alleged: "….as such there would be no position for [appellant] within Mianzo." Nothing is alleged about a redundancy of an Equity Platform manager.

[22] Furthermore, it is alleged by Tyandela, on behalf of the respondent:

> 'I also advised [appellant] that I would rather run the risk of losing Fatima's [Vadwa] mandates than keep him on board."

Moreover:

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[5] In evidence it was suggested by Tyandela that the word "is" should have been and was meant to be "if". On either text the sentence is ungrammatical. The omission of the word would leave a coherent sentence but that is the case of neither party. A more likely explanation is that "with 'should read "if" rather than trying to fiddle with "is'. That construction would be consistent with the evidence of Tyandela as to the threat of withdrawal owing to the appellant's alleged rudeness to Vadwa.

> '…[appellant] is clearly incompatible with Mianzo and me. I am advised that both incompatibility and the outsourcing can form the basis of a valid retrenchment and thus an agreement based thereon. Ultimately this is why the operational requirements vehicle was used.' (emphasis supplied)

[23] In addition to these affidavits, a pre-trial conference minute captured the issues to be placed before the Labour Court. The minute is prolix. The critical portions alone are referred to. A common cause fact was an impending possibility of the appellant facing the disciplinary enquiry. Paragraph [2.4] of the Minute states:

> 'One of the issues to be inquired into was whether or not the [appellant] by his conduct was incompatible with the respondent, and had, as a result, caused an irretrievable breakdown in the relationship between the [appellant] and the respondent.' (Emphasis supplied)

[24] In a chapter in the minute dealing with issues (of fact) in dispute, the issues identified, *inter alia*, were:

24.1. '[3.7] Whether a settlement agreement was entered into which was cast as an operational requirements dismissal by the parties by agreement.'

24.2. [3.9] whether the [appellant's] position had become redundant as a result of the respondent's operational requirements.'

24.3. [3.10] whether the settlement agreement was entered into by the [appellant] as a result of a misrepresentation by respondent, namely that his position was redundant and that the company was in financial difficulty.'

24.4. [3.13] whether the relationship between the [appellant] and the respondent had irretrievably broken done.' (Emphasis supplied)

24.5. [3.20] whether [appellant] in turn was incompatible with the respondent.' (Emphasis supplied)

[25] The chapter in the Minute on "legal issues" stated thus:

> '[4.1] ….[was] the [appellant] misled by a misrepresentation into signing the settlement agreement, or whether a settlement agreement was entered into in recognition of the fact that the relationship between [appellant] and respondent had irretrievably broken down. (Emphasis supplied)
>
> [4.2] If the [appellant] was misled by a misrepresentation into signing the settlement agreement whether such agreement is *void ab intio* alternatively, what the consequences of such a finding should be.
>
> [4.3] [if] ….the [appellant] was misled by misrepresentation to enter the settlement agreement (retrenchment) as a result of misrepresentation then the ….court is required to determine the extent of relief due to the [appellant] if any.'[6]

The Context of the dispute and the disparate versions about the alleged misrepresentation

[26] Axiomatically, the written agreement was concluded within a context which informs the meaning and significance of the text. That context is the total breakdown in the working relationship between Tyandela and the appellant. The origin of that breakdown was the accusations of dishonesty made by appellant of the conduct of Tyandela, culminating in appellant reporting the respondent to the Financial Services Board (FSB). Although the FSB exonerated the respondent, the episode was obviously an embarrassment to a young emerging asset management firm, striving to expand its business. It is unsurprising that a spat of that intensity destroyed their working relationship. These events had occurred shortly before the agreement had been reached.

[27] The significance of the roles of the two men must be noted. Tyandela's role in the respondent was as managing director. He was also the de *a facto* majority shareholder, albeit through a complex shareholding structure, involving a Trust. He managed the respondent's platform dealing with Absolute Returns investments. Appellant's role was twofold, research and managing the small Equity platform, consisting of one client. The appellant's shareholder status is

[6] As is obvious, the phraseology of this text does not always achieve clarity. Moreover, it seems plain that the authors blithely thought they could straddle the equitable and civil jurisdiction of the Labour Court. As a set of averments in a civil claim they are woefully inadequate.

obscure, but it is common cause he had a financial stake in the respondent. The two men were *de facto* partners in the business and owing to the fallout, they could not carry on in business together and, despite any other differences in their versions of events, it is plain that the only conversation taking place between them was about the terms of their parting; ie a disciplinary hearing and the risk of further litigation or an agreed exit for the appellant.

[28] In order to determine whose version is to be accepted about a misrepresentation, having regard to the probabilities, the substance of the communications and the exchanges that led up to the agreement need to be examined. Many are captured in e-mails.

[29] Appellant joined respondent in August 2011. Two years later in August 2013, a quarrel arose about the financial statements leading to the report to the FSB. On 3 September 2013, appellant was suspended pending a disciplinary enquiry. He was formally charged on 6 September; the substance of the charges has already been mentioned.[7]

[30] On 11 September, the enquiry was convened and immediately adjourned at appellant's request, allegedly to prepare. Straight away, talks commenced on a negotiated parting.

[31] The record of their exchanges about parting ways commences with the e-mail of 13 September 2013 from appellant to Tyandela [9/899]. The appellant, in the e-mail, alludes to 11 September when the enquiry had been adjourned. It is common cause the two men had met that day. The appellant says in the e-mail:

> 'Have not heard from you concerning our meeting of Wednesday to alternatively have me as an external contractor after me <u>resigning/ being retrenched</u> from Mianzo.' (underlining supplied)

[32] It is a highly significant communication, alluding to the possible outcomes as being "resignation /retrenchment". However, the appellant, understandably tried

[7] Supra, paragraph 20.

as best he could to deny having sent it. The denials are unimpressive. The attempt to distance himself, however, warrants an adverse inference. A Computer expert was called to track down the e-mail on the server which proved it had been sent. That evidence did not, of course, prove who sent it. But in the light of the common cause facts, especially the subsequent letter by respondent's attorney also on 13 September (dealt with hereafter), the probabilities of a forgery are too remote to warrant serious consideration.

[33] This e-mail of 13 September 2013 was also the subject of debate as to whether it proved that the appellant first raised the option of a retrenchment. Tyandela's evidence is that the retrenchment notion originated with the appellant for self-interested and self-evident reasons. Appellant claims the 26 September 2013 misrepresentation triggered it. Who first recorded it in writing is not all that significant. In my view, it is plain that the e-mail proves that, from the very outset of the negotiations, the options of a departure either by way of a resignation or of a retrenchment were in the minds of both appellant and Tyandela. The true significance of the e-mail is the willingness of both persons to discuss the specific possible terms of departure. This e-mail on 13 September, alluding to what was discussed on 11 September, is wholly contradictory to the appellant's thesis that he was gobsmacked on 26 September, two weeks later, by being told that his job had become redundant. This e-mail must be understood in the context of what was alleged in the disciplinary charges of 6 September, which invoked irretrievable breakdown in the employment relationship and also mentioned the threat by Vadwa to withdraw her work from the respondent over the appellant's alleged rudeness. Insofar as the contemporary correspondence offers evidence to tip the scales one way or the other, it is tipped, because of the probabilities, in favour of Tyandela's testimony on this point that retrenchment was raised by the appellant.

[34] Also, on 13 September, respondent's attorney wrote to appellant's attorney. [v3/257]. That letter alluded to the common cause settlement discussions between appellant and Tyandela on 11 September. It records that a proposal had

been put to appellant on 11 September. The terms were that he resigns and gets a three-month consultancy for his research work but observe the restraint of trade agreement. It did not take up the "retrenchment" notion; respondent was then still pushing for a resignation.

[35] Appellant's attorney replied on 18 September. The counter proposal put was that the appellant would resign, be given a 5-year renewable consultancy as fund manager and would abide by the restraint. A face to face meeting was suggested to avoid further back and forth written exchanges. The inference is that the belief existing that they were within reach of a settlement.

[36] Then on 20 September, appellant terminated his attorney's mandate. No explanation was given as to why.

[37] Tyandela and appellant met. On 23 September, appellant in an e-mail confirmed that meeting and asks for financial data of the respondent. He gives a reason for wanting it – to get a valuation of his "shares". He states that:

> '… me resigning before a finalisation of the exit benefits, consulting services and share values is premature and inappropriate.'

[38] On 26 September, Tyandela sends the e-mail already mentioned in relation to the alleged misrepresentation.[8]

[39] Appellant responds on 30 September. [v2/p131] He reiterates that:

> '...a resignation would only be contemplated should agreement be reached on all the issues….'

He also states:

> '…it is presumptuous to be telling Fatima [Vadwa] I am leaving.'

Appellant seeks here to be given better information on the financial aspects of the respondent, which were dire at the time. The general tenor of the e-mail is to

[8] Supra, cited in paragraph 19.

keep the negotiations pot boiling. Notable by its absence is any substantive response by him to the notion of there being no role for him any longer.

[40] The next day, on 1 October, Tyandela diverts this trajectory by stating the: "…without prejudice basis" (sic) is becoming prolonged and he switches pressure back onto appellant by requiring him to appear on 3 October for the enquiry. However, the talks persist, and the enquiry is again adjourned.

[41] On 10 October, respondent's attorney sends a draft agreement to both appellant and Tyandela. Notable is the allusion to the cash flow woes of the respondent, which resulted in a proposal about the payment offered to appellant being staggered over several months.

[42] On 11 October, the second final draft agreement is signed by both parties, including provision for staggered payment. The portion of the text, as cited earlier, remained identical in both drafts. [9]

[43] The parties then went their separate ways. Months later, the appellant learned that one, Lamohr, had been employed to manage the equity platform from about 15 October. This discovery triggered a protest and afforded a basis for the appellant's allegation that he was the victim of a misrepresentation, because his "old job" was filled at once after his departure. In truth however, it was only a minor aspect of his "old job" that had been filled by Lamohr. There is no suggestion that Lamohr also performed a research function. Tyandela version is that the recruitment of Lamohr had been in the pipeline since 2013, and mainly, the delay was occasioned by waiting for Lamohr's restraint with his former employer to expire.

<u>Evaluation</u>

[44] Thus, ultimately, it must be asked if it is credible that there was a surprise "redundancy" assertion that tipped the appellant into signing the agreement? In

[9] Supra, cited in paragraph 14.

my view, the probabilities are against such a conclusion. The overwhelming impression of all the contemporaneous evidence is that the appellant was reconciled to leaving, and all that remained were the terms thereof. No doubt the revelations about the financial predicament of the respondent had an exhilarating effect on his view about how much and how soon his exit could be accompanied by value extracted from the respondent. However, to suggest that he was either wholly or even mainly persuaded to exit because of a suggestion on 26 September that his post was redundant is in my view quite at odds with the probabilities. It was argued that the appellant was an experienced businessman not a precious and timid acolyte who could be bamboozled by a fatuous lie. I agree. Indeed, he had already made up his mind to go: all that mattered was how much money he could extract in an exit deal.

[45] Accordingly, in my view, it is unlikely a misrepresentation was made as alleged and still less likely that an attempt could have been credibly proposed to him. Moreover, the financial rewards in the agreement far outstrip anything that resembles an ordinary retrenchment package.

[46] The Judgment *a quo* dealt with these considerations and in my view came to the correct conclusions. The Court *a quo* weighed the "operational requirements" nature of the termination and concluded that no fraud on the fiscus was intended. I agree that such a finding could not have been made on this body of evidence. The irretrievable breakdown in the working relationship between the two key actors in the business, called on occasion "incompatibility" – perhaps an extravagant and possibly technically incorrect use of that concept as usually invoked in Labour litigation –is a common cause fact, and in any event, is an objectively demonstrable fact.[10] The breakdown was invoked as early as 6 September when the fallout led to the charges being laid for a disciplinary

[10] Precisely how to conceptualise the idea of 'incompatibility' and how it relates to, or is distinct from, "incapacity" and has or has not any bearing on "operational requirements" as defined in the LRA, is a question which remains open for a resolution, but is unnecessary to resolve in this matter. The term seems to have used in this case interchangeably with "irretrievable breakdown". This is a good illustration why too much effort to label occurrences is unwise; a proper description of the happening or the condition is often quite enough.

enquiry. It is perfectly legitimate to construe such occurrence as precipitating an operational need to resolve it by the departure of one or other of the keymen. The fiscus was not misled. In any event, the fiscus is not bound by what parties say, and can exercise its own judgment about whether to accept, reject or interrogate a request for a directive. The sweetening of an exit by the *spes* of benign tax treatment is not unconscionable and ought not to draw adverse criticism if there exists a real substratum to justify it, as exists in this case.

[47] In the result, the evidence assessed in accordance with the probabilities does not support the proposition that a misrepresentation as alleged was made, still less that the appellant was induced by such a belief to enter the agreement. The agreement was the least painful way to exit from the cash-strapped respondent and the impossibility of a continuing working relationship with Tyandela.

<u>The Costs cross-appeal</u>

[48] The Labour Court appears to have not seriously considered a costs order and taken it for granted that no order was appropriate, giving no reasons. As the matter is to be treated as a civil claim the regime for costs is that, absent special considerations, costs ought to follow the result.

<u>Conclusions</u>

[49] Accordingly, the appeal should be dismissed. The cross-appeal must succeed. Appropriate orders shall follow, including that costs should follow the result in both the court *a quo* and in this Court.

<u>The Order</u>

(1) The appeal is dismissed.

(2) The cross-appeal is upheld

(3) The order of the Court *a quo* is set aside in part and the whole order is substituted by:

"The application is dismissed with costs."

(4) The Appellant shall bear the respondent's costs of appeal.

Sutherland JA (with whom Phatshoane ADJP and Murphy AJA concur)

APPEARANCES:

FOR THE APPELLANT: Adv G Leslie SC,

Instructed by Bernard Vukic Potash & Getz.

FOR THE RESPONDENT: Adv S Harvey,

Instructed by Herold Gie