



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

CASE NO JR 69/12

In the matter between:

KANATI MACDONALD POROGO

PLAINTIFF

and

PITSO THOAHLANE

1ST DEFENDANT

SIKEME LABOUR BROKERS CC

2ND DEFENDANT

KABI THOAHLANE TRUST

3RD DEFENDANT

Trial : 11-12 February 2014

Judgment delivered: 14 February 2014

JUDGMENT

VAN NIEKERK J

- [1] There is a well-known adage to the effect that family and business do not mix. This case demonstrates the truth of that proposition. It is a dispute between two brothers-in-law. The plaintiff claims a total of some R3.2 million from the defendants consequent on his employment by the second defendant in November 2007 and the termination of that employment on 28 April 2010. The second defendant is a close corporation of which the first defendant was a sole member; the third defendant is what has been described as the first defendant's family trust.
- [2] The plaintiff's claim was referred to this court for determination in terms of s 77 of the Basic Conditions of Employment Act, 1977. In terms of s 77 (3), this court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment established by the Act constitutes a term of that contract. This provision assumes some significance in these proceedings, not least because the defendants contend that the plaintiff was never employed by the second defendant and secondly, because the scope of the claims (and especially a counterclaim filed by the defendants) appear to raise matters that do not directly concern any employment contract to which the plaintiff might have been party.
- [3] It is also necessary to record, by way of introduction, that these proceedings have been fraught with animosity and that the parties' inability or unwillingness to cooperate in the conduct of this litigation had the consequence that no pre-trial conference was held, nor was any pre-trial conference minute filed. At the outset, the court attempted to identify the issues in dispute. These extend to the following:

- a. Claim for travelling allowance money in the sum of R1 238 290,
- b. A sum of R 468 948 being deductions from remuneration
- c. R 25 851, being cell phone expenses
- d. R 55 476 being an award of compensation issued by the CCMA.
- e. R 62 777 being “annual leave payment”.
- f. R45 800 being payment in lieu of notice.
- g. R 45 800 being “arrear payment”.
- h. R 64 590 being what the plaintiff contends is owing to him on the basis of a miscalculation of his rate of remuneration.
- i. R1 238 290 being remuneration to which the plaintiff contends he is entitled.

[4] Both the plaintiff and the second defendant gave evidence. The material facts that are not in dispute are that the plaintiff was employed by the second defendant in November 2007. The terms of his appointment described him as a clerk of works and in this capacity, it is not disputed that the plaintiff became a member of what has been referred to as the Gautrain provincial support team.

[5] The terms of the agreement that the second defendant contends formed the basis of the plaintiff's engagement are described as a “subcontract agreement” the terms of the agreement do not contemplate employment; on the contrary, they contemplate the engagement of a subcontractor to perform a specified scope of work. It is not disputed that whatever the terms of the plaintiff's engagement, he was to be paid a rate of R100 an hour, an amount that was in practice converted into a monthly salary by assuming an eight-hour workday. At the time of the termination of the contract, the plaintiff was earning a gross salary of R 17 692 per month.

- [6] The second defendant testified (and this was not disputed) that he engaged the services of the plaintiff as an act of magnanimity. The plaintiff had been unemployed for some years at the time and was unable to secure employment. He was engaged without having the necessary experience and qualifications. After the plaintiff's engagement, relations between the plaintiff and the second defendant became strained, especially in relation to issues of money. Details in this regard will be discussed below, in the context of an evaluation of each of the plaintiff's claims.
- [7] The first defendant testified that by December 2009, he became aware that the project on which the plaintiff was engaged was nearing completion, and that he advised the plaintiff of this fact. In April 2010, he says that the plaintiff's contract was terminated for that reason. The plaintiff contends that he was summarily dismissed after a dispute between him and the first defendant over the issue of his remuneration (and in particular, the quantum of a travelling allowance) remained unresolved.
- [8] First, the status of the plaintiff's engagement needs to be determined. Although the terms of the contract that the first defendant says he prepared and forwarded to the plaintiff (it is common cause that the contract was never signed) contemplate an agreement between a contract and subcontractor, this court has long held that the label the parties attach to an agreement is not definitive of its status. In an employment dispute, what matters is the nature of the relationship between the parties. For the purposes of the BCEA at least, s 83 A creates a presumption of employment in circumstances where any one of more of seven factors are established. These include issues of control and direction of work, whether the person is part of an organization, is economically dependent on the other and works or render services only to one person. The court must necessarily consider these and other similar factors. In the present instance, it is not disputed that the plaintiff rendered services only to the second defendant, that he did so at a fixed and agreed rate, that he was paid what amounted to a monthly salary, that he was part of the second defendant's organisation, that his

activities were subject to the control of the second defendant (and the first defendant as its sole managing member), that he was economically dependent on the second defendant and that he devoted his full-time and attention to the second defendant's business. In these circumstances, I have no hesitation in concluding that the real nature of the relationship between the plaintiff and the second defendant was one of employment. That being so, the plaintiff is entitled, as he does, to seek to enforce the terms of his contract read, where necessary, with s 4 of the BCEA which provides, as I have indicated, that a basic condition of employment established by the Act constitutes a term of every contract of employment.

- [9] I turn now to each of the plaintiff's claims. In regard to the claim for a travelling allowance, the plaintiff testified that he calculated the figure of R1 238 290 on the basis of the allowance payable to other members of the Gautrain provincial support team. The plaintiff conceded in evidence that there was no agreement between him and the second defendant in terms of which he would be paid a travelling allowance other than the agreement initially that he would be paid R 800 per month, an amount later increased to R 1000. The first defendant explained in evidence that when the plaintiff commenced employment, he did not have his own transport. Transport was essential for the execution of the plaintiff's duties. In these circumstances, the plaintiff was given the use of a car owned by the third defendant and was paid a travelling allowance. Other employees who used their own vehicles for company business were similarly paid an allowance.
- [10] It is trite that a party seeking to enforce the terms of a contract of employment must establish the existence of the term on which he or she relies. Further, a contractual claim by definition contemplates the enforcement of an existing right. It does not contemplate the enforcement of rights enjoyed by other employees, or terms that the employee concerned might legitimately consider that him or herself entitled.
- [11] On his own version, the plaintiff has failed to establish any existing right to payment of a travelling allowance on the terms claimed. His claim is no more

than a reflection of what he considers to be an entitlement, based on what employees employed by another employer earned. In these circumstances, the plaintiff's claim to payment of a travelling allowance stands to be rejected.

[12] Turning next to the claim for monies deducted, the basis of the plaintiff's claim in this regard would appear to be variations in his net remuneration. The first defendant, in his evidence, explained that during the course of the plaintiff's engagement, he had regularly requested advances against his salary. These are captured in a spreadsheet compiled by the first defendant. The plaintiff did not dispute that he had requested advances on his monthly salary, or that these had been paid. The recovery of these advances necessarily resulted in variations in the plaintiff's net remuneration from month to month and I am satisfied, having heard the explanation proffered by the first defendant and having scrutinised the documentation to which he referred during the course of his evidence, that there is no basis for the plaintiff's claim as it is articulated in paragraph 71 of the statement of claim.

[13] The plaintiff's claim in relation to cellphone expenses is one that has a similar basis to his claim for a travelling allowance. In essence, the plaintiff testified that other employees on the Gautrain provincial support team were in receipt of expenses relating to cellphone calls. The first defendant testified that the nature of the plaintiff's duties did not require him to use a cell phone for business purposes. This was not disputed during cross-examination. More fundamentally however, in this instance, the plaintiff again lays claim to terms and conditions of employment to which he feels entitled on the basis of the experience of others. He was unable during the course of his evidence to establish any existing term and condition of employment in terms of which he was entitled to be paid expenses relating to a cell phone or the use of the cellphone. On the contrary, the plaintiff conceded that there was no such term. In these circumstances, the plaintiff's claim in regard to cellphone expenses stands to be rejected.

[14] The amount claimed by the plaintiff in respect of a CCMA award that he contends was issued in his favour must also be rejected. While the plaintiff might be in

receipt of such an award, the first defendant's uncontested evidence was that the award is the subject of an application for review. In any event, a claim of this nature is not a matter that concerns a term and condition of any contract of employment. The Labour Relations Act establishes a mechanism for the enforcement of arbitration awards, either by way of certification in terms of s 143 or by way of an application to this court in terms of section 158 (1) (c). The claim for payment of R 50 5476 accordingly stands to be rejected

- [15] Turning next to paragraph 74 of the plaintiff's statement of claim (and first to the claim for 'annual leave payment') section 20 of the BCEA provides that an employer must grant an employee at least 21 consecutive days annual leave on full remuneration in respect of each annual leave cycle. In his evidence, the plaintiff was unable to formulate a claim to the payment of leave pay with any precision. He conceded that in the construction industry, it was customary for there to be an annual shutdown over the December holiday period. He also conceded that he had taken leave of absence from work during this period to return to his family in Cape Town, and that he had been paid in full for that leave. In the absence of any further particularity in relation to any refusal by the second defendant to grant leave in terms of the Act or to remunerate the plaintiff for any period of leave, in my view, the plaintiff has failed to establish the basis for a breach of any term that might be read into his contract regarding annual leave and payment for annual leave. In these circumstances, the claim stands to fail.
- [16] Turning next to notice payment, the BCEA requires an employer to give notice of termination of employment, or to pay remuneration in lieu of a notice period. Since the plaintiff had been employed for more than four weeks at the time that his employment was terminated, he was entitled to be paid not less than four weeks remuneration in lieu of notice. The first defendant conceded that the plaintiff's contract had been terminated summarily, and he proffered no basis on which the plaintiff might forfeit his right to notice. To the extent that the first defendant suggested in his evidence that the plaintiff had been engaged in terms of a fixed term contract, this does not appear from the documentation introduced

into evidence. Although it may well be that the plaintiff's employment was ultimately dependent on the continuation of the Gautrain project, the contract was not entered into for a fixed term, nor do the terms of the agreement provide that the plaintiff's employment terminate automatically on the happening of a specified event. In these circumstances, in my view, it was incumbent on the second defendant to give the plaintiff notice of termination of his contract, or to pay him in lieu of notice. Given the plaintiff's rate of remuneration at the time that his contract was terminated, he is entitled to be paid the sum of R 17 692.00.

[17] The plaintiff's claim for the arrear payments is one based on the second defendant's failure to pay him for the month of April. As I have indicated above, it is common cause that the plaintiff's contract was terminated summarily on 28 April 2010. In his evidence, the first defendant explained that the plaintiff was indebted to the second defendant in respect of loans advanced when the plaintiff's mortgage bond account was settled and for the purchase of a vehicle. The subject of the loans was a matter of dispute, but it is not disputed that the plaintiff was advanced a loan of R 50 000 and that he consented to the recovery of that loan from his salary. Section 34 of the BCEA provides that a deduction may not be made except with the consent of an employee, and then only in respect of a date specified in the agreement. In the absence of any written agreement that entitled the second defendant to deduct what it contended was owing to it by the plaintiff was a breach of this provision, and thereby the plaintiff's contract of employment. In any event, in terms of the Act, any deduction may not exceed one quarter of an employee's remuneration in money. By failing to pay the plaintiff for the month of April (and in effect by deducting the whole of the net salary owing to him) the second defendant was in breach of a contractual term to be read into the plaintiff's employment contract by virtue of the provisions of section 4 of the Act. The plaintiff is accordingly entitled to payment in the sum of R17 692.00.

[18] The final element of the plaintiff's claim in terms of paragraph 74 of his statement of claim relates to the calculation of his salary. The provision on which the

plaintiff appears to rely is s 35, which establishes a mechanism for the calculation of wages by time. The section confers no substantive rights. The undisputed evidence before the court, as I have recorded above, is that while the plaintiff's notional rate was R100 per hour in terms of the so-called sub-contractor agreement, he was not called upon to account for his time and was effectively paid a monthly salary. In these circumstances, s 35 is of no assistance to the plaintiff.

- [19] Finally, the plaintiff claims that in terms of an agreement between the second defendant and the party to which it was contracted, the second defendant was obliged to pay him double the rate that was paid. There is no evidence produced to establish this claim, which is fanciful to say the least. Even if there were terms in any principal contract that related to the payment of employees or sub-contractors, the plaintiff may enforce only the terms of any existing contract of employment. The plaintiff was unable to point to any term of any contract in terms of which he was entitled to be paid double the rate he received. This part of his claim therefore stands to be dismissed.
- [20] In relation to the counterclaim brought by the defendants, the claim is in effect one brought by the third defendant and which mirrors the claim instituted in the Randburg Magistrate's Court. As I have indicated above, this court's jurisdiction under s 77(3) is limited to matters concerning the terms of employment contracts. The subject of the counterclaim is more properly one that relates to damages that the third defendant (which is and has never been the plaintiff's employer) suffered on account of unlawful acts that it contends were committed by the plaintiff. This court has no jurisdiction to entertain what amounts to a delictual claim instituted by the owner of property against a party that is alleged to have damaged that property. For that reason, the defendants' counterclaim stands to be dismissed.
- [21] In the result, the plaintiff is entitled to judgment in the amount of R 35 384.

- [22] In so far as costs are concerned, I intend to make no order as to costs. The plaintiff claimed payment of R 3 273 184, and has been awarded a fraction of that amount. This plaintiff's claim would have been better dealt with by the Department of Labour. In the main, his claims are nothing less than speculative and fanciful, and his decision to initiate this litigation was misguided. I also take into account the parties' attitude in the conduct of this litigation and the combative engagement that characterised every interlocutory step. This is not consistent with practice in this court, which requires parties, as far as possible, to co-operate in the conduct of litigation and to fulfill the statutory imperative of expeditious dispute resolution. In these circumstances, I intend to make no order as to costs.
- [23] Finally, there remains the question of the liability of the second defendant. The second defendant was deregistered on 31 August 2010. It no longer trades, but it does not follow from that fact or its deregistration that the court may not enter judgment against it. The application for deregistration was made in May 2010, when the first defendant says the Gautrain project was winding down, and in circumstances where increased pressure was being placed on labour brokers, the business of the second defendant. The plaintiff contends that the second defendant was deregistered with the sole purpose of frustrating his claim. He also contends that the business of the second defendant was carried on recklessly and with intent to defraud, and that in these circumstances, the first defendant should be held personally liable for the liabilities of the second defendant.
- [24] It is incumbent on the plaintiff to adduce sufficient evidence of grossly negligent or fraudulent carrying on of a business of the second defendant, alternatively, gross abuse of the separate corporate personality in terms of s 64(1) and s 65 of the Close Corporations Act, the provision on which the plaintiff relies. I did not understand the plaintiff to seek to hold the first defendant liable on any other basis.

[25] The applicable test was recently summarised by Steenkamp J in *Zeman v Quickelberge & another* (C 45/2010). The court stated (footnotes omitted):

“[18] In ***Ebrahim and another v Airport Cold Storage (Pty) Ltd*** the Supreme Court of Appeal held that:

"Acting recklessly consists in an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences. In applying the recklessness test to the running of a close corporation, the court should have regard to amongst other things the corporation's scope of operations, the members' roles, functions and powers, the amount of the debts, the extent of the financial difficulties and the prospects of recovery, plus the particular circumstance of the claim and the extent to which the member has departed from the standards of the reasonable man in regard thereto."

[19] The court held further that the transfer to the CC of the plaintiff's debt from another CC without any *quid pro quo* showed reckless disregard for the CC's solvency, for its ability to repay the debts it incurred and for its capacity as a legal entity to accumulate and preserve assets of its own.

[20] In ***L & P Plant Hire BK en Andere v Bosch en Andere*** Supreme Court of Appeal elucidated the use of the terms “reckless” on the one hand and “gross negligence” on the other hand. Essentially the court held that reckless conduct in Section 424 of the Companies Act (the equivalent Section to Section 64 of the Close Corporations Act) has been interpreted to mean gross negligence. Therefore when Section 424 of the Companies Act is said to include conduct which evinces the lack of genuine concern for the prosperity of the Company, such views can also be accepted as correct as regards to grossly negligent conduct in Section 64 of the Close Corporations Act.

[21] In ***Philatex (Pty) Ltd and Others v Snyman and Others; Praitex (Pty) Ltd and Others v Snyman and others***, after examining authorities, the court held that the ordinary meaning of “recklessly” includes gross negligence, with or without consciousness of risk taking...

[23] In relation to the provisions of s 424 of the Companies Act our courts have held that proof of a causal link between the relevant conduct and the debts or liabilities in respect of which a declaration of personal liability is sought is not required.

[24] However, in ***Saincic v Industro-Clean (Pty) Ltd 2009 (1) SA 538 (SCA)***, at para 20, Farlam JA stated that the absence of such a link is a factor to be taken into account by the court in the exercise of its discretion whether to grant the relevant declaration. In the same case, Harms JA, making reference to the *dicta* in *L&P Plant Hire BK v Bosch (supra)* at paras 39 and 40 in relation to the provisions of s 64 of the Close Corporations Act (“the Act”), drew a distinction between creditors and members of the corporation.

[25] The learned Judge was of the view that that when it came to creditor’s claims the section should be interpreted restrictively so as to apply only where the result of the relevant conduct is that it has a negative effect on the creditor’s claim against the corporation.’

[26] The plaintiff has applied a literal interpretation to the provisions of s 64. The high point of his submission is that the second defendant deducted PAYE and UIF contributions from his salary and failed to pay these over to the relevant authorities, and that the second defendant failed to appoint an accounting officer as required by the Act. These may be acts that are indicative of a failure of governance, but they are not *per se* acts of recklessness in the sense described above, nor is there any evidence of the required causal link. The first defendant did not dispute that deductions in respect of PAYE had been made from the plaintiff’s salary each month, and that this money was never paid over to SARS. He ascribed this to ‘administrative challenges’ faced by the business. This is no excuse for the second defendant’s failure to pay monies deducted from the salaries of its staff to SARS, but as I have indicated, it does not by definition and in the absence of any further evidence, amount to the reckless and fraudulent carrying-on of a business for the purposes of s 64 or any basis to exercise the discretion conferred by s 65. In my view, the plaintiff has failed to adduce sufficient evidence to satisfy the threshold referred to above, and in these

circumstances, there is no basis on which to hold the first defendant personally liable for the liabilities of the second defendant. I do however intend to direct that the Registrar forward a copy of this judgment to SARS, for any further investigation that might be appropriate.

I make the following order:

1. Judgment is granted against the second defendant in the sum of R 35 384, together with interest at the prescribed rate from date of the statement of claim to date of payment.
2. The Registrar is directed to forward a copy of this judgment to the South African Revenue Services.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the plaintiff: In person

For the defendants: First defendant, in person