REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A3010/17

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

9.10.2020
DATE

SIGNATURE

In the matter between:

NICOLA BEAUTEMENT Appellant

and

PROPNU CC T/A PROPERTEAM RENTAL First Respondent

BERYK NOEL BAYLY Second Respondent

J U D G M E N T

Coram: SENYATSI, J *et*, NOKO, A.J

Noko AJ.

Introduction

[1] This appeal lies against the judgment and order of Magistrate H Banks of the District Magistrates' Court for the District of Johannesburg North, Randburg. The magistrate dismissed an application brought by the appellant in terms of section 64(1) of the Close Corporation Act 69 of 1984 (the Act) to declare the second respondent jointly and severally liable together with the first respondent for the debts of the first respondent and further declaring the second respondent criminally liable in terms of section 64(2) of the Act.

Before court *a quo*

[2] The evidence of the appellant before the court a quo, in summary, was that appellant was in the employ of second respondent since 2006 as a rental agent. The second respondent was, at the time, trading as The Properteam. During July 2012 the second respondent invited the appellant to enter into a written contract of employment as required by South African Revenue Service ("SARS"). Unbeknown to the appellant the document signed was in fact an independent contract. The said contract though signed in 2012 was backdated to 2009. The appellant was dismissed a month later in August 2012. The appellant was aggrieved by the dismissal and referred a dispute of unfair dismissal to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The dispute was decided in favour of the appellant and she was considered to be an

employee of the first respondent[1] and further that the termination of employment was procedurally and substantively unfair. The appellant was awarded compensation against the first respondent in the amount of R164 524.05.

[3] The appellant approached Labour Court to make the award and order of court and thereafter issued a warrant of execution. The sheriff was instructed to attach the assets of the first respondent from the offices of the first respondent which were duly attached. The second respondent lodged a third party claim which was followed by the sheriff issuing interpleader summons. Having some doubts on the prospects of success at the interpleader hearing the appellant decided to withdraw of the attachment. The appellant subsequently issued a further warrant of execution and attached the bank account of the second respondent trading as the Properteam. The second respondent lodged another third party claim and sheriff served interpleader proceedings and argued that the assets attached by the appellant did not belong to the first respondent but were funds which were in her accounts for other parties. The funds which were placed under attachment were accordingly released.

[4] Having realised that the employer was not correctly cited at the CCMA the appellant approached the CCMA for a variation of the award to reflect the first respondent as the employer and not Propnun trading as Properteam Rentals. The

[1] CCMA has jurisdiction to adjudicate over matters between employer and employee, hence a determination had to be made whether the appellant is an employee or not.

appellant was successful and the award was issued correctly identifying the first respondent as the employer.

[5] The respondents in their answering affidavit addressed firstly condonation for the late filing of the answering affidavit. Condonation was accordingly granted by the court *a quo*. With regards to the merits, the respondents' counsel contended that the second respondent was called by South African Revenue Services (SARS) regarding payment of Skill Development Levy for its employees. SARS' representative [2]also stated that the levy is not payable where the employees are independent contractors and if that is the case proof in the form of independent contracts will be required. The second respondent then called the first respondent's employees, which included the appellant, and SARS advice was discussed and options were given to the agents to either sign independent contracts confirming that they are independent contractors or remain employees and be liable to pay skills development levy from their commissions. In the event they accept to become independent contractors such contracts would be backdated to 2009. In the premises, so argued the respondents' counsel, the appellant knew at all times and understood that she entered into an independent contract in terms which she would not be obliged to pay skills development levy. In addition, the appellant did go out and seek advice before she signed the independent contract and was accordingly advised that she was not an employee of the first respondent and was an independent contractor. The appellant was further made aware and agreed to the independent contract being back dated. The respondents' counsel further confirmed that at some stage second respondent was

[2] The respondents have not attached confirmatory affidavit from SARS.

taken to the Labour Court for an order that she must be personally liable for the debts of the first respondent. The appellant did not appear on the court date and her application was dismissed. To this end the respondents' counsel contended that the appellant's claim that she was employed by the second respondent is unsustainable.

[6] The court *a quo* held that, contrary to the appellant's argument that she was employed by the second respondent, evidence clearly indicated that the first respondent was an employer of the appellant. Of particular importance is the fact that the applicant had IRP 5 which clearly reflected that she was an employee of the first respondent. The appellant, so the court *a quo* proceeded, was aware of the fact the independent contract which was preceded by her seeking independent advice, would be backdated to 2009. In the premises the parties acted in concert when entering into a back dated independent contract with the intention to avoid paying the Skills Development Levy.

[7] The court *a quo* also noted that there were disputes of facts and could therefore not decide on the argument that the second respondent acted contrary to the provision of section 1 of the Estate Agency Act as she allegedly held trust funds in her personal account. The court *a quo* also found it discomforting that the independent contract is dated 2009 whereas in actual fact it was signed in 2012. The court *a quo* opined that this amounted to fraud. This worrisome position of the court was attenuated by the respondents' counsel who contended that in the face of it one could

construe the backdating as being fraudulent but putting it in context the parties intended to have 2009 as an effective date and this was not properly set out.

Before this court

[8] The appellant's counsel contended that the second respondent was fraudulent in her conduct of the business as she had funds belonging to the business in her personal account, which funds were apparently for the commission earned by the agents in respect of rental business. This, appellant's contended, that it was in contravention of the prescripts which regulates the estate agency business.[3]

[9] In addition, second respondent had several close corporations where she was the sole member though she used the same trading name for all of them in contravention of section 23 of the Act. This was purely to mislead the third parties who entered into business dealings with her. Whilst knowing that first respondent was not trading she nevertheless prepared and entered into an independent contract with the appellant.

[10] The appellant's counsel contended as set out above that the magistrate erred in not finding that the second respondent was fraudulent in converting the permanent employment of the appellant to independent contractor to avoid attendant legal obligations. Further that the employer was fraudulent in backdating the contract of

[3] Section 1 of the Estate Agency Act

employment. That the second respondent acted illegally by placing business funds into her personal accounts contrary to the Estate Agent Act.

[11] The appellant's counsel submitted further that section 6(4) of the Act relates to piercing of corporate veil where the conduct amounted to fraud, negligence and or recklessness. The applicant having referred to the SCA judgment (*Ebrahim and Another v The Cold Storage* 2008 (6) SA 585) where recklessness was construed as "consisting ...of entire failure to give consideration to the consequences of one's actions".

[12] In defence of the second respondent her counsel referred to section 64 of Act and contended that it becomes applicable only if it can be established that a member of the CC is found to have been reckless and or fraudulent.[4] This jurisdictional facts have not be demonstrated by the appellant, so argued the second respondent's counsel and as such the appellant argument for joint liability could not be sustained.

[13] The respondents' counsel contended furthermore that there were disputes of facts for which the appellant should have brought an *in limine* request that certain aspects should be referred to oral evidence which was not done. Further that in the SCA judgment of *Law Society, Northern Provinces v Mogami and Others* 2010 (1) SA 186 it was stated that the party may notwithstanding averments of possible dispute

[4] Section 64(1) of the Act speaks of being carrying business in recklessly, with gross negligence or with intend to defraud any or for any fraudulent purpose...

of facts persist in proceeding with papers as they are and this position was adopted by the appellant hence the appellant proceeded in the motion court.

[14] In relation to the application for condonation the appellant's representative argued that there was an inordinate delay by the respondent to file and serve the answering affidavit and as such condonation should not be granted. In this regard the matter was postponed at least four times with no justifiable explanation from the respondents. The respondents' counsel contended that the replying affidavit was also delivered late and there was no prejudice visiting the appellant as both parties had adequate time to prepare before the hearing. The court *a quo* exercised its discretion and granted condonation. There is no argument advanced to demonstrate that the discretion was exercised improperly or capriciously.

[15] The respondents' counsel argued that there was no underhand dealing in backdating the independent contract from 2012 to 2009. In fact, this was as per the advice from SARS. The appellant was initially appointed in 2007 (as per second respondents' affidavit) and was employed by Q Finance CC t/a Properteam and the said Q Finance CC had to deregister as she co-owned same with her ex-husband with whom they separated. She was then advised to register another CC and this was in 2009. The appellant was therefore employed by the new CC in 2009. It was upon this background that the appellant had a choice of being an independent contractor and not liable to pay SDL alternatively the appellant would remain an employee and be

obliged to pay SDL.[5] The respondents' counsel persisted with this contention despite the court cautioning him that it is not the employee paying SDL but the employer. This was also raised by the court *a quo*.

[16] The respondents' counsel further argued that in terms of the SCA judgment the effect of section 64 is not to declare a director to be personally liable for the debts of the CC. (*Allan P Plant Hire v Bosch*, SCA). If it can be established that the close corporation is still able to pay its debts the liability of the members cannot be triggered.

[17] The argument, so it went further, was that the appellant could not truthfully argue that she was misled. Before July 2012[6] she had an IRP5 which clearly showed that the first respondent was her employer. In addition, there is a correspondence in 2010 which confirms that she was an employee of the first respondent and thirdly her argument that second respondent was her employer also failed before the CCMA where it was held that the first respondent was the employer and not the second respondent personally. On the basis of the aforegoing the argument that section 23 of the Act was flaunted has no basis and the argument that she was misled is unsustainable.

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[5] See para 11.5 of the respondents' heads of argument "...They were given an option of either concluding written arguments, in which case SARS would not claim the Skills Development Levy, or they could maintain the status quo but then the Skills Development Levy would have to be paid to SARS and would be deducted from the commissions payable to estate agents".

[6] IRP 5 attached to the records as annexure BB5 is for 2012 year of assessment.

[18] The argument advanced that the second respondent used the first respondent knowing well that it is a shell company and has not assets or fund cannot hold. This position that first respondent was just a shell stated during interpleader proceedings in 2015 whereas the applicant was dismissed in 2012. The office of the first respondent having caught fire in November 2012 and then ceasing operations in March 2013.

Issues for this court

[19] This court need to decide whether the court *a quo* rightly held that there was no conduct on the part of the second respondent which can be considered to have been reckless by either being grossly negligent or fraudulent in conducting the business of the first respondent.

[20] As a prelude some principles regarding applications in terms of section 64(1) of the Act were elucidated by Cameron JA in *Ebrahim and Another v Airport Cold storage (Pty) Ltd* 2008 (6) SA 585 (SCA) who found it 'unnecessary to decide whether there is any meaningful difference between recklessness and gross negligence in the context of section 64." He referred to the dicta of Howie JA (as then was) in *Philotex (PTY) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) where Howie noted that the meaning of recklessness included gross negligence (143F) and noted that recklessness itself connotes at the very least gross negligence".

[21] Cameron JA, at para 14 further stated 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".

[22] It appears from the facts that the first respondent was the appellant's employer and this was the finding of the court *a quo*. The court *a quo* having decided that it was incorrect of the appellant to state under oath that she was at all times till 2012 being employed by the second respondent. In addition, the court *a quo* having found that the backdating of the independent contract is unlikely to have been suggested by the office of SARS and in fact held the view that it was fraudulent of the parties to back date the agreement.

[23] The court *a quo* could also not resolve on the contravention of section 23 of the Act or section 1 of the Estate Agency Act as the said issue, I surmise, could not be interrogated comprehensively in motion proceeding.

[24] With regard to the evidence pertaining to SDL the respondents suggested that the reason for the signing of the independent contract was as per advice from SARS that the appellant would have had to pay SDL if she was an employee of the first respondent. To this end the advice was correct[7] with the caveat that the employers who are compelled to register and pay SDL are those whose salary bill exceeds R500

[7] For the purpose of skill levy an employee in terms of 'means (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; or …'. See section 1 of the Skill Development Act 97 of 1998.

000.00.[8] The second part of what the second respondent has stated that the SDL is payable by the employee was incorrect and was used to induce the appellant to opt for independent contract failing which the appellant would be liable to pay SDL from their commission. This was too remote from the truth and even worse there was no confirmation affidavit from SARS. Section 3 of the Skill Development Levies Act provides as follows:-

> *(1) "Every employer must pay a skills development levy from*
>
> *(a) 1 April 2000, at a rate of 0.5 percent of the leviable amount; and*
>
> *(b) 1 April 2001, at a rate of one percent of the leviable amount. "*

[25] No mention in both Skill Development Act[9] and Skills Development Levies Act[10] is made that the employees are required to contribute to the SDL.[11] The appellant had to seek advice as to what are the implications of the contract and to this end she could not be assumed to have been in concert with the employer as the magistrate has found. In any event the advice which was given just interpreted the essence of the independent contract but not the consequences thereof.[12] The court *a quo* was incorrect to state that it appeared that the appellant was attempting to commit a non-existing offence/crime as she was not liable to pay skills levy which she would have avoided by entering into an independent contract with the first respondent. The finding by the CCMA and failure by the respondent to challenge same clearly amount to a concession that the real employer was the first respondent. This is fortified by the IRP 5 which was for the period preceding the signing of the independent contract by

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[8] See section 4(b) of the Skill Development Levies Act 9 of 1999.
[9] Act 97 of 1998.
[10] Act 9 of 1999.
[11] In contrast section 6(1)(b) of the Unemployment Contributions Act specifically enjoins the employer to deduct 1 percent of the employee's salary .
[12] The advice from Ms Mahdeb states that 'according to your contract you are an independent contractor and are not employed by the company'.

the parties. The IRP 5 attached was issued to appellant as an employee of the first respondent. The said IRP5 also reflects PAYE, UIF and SDL numbers of the first respondent. This should have been the basis why SARS called for payment.

[26] The contention by the respondents' counsel that the date on the last page must be interpreted differently from how it appears cannot be accepted as evidence to clarify the misrepresentation. It is clear that it was backdated. This is a clear misrepresentation more so that the second respondent clearly stated that if the appellant refuses to be treated as independent contractor she will remain an employee and liable to pay SDL from her commission. (emphasis added). In any event the IRP5 shows that she was an employee in 2011-2012 tax year.

[27] The said independent contract was signed in July 2012 and in August 2012 the appellant was dismissed. This appears to have been an orchestrated endeavour to frustrate the appellant from possibly enjoying some benefits ordinarily due to employees, for example, UIF pay-outs in the event of dismissal or severance package if employee is dismissed for no fault on the part of the employee.

[28] The appellant could not even execute warrants issued pursuant to the award from the CCMA. The first respondent ceased operating just two months after the award allegedly due to fire. I am of the view that second respondent acted recklessly if there was no insurance to cover risks generally insured for businesses including fire. This is more so in that the estate agency business will have records of funds of third

parties particularly funds which are normally kept in trust for the benefit of the sellers of properties. There was no evidence that the said CC was liquidated and it appears to have remained dormant.

[29] The evidence shows that the first respondent became a non-operating entity just two months after receiving the award from CCMA. It is however not surprising that the said CC could not pay the awarded damages as it ceased operation. The contention by the respondents' counsel that section 64(1) of the Act is intended to cater for instance where the CC is unable to pay becomes even more relevant in this instance. The tendency not to ensure that the close corporation which ceases to operate will properly be liquidated is consistent with the discontinuance with the Q Finance CC which was deregistered in 2009 as there was no evidence of how the Q Finance CC was deregistered and what happened to the employees and their benefits. Instead the second respondent registered a new close corporation and employed the appellant. It was conceded that the second respondent had many close corporations though others being liquidated. Reference was made in para 37 of respondents' heads of a letter from second respondents captioned with letterhead The ProperTEAM Property Group and at the bottom written Propnu CC T/A The Properteam. The bank account which was attached was with Standard bank under the name and style of Bayly t/a Properteam.[13] The first respondent's registration number (2009/229853/23) is two numbers away from the Properteam cc (2009/229855/23)[14] and the two may have been registered almost on the same day. This lends credence to the contention that the corporate identity may have been abused for under hand dealings with the

[13] See para 12 of the appellant's heads of arguments
[14] These details are in para 50.2 of the respondents' answering affidavit.

third parties. The second respondent appears not to care for the other parties doing business with the close corporations. Her conduct in not insuring the close corporation from possible risks including fire may be construed as being grossly negligence and for someone having 12 close corporations most of which are into property business protecting third parties should have followed automatically.

[30] It is trite that ordinarily the court of appeal can interfere with the findings of the lower court only where it is clear that the presiding officer misdirected himself or exercised his discretion capriciously. The facts are so clear that if anyone was to benefit from independent contract would have been the first respondent and such conduct of entering into an independent contract of the first respondent catapulted by second respondent was for a fraudulent purpose and would have defrauded SARS. The backdating was also to serve the same purpose especially on the face of the IRP 5 which reflected an SDL number for the second respondent and the second respondent having declared that failure to migrate to independent contract would mean that the appellant remains an employee and liable to pay SDL from her commission. This was clear misrepresentation made by the second respondent to the appellant as the payment of levy remains the responsibility of the employer.

[31] The second respondent was therefore reckless and or fraudulent at worst. It is so clear that the facts before the court *a quo* did not support its findings and interference by the appeal court in this instance is therefore warranted.

[32] There is no sufficient evidence warranting interference with court *a quo's* discretion exercised in relation with appellant's prayer in terms of section 64(2) of the Close Corporations Act.

Costs

[33] There are no reasons to persuade me to deviate from the general rule that costs should follow the cause.

[34] I therefore make the following order;

a) The appeal is upheld and the order of the court a quo is set aside and replaced with the following;

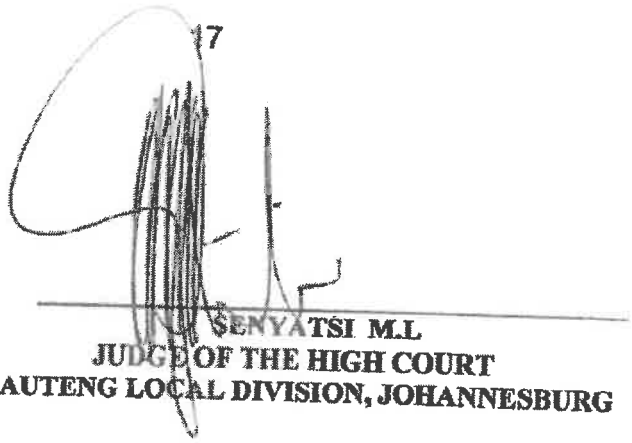
'The second respondent is declared to be personally liable for debts of the first respondent jointly and severally with the first respondent the one paying the other to be absolved.'

b) The appeal in respect of prayer 2 is dismissed.

c) Respondents are ordered to pay the costs.

NOKO MV
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree



SENYATSI M.L
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

FOR THE APPELLANT	:	ADV NAIDOO
INSTRUCTED BY	:	ALLAN LEVY ATTORNEYS
FOR THE RESPONDENTS	:	ADV MTA COSTA
INSTRUCTED BY	:	KIM MEIKLE ATTORNEYS
\DATE OF HEARING	:	18 June 2020
DATE OF JUDGMENT	:	9 ~~8~~ October 2020