166336IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NUMBER: C146/97

In the matter between:

UNICAB TAXIS (PTY) LTD **APPLICANT**

and

ANDRIES KAMMIES **RESPONDENT**

JUDGMENT

FABER AJ

1. This matter came before me as an application in terms of section 165 of the Labour Relations Act, 66 of 1995 (“the Act") to rescind the Order made by Landman J on 13 February 1998.

2. The relevant facts pertaining to this application are set out hereunder:

   2.1 The respondent alleged that he was employed by one Unis Kahn ("Kahn") trading as Unicab Taxis (not the applicant in this matter) and that Unicab Taxis unfairly dismissed him on 2 May 1997.

2.2 A dispute concerning the alleged unfair dismissal of respondent was referred to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") during July 1997 for conciliation.

2.3 A conciliation meeting was convened by the CCMA on 12 August 1997. Unicab Taxis was represented thereat by its fleet manager Mr Derek Mullins ("Mullins"). At this meeting the dispute was settled and a written settlement agreement was signed between the parties which read, *inter alia*, as follows:

> "*The parties have agreed that the above matter is settled on the following basis:*
>
> *1. That the employee Andries Kammies ("Kammies"), be reinstated without loss of remuneration or benefits, backdated to the date of dismissal."*

2.4 The agreement was signed by respondent personally and by Mullins, on behalf of Unicab Taxis.

2.5 The respondent returned to work in terms of the agreement the next morning but did not find either Kahn or Mullins present.

2.6 The respondent's trade union representative, Mr David Constable ("Constable"), thereafter made telephonic contact with Kahn on 14 August 1997. Kahn intimated that he would not comply with the settlement agreement nor would he pay respondent any money.

2.7 As a result of Kahn's attitude respondent filed an application at this Court on

27 November 1997 asking for the settlement agreement to be made an order of Court.

2.8 On 2 December 1997 the Registrar served a notice on Unicab Taxis and the respondent enrolling the application for hearing on 13 February 1998. On that date Landman J granted the order sought by the respondent, making item 1 of the settlement agreement an order of this Court ("the Order").

2.9 On 1 April 1998 applicant was incorporated and Unicab Taxis' rights and obligations were transferred to applicant.

3. The applicant now applies for the rescission of the Order on the following basis:

3.1.1 the respondent in this matter wrongly referred the dispute to the CCMA. Applicant avers that since the respondent was never an employee but an independent contractor the CCMA had no jurisdiction to deal with the dispute.

3.1.2 Mullins, the applicant's fleet manager, who represented Unicab Taxis at the CCMA, was ignorant of the fact that the CCMA had no jurisdiction over the dispute. He was labouring under this misapprehension when he signed the settlement agreement.

4. Before dealing with these allegations I am required to decide a preliminary point raised by the respondent.

4.1 The respondent states that at the time of his dismissal he was employed by Kahn trading as Unicab Taxis and not by applicant.

4.2 The respondent accordingly avers that the applicant has no direct interest in the application for the rescission of the Order. The issue which respondent requires me to decide, in *limine*, is whether or not the applicant has the necessary *locus standi* to bring this application.

4.3 In the affidavit filed by Kahn he confirms that applicant was incorporated on 1 April 1998 and that all Unicab Taxis' rights and obligations were transferred to applicant on that day. It is clear that Unicab Taxis' business was transferred to applicant as a going concern.

4.4 By the time of the transfer of the rights and obligations to applicant on 1 April 1998, the settlement agreement had already been concluded and made an Order of Court. In terms thereof, the applicant's predecessor was obliged to take respondent into its employment as an employee.

4.5 I am satisfied the applicant does have a *locus standi* in the present matter having regard to the aforegoing and section 197(2)(a) of the Act. The aforesaid section reads as follows:

> "*If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1)(a), unless otherwise agreed, all the rights and obligations between the old employer and each* ***employee*** *at the time of the transfer continue in force as if they had been rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in*

relation to the new employer."

4.6 All the rights and obligations under the settlement agreement were accordingly transferred to applicant.

4.7 Similarly the Order granted by this Court "will be considered to have been done in relation to the new employer".

4.8 Applicant has a clear and direct interest and accordingly has *locus standi*.

5. Turning to the substance of the application it is trite that in order for the applicant to succeed it needs to satisfy the requirements of section 165 of the Act.

6. The applicant contends that:

6.1 Respondent was not an employee of Unicab Taxis but was engaged as an independent contractor. Accordingly the CCMA had no jurisdiction and the dispute was erroneously referred;

6.2 Mullins who represented the applicant's predecessor at the CCMA proceedings did not know that the CCMA had no jurisdiction over independent contractors;

6.3 Mullins had no authority to bind Unicab Taxis;

6.4 For these reasons the applicant claims that its predecessor was not bound by the settlement agreement which was subsequently made an order of this Court.

7. Whilst it is clear on the papers that there is a factual dispute as to whether or not the respondent was an independent contractor or an employee I only need to resolve the factual dispute if I find that the applicant can escape the consequences of the settlement agreement based on its own version.

8. The first issue for me to decide therefore is whether the applicant can escape the consequences of the settlement agreement based on Mullins' ignorance of the fact that the CCMA did not have jurisdiction over the dispute. In order for the applicant to succeed it needs to show that Mullins:

8.1 made an error which entitles applicant to escape the consequences of the contract i.e. a *iustus error*;

8.2 had no authority or ostensible authority to bind Unicab Taxis.

9. In relation to Mullins' mistake, it is clear from the authorities that the applicant will have to show that the mistake was, in the eyes of the law, reasonable (*iustus*). In *National and Overseas Distributors Corporation (Pty) Ltd v The Potato Board* 1958 2 SA 473 (A) Shreiner JA stated at 479:

> "*Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope of defence of a unilateral mistake is very narrow, if it exists at all"*.

10. This decision neatly summarises the position in our law namely that unless the mistaken party can prove that the other party knew of his mistake, or that as a reasonable man he ought to have known of it, or that he caused it, the onus of showing that the mistake was a reasonable one justifying release from the contractual bond will not be easy to discharge.

11. At 354 *Christie, the Law of Contract in South Africa*, 3rd Edition, 1996, Christie puts it as follows:

> "*However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. …. in any circumstances in which the mistake is due to his own carelessness or inattention, for he cannot claim that his error is iustus.*
>
> *It is not sufficient simply to avoid the condemnation as careless or inattentive, for the mistaken party must go further and discharge the onus of proving that his mistake was, in the eyes of the law, reasonable.*"

12. The applicant has not sought to allege that the respondent knew or ought to have known of Mullins' mistake nor is there any allegation that the respondent has made any misrepresentations in this regard.

13. The applicant has not, in my view, discharged the onus of proving that the mistake on the part of Mullins, which motivated him into entering into the agreement on behalf of Unicab Taxis, was reasonable (*iustus*). Since his mistake was a unilateral one applicant cannot, on this basis, be allowed to escape the consequences of the contract.

14. The second leg of the applicant's argument is that Mullins had no authority to bind its predecessor. In this regard Kahn alleges in his affidavit that he only instructed Mullins to enter into an agreement with the intention that the respondent should return to "sort out" the monies owed. He goes on to allege that reinstatement was never the intention and that Mullins never had the authority to enter into the agreement reinstating respondent.

15. It is clear from the papers that Mullins was sent by Kahn to represent Unicab Taxis and that he signed the agreement on the latter's behalf. The legal principle in this regard had been established as far back as 1929 in the case of *Monzali v Smith* 1929 AD 382 at 385:

> "*Where any person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to anyone dealing with him as an agent on the face of any such representation, to the same extent as if such other person had the authority which he was so represented to have.*"

Also see *Southern Life Association Limited v Beyleveld* N.O. 1989 1 SA 496 (A).

16. In the present case Mullins, who was the fleet manager at the time, was designated to represent applicant's predecessor at the CCMA proceedings. The simple question is whether a reasonable man in the position of the respondent would have believed that Mullins had the authority to sign and enter into the settlement agreement. I find no reason to believe that respondent could not rely on the fact that Mullins was duly authorised to do so. Accordingly applicant cannot escape the consequences of the

agreement on this ground either.

17. It finally remains to decide whether any grounds exist to vary or rescind the Order.

18. Section 165 provides that the Labour Court, may vary or rescind a decision, judgment or order on one of three grounds.

18.1 The first ground is that it was erroneously sought or erroneously granted in the absence of any party affected by that judgment.

18.2 The court may also exercise its powers where there is an ambiguity in the award, an obvious error or omission, but only to the extent of that ambiguity, error or omission.

18.3 Lastly, the court may rescind the order granted as a result of a mistake common to the parties to the proceedings.

19. The last mentioned ground does not arise in the present set of facts. I therefore need to decide whether the facts before me fall within the ambit of the first two grounds.

20. Section 165 of the Act is clearly modelled on Rule 42 of the Rules of the High Court . The wording is virtually identical. The High Court has frequently held that in applications for rescission in terms of rule 42, it is not incumbent upon an applicant to show good cause for rescission.

See: *Tshabalala & Another v Peer* 1979 (4) SA 27 (T) at 30D-E

Topol & others v L S Group Management Services (Pty) Ltd 1988 (1) SA

639 (W) at 650D-J

21. The applicant contends that the following facts were not placed before this Court at the time of granting the order:

21.1 The respondent was not an employee of the applicant as no employment relationship existed;

21.2 The respondent had entered into a fresh lease agreement with Mr Allie Nolan of Magicab, the very next day after leaving applicant.

21.3 The respondent never tendered performance under the agreement.

22. These facts are denied by respondent.

23. I have already decided that applicant is bound by the settlement agreement. Accordingly the settlement agreement could be made an order of Court as envisaged by section 158(1)(c) of the Act.

24. The fact that respondent may have breached the agreement, and I make no finding in this regard, is not a bar to making the agreement an order of this Court.

25. I accordingly find that the applicant has not made out a proper case for rescinding the Order granted by Landman J.

26. The application is dismissed with costs.

166336

P C FABER

Acting Judge of the Labour Court of South Africa

DATE OF HEARING:

DATE OF JUDGMENT:

APPEARANCE FOR APPLICANT:

APPEARANCE FOR RESPONDENTS: