IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO **D318/03**

DATE HEARD: 2004/02/09

DATE DELIVERED: 2004/02/16

In the matter between:

NOEL WILLIAM OBEREM Applicant

and

COTTON KING MANUFACTURING (PTY) LTD First Respondent

SYNERGY MANAGEMENT & FINANCE (PTY) LTD Second Respondent

JUDGMENT DELIVERED BY
THE HONOURABLE MADAM JUSTICE PILLAY
ON 16 FEBRUARY 2004

MS C NEL

MR R A K VAHED

TRANSCRIBER
SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

JUDGMENT 16 FEBRUARY 2004

PILLAY J

[1] This is an application for remuneration and other benefits in terms of section 77(3) of Basic Conditions of Employment Act No 75 of 1997. The facts were as follows:

[2] The applicant was employed by the first respondent on 7 June 2001 as the latter's managing director. The material terms of the contract of employment were, firstly, that the applicant would be employed for a minimum period of 24 months. Secondly, if the first respondent was in breach or if it terminated the contract earlier it could do so only by paying the applicant 12 months' salary, including a car allowance. Thirdly, if for any other reason either party found substantial cause sufficient to cancel the contract, the termination would be negotiated by mutual agreement.

[3] The second respondent owned 50% of the shares in the first respondent. Peter Bilbro, the erstwhile managing director of the first respondent, owned the balance of the shares. Bilbro agreed to purchase the second respondent's shares in the first respondent. The agreement of purchase and sale dated 9 October 2002 was concluded between the second respondent as the vendor and the purchaser, represented by John Kenward, in his personal capacity and as the representative of Melloncrest Limited. A material term of the agreement of purchase and sale was:

"4.1.1 Within 14 days of the signature of this agreement the vendor will have negotiated and agreed the lawful retrenchment and termination with immediate effect, of the employment of the Cotton King managing director, Noel Oberem, on terms

acceptable to the vendor, Cotton King, and the purchaser, which termination must be complete and final with no right of recourse or claim of any nature whatsoever against Cotton King, Secula Subsidiaries, and must include an undertaking of confidentiality (acceptable to the purchaser) an undertaking to return all and any information and documentation belonging to Cotton King.

.....

The vendor shall be liable for the payment of all and any amounts owing to Oberem arising out of or in connection with the termination of the employment except for any leave pay accrued, annual bonus and any salary entitlement up to the day of retrenchment, both of which shall be paid by Cotton King, and the vendor indemnifies Cotton King, Secula and the Subsidiaries accordingly."

[4] On 10 October 2002 the first respondent, second respondent and Bilbro entered into a termination of partnership agreement in terms of which they sought to terminate the partnership and the sale of business agreement.

[5] On 14 October 2002 the applicant and the first respondent entered into an agreement in terms of which the applicant terminated his employment with the first respondent with effect from 15 November 2002 but undertook to leave by 31 October 2002. The official reason for the applicant leaving the first respondent's employ was agreed as being due to the change of shareholding in the first respondent, the applicant decided to resign.

[6] In terms of clause 9 of the termination of employment agreement the applicant was to be paid a severance package by the second respondent in an amount which was to be agreed between the applicant and the second respondent in writing. It was to be in full and final settlement of all claims of

any nature whatsoever which the applicant had arising from his employment or the termination thereof.

[7] Upon signing the termination of employment agreement, the applicant undertook to waive any other rights he had in terms of the Labour Relations Act No 66 of 1995 ("the LRA") or his contract of employment. The first respondent accepted the benefits conferred on it by clause 9.

[8] On the same day the second respondent wrote as follows to the applicant:

"As previously mentioned, Cotton King are vigorously opposed to paying you any amount relating to your termination. In the circumstances, with reference to paragraph 9 of the agreement, we confirm that you will be paid the following in full and final settlement of any claims of whatsoever nature that you may have:

1. On 15 November 2002,

1.1 Your salary to 15 November 2002;

1.2 The outstanding bonus of R30 000 related to profit share for the year ended 31 January 2002;

1.3 Leave pay on the basis of 25,8 days due, less 15 days taken, equals R14 645.

.....

1.4 *Pro rata* share of year-end (January 2003) bonus, R10 000 X 10, divided by 12 equals R8 333.

1.5 R4 000, (being part of four months' severance package set out below).

2. On 1 March 2003, R150 000, being four months' salary as a severance package, equals R154 000 (R31 + R7500 = R38500 x 4) less R4 000 paid per R1.5 above.

(A post-dated cheque to be delivered to Noel on 31 October 2002. No interest will be paid for the period to 1 March 2003). The terms of this agreement will be kept strictly confidential between us. This entire agreement, inclusive of the annexure is subject to

us completing an agreement to our satisfaction with John Kenward and/or his nominee."

[9] The applicant agreed to these terms and conditions.

[10] On 21 October 2002 the second respondent, Melloncrest Limited and Kenward concluded an addendum to the memorandum of purchase and sale agreement ("the addendum"), in terms of which they sought to agree the precise terms on which the provisions of clause 4.1.1 of the purchase and sale agreement would be fulfilled. The addendum provided as follows:

"4.2. Insofar as clause 4.1.1 is concerned it is recorded that on 14 October 2002 Noel Oberem has signed an agreement with Cotton King, (which still needs to be accepted by Cotton King), in terms of which his employment will be terminated with effect from 15 November 2002 but to leave on 31 October 2002. The purchaser and the vendor confirm that they are satisfied with the terms of the agreement reached with Oberem and that on signature of this Addendum the purchaser will procure that Cotton King will sign the agreement with Oberem subject to the proviso that, notwithstanding the terms of the Oberem agreement, Cotton King will only be responsible for payment of Oberem's salary to 31 October 2002. The vendor will be responsible for payment of any amount due to Oberem as salary or notice pay for the period 1 November 2002 to 15 November 2002 and indemnifies the vendor and Cotton King accordingly."

[11] On 25 February 2003 the second respondent denied its indebtedness to the applicant in any amount. It nevertheless proposed to settle the applicant's salary for 15 days in November and R4 000 in instalments payable from 14 February 2003 to 14 March 2003, the balance of R150 000

by ceding a claim of R100 000 against Bilbro personally and by a cheque of R50 000 post-dated to 30 June 2003.

[12]In turn, the applicant was to cede his claim for the outstanding bonus of R30 000 to the second respondent. Furthermore, he was to look to the first respondent for the payment of any other amounts referred to in the letter of 14 October 2002.

[13]The applicant rejected the offer and instituted these proceedings.

Submissions for applicant

[14]Ms *Nel* for the applicant submitted, firstly, that the termination of employment agreement between the applicant and the first respondent was consensual and not a resignation by the applicant, as suggested by the first respondent. This was so because the language of the termination of employment agreement records that resignation was the "official reason". That implied that resignation was not the true reason for the termination. Furthermore, the termination of employment agreement cannot be seen as separate from the purchase and sale agreement as the first respondent had guaranteed the applicant 24 months' employment and 12 months' remuneration on termination for operational reasons. The applicant's agreement to terminate the contract of employment was dependent on him being paid the amount itemised in the letter dated 14 April 2002 from the second respondent. For these reasons the termination of employment was mutually agreed and not a unilateral act of resignation.

[15]Secondly, Ms *Nel* contended that if clause 9 of the termination of employment agreement cannot be construed as a *pactum de contrahendo* in the sense of a promise by the applicant to settle claims and waive his rights on being paid an agreed severance package by the second respondent, then it must be a condition. Moreover, clause 9 is a resolutive condition, in that if the applicant was not paid the agreed severance package by the second respondent, then the termination of employment agreement would be of no further force or effect. The purpose of the termination of employment agreement was to secure the termination of the applicant's services in exchange for the consideration agreed. This was the core of the agreement. If payment were not made, the parties would, if asked whether the termination would still have taken place, have replied "No".

[16]Alternatively to the foregoing, it was submitted that the agreement to terminate the applicant's services being conditional upon the payment of the severance package it could not be said that the applicant had agreed to settle his claims and waive his rights if the condition was not fulfilled.

[17]If clause 9 is construed as a resolutive or suspensive condition then, as payment has not been effected either by the first or the second respondents within a reasonable time, the termination of the employment agreement fell away and the *status quo* should be restored. That called for an order reinstating the applicant.

[18]The addendum was only concluded after the termination of employment agreement, hence when this occurred it was contemplated by the

respondents that the first respondent would be liable for the amount owing to the applicant in terms of the contract of employment.

[19]The applicant persisted that one Thomas was mandated by both the first and second respondents to negotiate with the applicant the termination of his employment and the severance package. Consequently his confirmatory affidavit supported the interpretation of the termination of employment and severance pay agreements.

[20] So it was submitted for the applicant. Ms *Nel* relied on the following authorities. *Rustenburg Town Council v Minister of Labour and Others* 1942 (TPD) 221; *R v Katz* 1959 (3) SA 408 (C) at 417; *The Law of Contract*, 4th edition, R H Christie, at page 153, citing with approval *Administrateur-Generaal vir die Gebied Suid-Wes Afrika v Hotel Onduri (Edms) Beperk en Andere* 1983 (4) SA 794 (SWA); *Dirk Fourie Trust v Gerber* 1986 (1) SA 763 (A); *Rainbow Chicken Farms (Pty) Limited v Commission for Conciliation, Mediation and Arbitration and Others*, case No D1109/01 (unreported judgment); *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 767E-768E.

Submissions for first respondent

[21]Mr *Vahed* for the first respondent submitted, firstly, that the applicant was not entitled to shift his ground by additionally claiming payment from the first respondent amounts that were agreed to be due by the second respondent. No case was made out in the papers to demonstrate that the first respondent had ever agreed to pay the amount claimed to the

applicant. Secondly, even if the applicant is allowed to so shift his ground, the first respondent could not be held liable for the amount claimed.

[22]The first respondent denied that it mandated Thomas to represent it in negotiations with the applicant. This was confirmed by Thomas himself in the affidavit he filed in support of the application.

[23] Clause 9 of the termination of employment agreement was not a *pactum de contrahendo* as the future agreement was not envisaged as between the applicant and first respondent but between the applicant and second respondent.

[24]Nothing in the words of clause 9 indicates that it constitutes a suspensive or resolutive condition. If the clause amounted to a condition, the applicant would have phrased it accordingly.

[25]The applicant signed the termination of employment agreement on the same day as the acceptance of the severance package from the second respondent. As the latter document was conditional upon other agreements being concluded, the applicant ought to have been alive to stipulating conditions in the termination of employment agreement.

[26]The termination of employment agreement should be treated on its terms and as being concluded freely and voluntarily between the applicant and the first respondent. In terms thereof the applicant waived any rights he had under the LRA and his contract of employment.

[27]The applicant was aware that it was a condition of sale of shares in the first respondent by the second respondent that the termination of his employment and absolving the first respondent of all liability to him were necessary preconditions to the severance pay agreement. It is untenable for the applicant to contend that the parties to the other agreements would remain at risk with regard to the applicant's employment with the first respondent or with regard to payment by the first respondent of any severance package.

[28]In so far as clause 9 constituted a condition, such condition related to the conclusion of an agreement between the second respondent and the applicant. Such an agreement was concluded and, to that extent, the condition was fulfilled. It cannot be contended that the condition extended to the eventual performance by a party over which the first respondent had no control.

[29] So it was submitted for the first respondent. No cases were referred to by Mr *Vahed*.

[30] The second respondent did not oppose the matter.

[31]It is clear from the language of the termination of employment agreement that the termination of the applicant's services was brought about freely and voluntarily by mutual agreement. It is common cause that the first respondent did not want the applicant in its employ. The applicant was prepared to release the first respondent from the contract of employment on certain terms and conditions. Both parties agreed to hold

the second respondent liable for the severance pay.

[32] Accordingly, I find that the termination of the applicant's services was brought about by neither his resignation nor his retrenchment, but by mutual agreement.

[33] Was Thomas mandated to represent the first respondent? In his affidavit Thomas confirmed that he was mandated to represent the respondents. He specifically confirmed that he negotiated both the agreement to terminate the applicant's employment with the first respondent and the severance package agreement with the applicant "on behalf of the second respondent". He does not indicate what his mandate was for either of the respondents. The probabilities are that he had a general mandate from both respondents to facilitate a tripartite settlement.

[34] However, one needs to look to the agreements themselves to determine what his mandate was. The agreements were signed by the parties personally and not by Thomas on their behalf. Moreover, it is not in dispute that the written agreements correctly record what was agreed. Therefore, whether Thomas was mandated by the first respondent or not and what his mandate was are irrelevant as the agreements speak for themselves.

[35]Did clause 9 constitute a *pactum de contrahendo*? A *pactum de contrahendo* is a contract between parties who agree to agree on a possible future agreement. (Kerr A J, *The principles of the law of contract*,

Butterworth, 4th edition, at 65-66; Christie R H, *The law of contract in South Africa*, 3rd edition, Butterworth, at 39-40.)

[36]Mr *Vahed* appears to have misconstrued the basis on which Ms *Nel* has relied on the existence of a *pactum de contrahendo*. The agreement is not a *pactum de contrahendo* in the sense referred to by Ms *Nel*, that is a promise by the applicant to release the first respondent from its obligations in the future for, as discussed below, the applicant clearly release the first respondent from all its obligations on the signing of the termination of employment agreement and the severance pay agreement.

[37]Was clause 9 a condition? A condition is a stipulation which defers an obligation to the occurrence of some chance or uncertain event, whereupon the stipulation becomes enforceable. (Christie, 145.) Framed as it is, clause 9 is a condition. The condition is that the applicant and second respondent "will" agree the severance package. Although the words "will be agreed" manifest confidence that a severance pay agreement will come into existence, it was outside the control of the applicant and the first respondent whether it would, in fact, come into existence.

[38]Was the condition fulfilled? The answer is "yes". The applicant and second respondent did agree the severance package. It is not a condition of the termination of employment agreement that the severance package agreement would actually be fulfilled but merely that it would be concluded. Once the severance package agreement was concluded the condition in the termination of employment agreement was fulfilled. It was in full and final

settlement of all claims of any nature whatsoever arising from the applicant's employment or the termination thereof. In that sense the condition is resolutive.

[39] At the same time the applicant also agreed that, upon signing the termination of employment agreement, he waived any other rights he may have had to the LRA or his contract. The first respondent accepted this benefit. The waiver of other rights was therefore not conditional upon the severance package agreement with the second respondent. It was dependent on the signing of the termination of employment agreement. It is common cause that this agreement too was signed.

[40]Thus the applicant's agreement to terminate his employment and his resignation as director of the first respondent, i.e. clauses 1 and 4 of the termination of employment agreement, are not affected by the condition relating to the severance pay agreement. The applicant had recourse to the first respondent only in respect of the severance pay if it was not agreed with the second respondent.

[41]The severance package agreement and the termination of employment agreement were signed on the same day, if not at the same time. This, coupled with the fact that the termination of employment agreement is silent about what might happen if the severance pay agreement was not concluded, leads me to infer that the applicant was confident about getting satisfaction of his severance pay claim from the second respondent.

[42] That he held the second respondent liable mainly, if not exclusively, for the severance package is evident from the way he has pleaded his claim. Although the first respondent is cited, the case was made out against the second respondent, until the amendment of the prayer.

[43]The applicant was aware when he agreed to the severance package that the first respondent was "vigorously opposed to paying (him) any amount relating to (his) termination". Furthermore, the applicant settled for four months' severance pay amounting to R154 000. That is a significant compromise of the amount of twelve months' pay plus a car allowance he claimed he would have been entitled to if the first respondent terminated the contract earlier than 24 months.

[44]Therefore, in all the circumstances, to the question whether the termination of employment would have taken effect if the payment were not made, I cannot say with any confidence that the applicant or first respondent would have answered "No". The applicant unequivocally released the first respondent from all his obligations in terms of the LRA and his contract of employment, including the obligation to pay severance pay.

[45] The order that I grant is in the following terms:

(1) The claim against the first respondent is dismissed.

(2) The claim, as amended, against the second respondent succeeds.

(3) The second respondent is ordered to pay the applicant the amounts appearing at paragraph 1(i) to (xii) inclusive in the amended notice of motion.

(4) The applicant to pay the first respondent's costs.

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Judge D Pillay

05/03/2004