

SOUTH AFRICA / JUDGMENT

**Labour Group and Others v SA Dopper
(Pty) Ltd (J 1251/13) [2013] ZALCJHB 263;
(2014) 35 ILJ 1011 (LC) (14 October 2013)
[2013] ZALCJHB 263**

COURT

Labour Court Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

J 1251/13

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1251/13

In the matter between:

THE LABOUR GROUPFirst Applicant

THE PERSONS LISTED ON ANNEXURE “A”Second to Further Applicants

and

SA DOPPER (PTY) LTDRespondent

Heard: 14 June 2013

Delivered: 14 October 2013

Summary: Cancellation of labour broker contract. The employer instituting proceedings on behalf of the employee because the other

party to the labour broker contract was in breach of the contract. Labour broking contract a pure commercial contract and therefore

Labour Court has no jurisdiction.

MOLAHLEHI, J

The dispute between the parties in this matter involves the allegation that the respondent cancelled the labour broker contract

with the applicant. The applicant seeks an order declaring the alleged conduct of the respondent to be unlawful.

The respondent has raised a point in limine concerning the jurisdiction of this Court to entertain the clam raised by the first applicant. The respondent contends that the Court has no jurisdiction because the matter concerns a contract concluded in terms of section 198 of the Labour Relations Act (the LRA). Section 198 of the LRA provides:

‘198. Temporary Employment Services.–

- (1) In this section, 'temporary employment services' means any person who, for reward, procures for or provides to a client other persons–
 - (a) who render services to, or perform work for, the client; and
 - (b) who are remunerated by the temporary employment service.
- (2) For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.
- (3) Despite subsections (1) and (2), a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person.
- (4) The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes–
 - (a) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;
 - (b) a binding arbitration award that regulates terms and conditions of employment;
 - (c) the Basic Conditions of Employment Act; or
 - (d) a determination made in terms of the Wage Act.’

The applicant is a registered labour broker that employs a number of employees who are assigned to the respondent. The first applicant concluded a labour broking agreement with the respondent.

The dispute between the first applicant and the respondent arose from the shot payment of the invoices presented by the first

applicant to the respondent. The attempts by the first applicant to resolve the problem was unsuccessful. Apparently, the respondents

refused to pay the invoices in full because it contended that the first applicant's prices were too high.

In the course of the engagement about the payment of the fees, the respondent addressed a letter to the applicant dated 7 June 2013, which the applicant interpreted as cancellation of the labour broking contract. The essential aspect of that letter for the purposes of the first applicant's contention reads as follows

'Accordingly I deny that there is any agreement on the issue of the placement fee or governing the providing of the services to SA Doper (Pty) Ltd.'

The first applicant contends that this Court has jurisdiction to entertain this matter on the basis of the provisions of section 157

(1) and (2) of the LRA. Section 157 (1) of the LRA provides:

'Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.'

And section 157 (2) of the LRA provides:

'The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental

right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from-

employment and from Labour relations.'

The first applicant contended further that although the second applicants, the employees have no right of recourse against the

respondent, it had a duty to approach the Court to complain to ensure that the respondent does not remove the 55 employees involved

in the matter when there is no good reason to do so. It should be noted that the second to further applicants have not been properly

cited in that their details have not been finished neither has anyone them filed in supporting affidavit.

In arguing that it was entitled to approach the court for and on behalf of the second applicants, the respondent relied on the authority of *NAPE v NTC Corporate Solutions (Pty) Ltd.*¹ The facts of that case involved the retrenchment of an employee following the demand from the client of a labour broker to have him removed from its premises because of allegations of misconduct. The

issue before the Court was whether the retrenchment of the employee by the labour broker was substantively and procedurally unfair. In addition and in obitor, the Court dealt also with the conduct of the client in insisting that the employee be removed from the site and found that that conduct was “unlawful and a breach of the applicant's right to fair labour practises” because the employee did not commit an offence for which dismissal was justified.

After analysing the policy, consideration why a labour broker would be entitled to approach, the Court on behalf of its employees where the client’s conduct amount to unfair treatment of the employees, the Court in NAPE distinguished between legality of the relationship between the parties and the terms of the contract. The Court further observed that whilst the relationship may be lawful, the same does not apply to its terms. In dealing with the issue of labour broking, the Court, per Boda AJ, had the following to say:

[58] Labour broking arrangements affect three parties: the client, the broker and the employee. As this case shows, it is almost inevitable in the way the relationship is structured that the client will wield the most bargaining power and gets the best end of the deal. The labour broker is in the middle. The labour broker gets paid for procuring the labour and earns a profit but, as this case shows, the labour broker is the one liable in the case of an unfairly retrenched employee. The employee, however, may claim statutory severance pay from both.

[59] In this tripartite arrangement, employees are the weakest and most vulnerable.

[60] Although I have found and accepted that the arrangement itself has been given the stamp of approval by organised labour, management and the Legislature, this does not mean that the labour broker and the client are at liberty to structure their contractual relationships in a way that would effectively treat employees as commodities to be passed on and traded at the whims and fancies of the client.

[61] Nor does it mean that labour brokers and clients may structure their contractual relationship in a way that would undermine the employee's constitutionally guaranteed right to fair labour practices.’²

After accepting that employees have no right of recourse against a labour broker for unfair dismissal in terms of section 198 of the LRA, the Court observed that:

[75] The Legislature has, however, placed the burden of satisfying unfair dismissal claims in cases like this, on the labour broker. That is part of the compromise inherent in the section. As the constitutional validity of this compromise has not been challenged, I do not express any opinion about it. I have dealt with this aspect earlier.

[76] But the Act is silent about the rights of the labour broker against the client.

[77] It follows from what I have stated above, especially in the Barkhuizen and Mozart Ice Cream Parlour cases that I have referred to earlier, that the labour broker is in fact not powerless to resist its client's attempt to wield its bargaining power in a way which undermines the fundamental rights of employees. The labour broker is entitled to approach a court of law to

compel the client not to insist upon the removal of an employee where no fair grounds exist for that employee to be removed. The labour broker is also entitled to resist any attempt by the client to enforce a contractual provision which is against public policy.’³

The important point made by the Court upon which the contention of the first applicant is based is that:

‘[79] In my view, the labour broker could in such a case approach either the High Court or the Labour Court for appropriate relief. The fact that the dispute in such an event would be between two parties to a contractual relationship, which is not an employment relationship, would not mean that the Labour Court could not grant appropriate relief to a labour broker if the issue in dispute concerns the employee's rights not to be unfairly dismissed.’⁴

In *Transman v SA Post Office* the Court,⁵ held that it had jurisdiction to entertain a dispute between the labour broker and its client. The dispute in that matter arose from the refusal by the client to provide the labour broker with information to assist it in consulting with the employees regarding

the anticipated retrenchment arising from the cancelation of the labour broker contract by the respondent.

It would appear that the Court in the *Transman* matter assumed jurisdiction even though the dispute was between the labour broker and the client on the basis that the dispute had to do with the protection of the “employees’ interests.” However, the Court dismissed the application on the basis that on the facts, there was no evidence that the employees were aware, supported or endorsed the application. In this respect, the Court held that:

‘If concern for the employees’ interests was the principal, if not the sole reason for this application, the applicant has clearly underplayed their role in the entire dispute. Hence, I am not convinced that this application is motivated by the interests of protecting the employees. There is another interest at play. That is the interest that the applicant has in retaining the commercial

contract with the respondent.’⁶

The issue of jurisdiction in the present matter arises in the context where the facts point towards an alleged breach of contract between the applicant, a labour broker and the respondent its client. Although, the employees are cited as second applicants no case has been made on their behalf. There is, similar to what happened in *Transman’s* matter, no evidence that the employees are aware of, supported and endorsed the application.

The issue, in this matter, involves the determination of whether the provisions of section 198 of the LRA can be interpreted to include protection of commercial rights of parties to a labour broking contract. In such situations, the Court does not have jurisdiction. However, in cases involving employment or labour relations issues as envisaged in section 157 of the LRA, the Court will not hesitate to assume jurisdiction. This is essentially what the two authorities referred to above say. I am in agreement with the views expressed therein.

There is a suggestion that the above authorities are in conflict with the decision of this Court in *Colven Association Border CC v Metal and Energy Industries Bargaining Council and Others*.⁷¹ I do not agree with that proposition. The relevant part of that judgment reads as follows:

‘[17] The desirability of agreements concluded in terms of s 198 of the LRA is matter of policy, falling outside the purview of this court. The policy issues that generally arise in this type of cases concern the role and influence that the client has over the job security of the employee. In general employees are never involved or consulted in formulating the terms and conditions of this type of arrangement. The involvement of unions in representing employees before and after accepting the assignment is almost non-existent, living employees involved in these relationships highly vulnerable in so far as the influence that the client may have on the job security.

[19] In *LAD Brokers (Pty) Ltd v Mandla*, (footnote omitted) the court an equivalent held that even though the person is in a relationship with the contractor the employer remains the labour broker. It therefore means any investigation into the question whether or not there was a dismissal must be directed at the conduct of the labour broker is the employer, in this instance the applicant, and not the client.’⁸

The above deals with the general principle relating to jurisdiction in a labour broker relationship and, as indicated earlier, it does not exclude the exceptions envisaged in the two authorities referred to earlier.

In my view, this court has no jurisdiction to entertain the case of the first applicant for the reasons set out below. In the first instance, the first applicant has not pleaded jurisdiction in its founding affidavit. And secondly, as indicated earlier, the second to further applicants’ are not properly before the Court.

It is common cause that the contract in question is not an employment contract and therefore the LRA does not apply. Whilst the

relationship between the parties is provided for in section 198 of the LRA, it is clear that this is a commercial relationship and the breach which the applicant complains about falls squarely within that purview. It was never the intention of the legislator that contracts of this nature will fall within the jurisdiction of the Labour court. Section 198 of the LRE was intended to protect employees against employers will fail to protect them.

Conclusion

For the above reasons, I find that this Court does not have jurisdiction to entertain this matter. I see no reason in circumstances of this case, why costs should not follow the results.

In the premises, the first applicant's application is dismissed with costs.

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Y Saloojee Instructed by Ayoob Kaka Attorneys

For the Respondent: Advocate G Van der Westhuizen instructed by MacRobert INC

1 [2010] 8 BLLR 852 (LC).

2Ibid at paras 58-61

3Ibid at paras 75-77.

4Ibid at para 79.

5(2005) 26 ILJ 1124 (LC).

6Ibid at para 19.

7(2009) 30 ILJ 24006 (LC).

8Ibid at paras 17 and 19.

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