

SOUTH AFRICA / JUDGMENT

Nieftagodien v Yikusa Building Contractors (Pty) Ltd (PS07/20)

[2024] ZALCPE 1 (12 February 2024)

[2024] ZALCPE 1

COURT

Labour Court Port Elizabeth

BEFORE

M Makhura

CASE / FILE NUMBER

PS07/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not

Reportable

Case

No: PS07/20

In the matter between:

MOGAMAT

NIEFTAGODIEN

Applicant

And

YIKUSASA

BUILDING CONTRACTORS (PTY) LTD

Respondent

Heard:

23, 24, 25 and 26

January 2024

Delivered:

12 February 2024

This

judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 12 February 2024.

JUDGMENT

MAKHURA, J

Introduction

- [1] The applicant lodged a claim in terms of section 77(3) read with section 73A(3) of the Basic Conditions of Employment Act^[1] (BCEA). He seeks payment of arrear salaries in the amount of R300 000.00, which is for the period May 2019 to February 2020. He claims that this amount is due and payable in terms of his contract of employment with the respondent.
- [2] This contract of employment between the applicant and the respondent, so the applicant argued, was transferred from his old employer, Mtawelanga MCC JV (Mtawelanga) to the respondent on 7 November 2018, pursuant to a transfer of business from Mtawelanga to the respondent. In the alternative, he argues that this contract of employment between him and the respondent exists on the basis that when Mtawelanga ceded its rights and obligations in relation to the tender contract or project concluded with the Department of Public Works (DPW) to the respondent, it also ceded all its rights and obligations under the contract of employment. In addition, the applicant seeks an order that the respondent is obliged to honour and maintain the terms of the contract of employment and pay his salary as and when it becomes due.
- [3] In response, the respondent disputed that the applicant was its employee. The respondent argued that it exercised no supervision and control over him and his day to day duties, it did not provide him with the tools of trade, it did not have a position of Clerk of Works (CoW) in its organisational structure and that its responsibility was simply to pay his salary, in accordance with a provision made in the tender contract. The respondent also argued that the applicant was not economically dependent on it because his salary was for all intents and purposes, paid by the DPW.

Material facts and evidence

- [4] The DPW advertised a tender, on behalf of the Department of Basic Education in the Eastern Cape, for the construction of Bethelsdorp Comprehensive School. It is common cause that Mtawelanga, as a successful bidder, was appointed to carry out the work. The DPW and Mtawelanga concluded a tender contract. In line with the tender specifications, this tender contract made provision for the 'employment' of a Clerk of Works in its Bill of Quantities (BoQ).
- [5] On 1 March 2017, the applicant concluded a contract of employment with Mtawelanga. His monthly salary was R30 000.00. He was appointed as a CoW. The period of employment was stipulated to be until practical completion of the current project, repairs and renovations, additions and demolitions of inadequate structures at Bethelsdorp Comprehensive School. Clause 3.4 of the contract of employment provides that:

‘The Appointment of the Clerk of works through the contract is for payment purposes only, the appointed Clerk of works will report to the principal agent.’

- [6] The DPW appointed, as its principal agent, Matrix Urban Designers & Architecture. It is common cause that the applicant was interviewed by officials from the DPW, the principal agent and the contractor (Mtawelanga at the time). The reason he was interviewed by the three parties is said to be that the CoW must be a person who is completely impartial in the execution of his duties. He reported to the principal agent in accordance with his duties and responsibilities.
- [7] The role of the CoW primarily involves ensuring that work is carried out in accordance with the standards, specifications and schedules. Consequently, the applicant’s duties included assisting the architect or principal agent in the review of plans, designs and specifications, an inspection of materials and workmanship and practices of the contractor (the respondent in this case), continuous inspection during construction to ensure adherence to building regulations, specifications and plans, advise the contractor on any deficiencies in the workmanship and submit progress reports to the DPW which may include a report on any significant event on site including any deficiencies observed.
- [8] On 7 November 2018, Mtawelanga, the respondent and the DPW signed an agreement in terms of which Mtawelanga agreed to cede the contract or project to the respondent (the cession agreement). In terms of this cession agreement, the respondent assumed and accepted ‘full responsibility and liability’ for the contract under the ‘same terms, conditions and contracted prices as it was held’ by Mtawelanga.
- [9] The applicant’s case was that by virtue of the cession agreement, there was a transfer of business in terms of section 197 of the LRA from Mtawelanga to the respondent. Alternatively, that his employment contract was transferred from Mtawelanga to the respondent. He relied on the following provisions of the cession agreement:

‘The Transferor and Transferee hereto acknowledge that the prior approval of the DEPARTMENT OF PUBLIC WORKS SARA BAARTMAN REGION is a prerequisite for the legal transfer of rights and obligations under the above quoted contract and this agreement will only be binding and enforceable when the assignee of the DEPARTMENT OF PUBLIC WORKS countersigns the agreement to certify that approval has been granted and thereby ratifies the agreement.’

- [10] Further, that Mtawelanga, in its capacity as the transferor:

‘Hereby cede all the rights and obligations under the above quoted contract to [the respondent] (called the Transferee).’

- [11] The applicant also referred to the provision where the respondent, in its capacity as the transferee:

'Hereby assume and accept full responsibility and liability for the herein mentioned contract under the same terms, conditions and contracted prices as it was held by the aforementioned Transferor.

This agreement together with the bid document, JBCC Series 2000 Edition 4.1 Contract, assignment agreement between the transferor and transferee, addendum to existing JBCC Series 2000 Edition 4.1 attached hereto, constitutes the entire Agreement between the DPW and the Contractor.'

- [12] The applicant further relied on the BoQ. The BoQ made a monetary provision in the provisional sums of R900 000.00 for the employment of a Clerk of Works for the duration of the contract.
- [13] The applicant's evidence was that after the transfer of the contract from Mtawelanga to the respondent, the respondent did not recognise him as its employee. This issue, so the applicant testified, led to non-payment of his salaries for the months of October and November 2018. The issue was later resolved between the respondent and the DPW. Before payment, the applicant signed a 'new employee information' form with the respondent. The form reflected the date of engagement as 1 November 2018. The applicant was then paid his outstanding salaries.
- [14] The applicant also relied on the monthly payslips he received from the respondent, which recorded his date of engagement, the job title, the employee code and remuneration. The payslip further reflected two deductions – tax and Unemployment Insurance Fund (UIF). The respondent's case was that it agreed to facilitate payment of the applicant's salary and that the conclusion of the 'new employee information' form was solely for that purpose.

Legal principles

- [15] Section 213 of the Labour Relations Act[2] (LRA) defines an employee as any person who works for another person and who receives or is entitled to receive any remuneration and any other person who in any manner assists in carrying on or conducting the business of the employer. An independent contractor is expressly excluded as an employee.
- [16] The Labour Court Appeal in State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others[3] set out three primary criteria for consideration when determining the true nature of the relationship between the parties in the context of employment. These are - the employer's right to supervision and control, whether the person claiming to be an employee forms an integral part of the company and the extent to which he or she claims to be economically dependent upon the company.[4]
- [17] Determining the true nature of the relationship enjoins the Court to look at substance over form and to go beyond the terms of the contract in question. As the LAC puts it in SA Broadcasting Corporation v Mckenzie (Mckenzie)[5]:

‘The legal relationship between the parties must be gathered primarily from a construction of the contract which they concluded ...

although the parties’ own perception of their relationship and the manner in which the contract is carried out in practice may, in areas not covered by the strict terms of the contract, assist in determining the relationship ... In seeking to discover the true relationship between the parties, the Court must have regard to the realities of the relationship and not regard itself as bound by what they have chosen to call it...’[6]

[18] Regarding the employer’s right to supervision and control, the LAC said the following in Mckenzie:

‘The employee is subordinate to the will of the employer. He is obliged to obey the lawful commands, orders or instructions of the employer who has the right of supervising and controlling him by prescribing to him what work he has to do as well as the manner in which it has to be done. The independent contractor, however, is notionally on a footing of equality with the employer. He is bound to produce in terms of his contract of work, not by the orders of the employer. He is not under the supervision or control of the employer. Nor is he under any obligation to obey any orders of the employer in regard to the manner in which the work is to be performed. The independent contractor is his own master.’[7]

[19] In Goliath v SA Broadcasting Corporation SOC Ltd and Others[8] (Goliath), this Court, dealing with whether the applicant was an integral part of the organization, held as follows:

‘[44] Goliath had contended that he was an integral part of the station’s organisation. He said he had been at the station for a lengthy 15 years and had become synonymous with the Good Hope FM brand. He had a Good Hope FM email address and Good Hope FM branded clothing. He used SABC’s technical infrastructure to conduct the radio programme, he had to attend strategic planning meetings and signed off his intellectual property rights to SABC. He contended that he was involved in the station’s core business and was subject to SABC’s disciplinary procedures.

...

[46] ... It is hard to imagine how the show Goliath presented could be delivered without a degree of cooperation from all parties involved. To that extent he was an integral part of the programme he presented, but beyond this he was free to pursue other non-competitive commercial interests independently ...’[9]

Evaluation

[20] The question before this Court is whether the applicant was an employee of the respondent. If he was, the next question is whether he has proved his claim for payment of R300 000.00 and for a declaratory order that the respondent is obliged to maintain and honour the terms of the contract of employment. The latter order is of course superfluous because if I find that the applicant was employed by the respondent, he will be entitled to all the rights that any employee is entitled to in terms of the LRA.

[21] The applicant earned R30 000.00 per month, which is above the amount determined by the Minister in terms of section 6(3) of the BCEA[10] Accordingly, the presumption as to who is an employee contained in section 200A(1) of the LRA is not applicable in the present

matter.[11]

The contract of employment

[22] The objective facts show that in terms of the tender contract concluded between the DPW and Mtawelanga, the DPW had made provision in the BoQ under provisional sums for funding the position of CoW. The DPW advertised the position and the interview panel was constituted by officials from the DPW, the contractor (Mtawelanga) and the principal agent. The principal agent acts on behalf of the DPW. After the interviews, the contractor was instructed by the DPW to appoint the successful candidate as a CoW.

[23] The applicant signed a contract of employment with Mtawelanga on 1 March 2017. The terms of the contract included that he would report to the principal agent and that his appointment was for payment purposes only. I cannot think of any alternative interpretation of this provision than what it says – that the applicant was appointed by Mtawelanga solely for payment of salary purposes only. Of course, this Court is not bound by the parties' description of their relationship.

[24] The employment of a CoW by Mtawelanga was a consequence of the tender documents and contract, which made provision in the BoQ for the employment of the CoW. The tender contract was taken over by the respondent with effect from November 2018. The terms and conditions of the cession agreement have been referred to above. There is nothing that deals with the transfer of employees of Mtawelanga or the transfer of the applicant from Mtawelanga to the respondent. The cession agreement only deals with the transfer of the contract or project from Mtawelanga to the respondent.

[25] The applicant's case that the conclusion of the cession agreement amounted to a transfer of the business of or from Mtawelanga to the respondent in terms of section 197 of the LRA has no substance. It falls to be rejected for one simple reason – there is no written agreement concluded in terms of section 197(7) of the LRA.[12]

[26] In any event, the respondent did not take over Mtawelanga's employees nor did it take over its customers and/or any equipment. Therefore, any reading of the cession agreement to suggest that there was a transfer of business in terms of section 197 of the LRA is inexplicable and a fundamental misconception of the provision.

[27] The applicant's alternative argument is that the cession agreement amounted to a transfer of his contract of employment with Mtawelanga dated 1 March 2017 to the respondent. In support of this, the applicant testified that it was his understanding that his contract would be taken over by the respondent. Asked what informed the understanding, he said that the tender contract included the entire package and that the position of a CoW was a requirement for the contract or project. The cession agreement did not make any reference

to the transfer of employees, specifically the applicant. Further, the respondent brought its own personnel to the site.

- [28] The respondent's evidence was that at the commencement of work, the DPW introduced the applicant as the CoW. No discussion ensued between the applicant and the respondent about the terms of his employment. In his evidence, the applicant acknowledged that the respondent disputed that he was its employee. The issue relating to his employment status, so the applicant testified, was only resolved at a later stage between the respondent and the DPW, which culminated in the applicant signing a 'new employee information' form and the respondent paying his salary. However, the applicant does not know how this issue was resolved between the DPW and the respondent. The respondent's evidence was that it agreed to be a platform to pay the applicant's salary, as evinced by the late managing director of the respondent, Pieter Strauss' (Strauss) emails. In his 11 September 2019 email, Strauss wrote to the applicant as follows:

'The amount for the Employment of the Clerk of Works is not recovered through the Contractor's P&G but through the contract. This is Provisional Amount in the contract document ... You are not an employee of Yikusasa. We are merely the platform for payment purposes and act in the contract as far as Provisional Sums are concerned.

Please take this matter further with the Department of Public Works. We further state that the remuneration for the Clerk of Works have not been certified in the last three certificate. Also take cognizance of the current suspension by the contractor from 23 April 2019 due to Non-Payment by the Department of Public Works.'

- [29] I am therefore unable to find that the applicant's contract of employment was transferred to the respondent. Therefore, this means that the applicant failed to prove that he is employed by the respondent and his claim should fail on this basis alone.
- [30] Even if I am wrong and the contract of employment was transferred to the respondent, the applicant agreed with Mtawelanga that the contract of employment signed between them was for payment purposes only. That this may have been an attempt to circumvent the provisions of the LRA is not an issue for determination. Regardless, the fact that the contract of employment was styled to be for payment purposes only is not decisive and dispositive of the matter. This Court has to consider the realities or substance of the relationship between the applicant and the respondent over form.

Right of supervision and control

- [31] The applicant's testimony was that he had an office equipped with furniture on site. This was already provided at the time of the respondent's take-over of the tender contract. He said that he was also given a laptop by Mtawelanga. It was established that he did not have the respondent's email address nor access to the respondent's information and systems on his laptop. The respondent had no control over this laptop. In fact, it became his personal laptop. It remains in his possession to date and the respondent never asked for its return. He

was not provided with a cellular phone. He was not a member of the respondent's medical aid or provident fund. There is no evidence that he was provided with the respondent's policies and that he was bound by such policies.

- [32] The respondent had no supervision and control over the applicant's work. The effect of this is that the respondent was in no position to discipline him for any alleged misconduct, for example, negligence or misrepresentation, nor could the respondent subject him to a poor performance management process if his work was substandard.
- [33] The applicant's witness, Collette de Wit (De Wit), testified that although the applicant did not report to the respondent, he would have applied for leave from the respondent. The applicant testified however that he never took any leave other than the regulated Builders Holiday leave. De Wit is in no position to authoritatively comment on the relationship between the applicant and the respondent. Her evidence was largely speculative.
- [34] The fact that he had a name tag bearing the name of the respondent and was identified as the respondent's employee on site is of no assistance to the enquiry. That he signed a 'new employee information' form, which the respondent maintained was for payment purposes, is equally of no assistance to the enquiry. Further, the phrase used in the BoQ making provision for the 'employment of a Clerk of Works' takes the enquiry no further. Otherwise, this Court will be deviating from the qualitative enquiry and adopting an enquiry focused on form over substance.
- [35] The reason the applicant reported to the principal agent was that he had to be impartial. He worked alongside the respondent's

project manager. Fhumulani Thanyani (Thanyani), the respondent's commercial manager at the time of the cession agreement and the current managing director, testified that the respondent considered the applicant as their 'boss'.

- [36] During arguments, Mr Voultsos for the applicant correctly argued that the enquiry is not whether the respondent had supervision and control over the applicant but rather whether it had the right to supervise and control the applicant. He could not however mention any right of control and supervision that the respondent had over the applicant. The applicant was the eyes and ears of the principal agent. He was not under the respondent's commands, orders or instructions and the respondent had no right to prescribe to him what work he had to do and how to do it. The facts overwhelmingly show that the respondent had no right of supervision and control over the applicant.

Economic dependence

- [37] The respondent has no position of CoW in its structure and was not required to allocate a budget for CoW's salary. The salary of the CoW was not covered as part of the Preliminaries and General (P&G) which covers all site expenses, including payment of the contractor's or respondent's employees. As already mentioned above, the DPW made a monetary provision within the BoQ for the contractor to employ a CoW in the budget of R900 000.00 for the

duration of the contract. This meant that the budget for a CoW was specifically provided for by the DPW in the tender documents. As a result, the DPW would make payment of the CoW's salary through the contractor based on the payment certificate. These payment certificates must first be valuated and certified by the principal agent.

- [38] Based on the above, I am inclined to accept the respondent's argument that the reality is that the applicant was economically dependent on the DPW. Accordingly, the applicant was not economically dependent upon the respondent.

An integral part of the respondent's business

- [39] The nature of the work and the purpose for which the applicant was appointed are important factors to be considered. The applicant argued that he worked exclusively for the respondent and dedicated his time to his job as a CoW. He was there to ensure that the work was carried out in accordance with the specifications, regulations and schedules. The nature of the position required the applicant to be on site. The reality is that the applicant was committed to the project, not the respondent. There is nothing that suggests that the applicant was precluded by the respondent from undertaking any other work.
- [40] The applicant did not form any part of the respondent, and the extent of the relationship between the applicant and the respondent was that of disbursing the applicant's salary. Insofar as the respondent's operations were concerned, the applicant could only advise the respondent on the workmanship. Other than this specific project, the applicant was not involved in any operations of the respondent.
- [41] Further, if the applicant were to be absent from work, I fail to see how this would have had any impact on the respondent carrying out its operations as a contractor.
- [42] The respondent had nothing to do with the applicant's reports to the principal agent and had no right to tell the applicant how and when to do his job. The applicant did not work for nor did he assist in carrying on or conducting the respondent's business. It is difficult to imagine a situation where an 'employee' who takes no commands or instructions or orders from an 'employer' and who produces no work for the employer, could be said to form an integral part of the 'employer'. This is the situation in this case. The applicant forms no part of the respondent.

Conclusion

- [43] Having considered the above, I find that the applicant was not an employee of the respondent. This Court therefore lacks jurisdiction to entertain the applicant's claim of arrear salaries and his claim falls to be dismissed for want of jurisdiction. Having decided that he was not an employee, I am not required to pronounce whether the applicant was an independent contract nor am I required to determine whether he was employed by another person.

[44] Both parties argued that as this is a contractual dispute, costs must follow the result. This Court retains the discretion to award costs. Considering the nature of the issues raised in this matter, I have decided to exercise my discretion against awarding costs.

[45] In the premises, I make the following order:

Order

1. The applicant's referral is dismissed for lack of jurisdiction.
2. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv L Voultos

Instructed by: Brown, Braude & Vlok Inc.

For the Respondent: Mr J Hattingh of Strata-G Labour Solutions

[1] Act 75 of 1997.

[2] Act 66 of 1995, as amended.

[3]

[2008] ZALAC 1; (2008) 29 ILJ 2234 (LAC).

[4] Ibid at para 12.

[5] (1999) 20 ILJ 585 (LAC); [1998] ZALAC 13 at para 10.

[6] Ibid para 10; see also Denel (Pty) Ltd v Gerber

(2005) 26 ILJ 1256 (LAC) at para 93.

[7] Mckenzie at para 9.

[8]

[2022] ZALCCT 10; (2023) 44 ILJ 185 (LC).

[9] Ibid at paras 44 and 46.

[10] The current threshold, effective from 1 March 2023, is R241 110.59 per annum. Government Notice No 48092 of 2023.

[11] See section 200A(2) of the LRA.

[12] Section 197(7) of the LRA provides: ‘(7) The old employer must – (a) agree with the new employer to a valuation as at the date of transfer of - (i) the leave pay accrued to the transferred employees of the old employer; (ii) the severance pay that would have been payable to the transferred employees of the old employer in the event of a dismissal by reason of the employer’s operational requirements; and (iii) any other payments that have accrued to the transferred employees but have not been paid to employees of the old employer; (b) conclude a written agreement that specifies – (i) which employer is liable for paying any amount referred to in paragraph (a), and in the case of the apportionment of liability between them, the terms of that apportionment; and (ii) what provision has been made for any payment contemplated in paragraph (a) if any employee becomes entitled to receive a payment; (c) disclose the terms of the agreement contemplated in paragraph (b) to each employee who after the transfer becomes employed by the new employer; and (d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph (a).’

[12] Section 197(7) of the LRA provides:

‘(7) The old employer must –

(a) agree with the new employer to a valuation as at the date of transfer of -

(i) the leave pay accrued to the transferred employees of the old employer;

(ii) the severance pay that would have been payable to the transferred employees of the old employer in the event of a dismissal by reason of the employer’s operational requirements; and

(iii) any other payments that have accrued to the transferred employees but have not been paid to employees of the old employer;

(b) conclude a written agreement that specifies –

(i) which employer is liable for paying any amount referred to in paragraph (a), and in the case of the apportionment of liability between them, the terms of that apportionment; and

(ii) what provision has been made for any payment contemplated in paragraph (a) if any employee becomes entitled to receive a payment;

(c) disclose the terms of the agreement contemplated in paragraph (b) to each employee who after the transfer becomes employed by the new employer; and

(d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph (a).’

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Prepared on 11 October 2026 · Esheria