

SOUTH AFRICA / JUDGMENT

NUMSA obo Ngoepe and Others v Capital Outsourcing Group (Pty) Ltd and Another (J2406/16) [2016] ZALCJHB 521 (5 December 2016) [2016] ZALCJHB 521

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J2406/16

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: J 2406/16

In the matter between: NUMSA OBO F NGOEPE & 53 OTHERS and CAPITAL OUTSOURCING GROUP (PTY) LTD UNITRANS SUPPLY CHAIN SOLUTIONS (PTY) LTD Applicant First Respondent
Second Respondent

Heard: 1 December 2016

Judgment:

5 December 2016

VAN NIEKERK J

- [1] This matter has a sorry history. It has been on-and-off the trial and motion court rolls since November 2013, almost exactly 3 years ago. The dispute between the parties, appears to have commenced by way of action. What is before the court is an opposed motion in which the applicant seeks a declaratory order that each of the individual applicants is an employee of the first respondent and that the first respondent is liable to each of the individual applicants for the payment of remuneration from November 2011, the date on which the applicant avers that the individual applicants were employed.

- [2] The factual background to the claim is not in dispute. The individual applicants were employed in Pretoria West at the Acelor Mittal site. Their employer was a temporary employment service, Xore. After what appears to be in dispute between the individual applicants and their employer, a settlement agreement was signed. It would appear thereafter that Xore was not in a position to pay the amounts owing in terms of the agreement and it advised Unitrans, the second respondent, of this fact. The contract between the second respondent and Xore was terminated with effect from 1 November 2011. It would appear that Xore was not in a position to pay the applicants wages, despite the fact that the second respondent had paid the required contractual sum to Xore in respect of the employees' services. At about the same time, the second respondent then concluded an agreement with the first respondent in terms of which the first respondent was to assign employees to work on the site.
- [3] The first respondent's version is that the second respondent requested its assistance as it felt an obligation to ensure that the individual applicants were paid. The nature of the agreement was that the first respondent would make its payroll available to pay the individual applicants, since the first respondent had in place a payroll which was suitable for making ad hoc payments. The second respondent duly made available funds to the first respondent, which in turn paid the money to the individual applicants. Each of the individual applicants was furnished with a payslip, issued by the first respondent.
- [4] At some stage during November 2011, the applicants referred an unfair dismissal dispute, against Xore, to the bargaining council. The certificate of outcome was issued on 8 December 2011. At that point, the applicants inverted that the individual applicants were employees of Xore, and that their employment contracts had been terminated unfairly by Xore. It was never the applicant's case at that stage that the first respondent was the employer of the individual employees.
- [5] Some 12 months after Xore's contract was terminated, the present proceedings were initiated in which the applicants claimed,

for the first time, that they had been employed by the first respondent and sought a declaratory order to that effect.

- [6] In essence, the case made by the applicants is that on 2 November 2011, the individual applicants presented themselves at the Unitrans site for employment with the first respondent. They aver that they commenced employment with the first respondent at which time they were required to furnish the first respondent with personal information, including bank accounts. They aver further that in November 2011, the first respondent paid salaries to each of the individual applicants into their bank accounts and issued a payslip in respect of each applicant. A single payslip is annexed to the founding affidavit. The individual applicants state that they tendered their services at the Unitrans site but that they were not given any duties and received no further salary payments.

[7] The legal basis of the applicant's claim is apparent from the replying affidavit in which the case is made that the first

respondent employed the individual applicants by virtue of the payslips issued to them, alternatively, and to the extent that the

first respondent represented to the individual applicants in the payslips that they are employees of the first respondent, the

applicants hold the respondent to that representation and submit that the first respondent should be estopped from retracting it.

[8] The first respondent denies having employed the individual applicants. It admits that payslips were issued to the individual

applicants, but only on the basis of the arrangement agreed with the second respondent, in effect to make available its payroll to pay the individual applicants monies that the second respondent had elected to make available consequent on the default by the employer of the individual applicants, Xore.

[9] The facts on which the applicants rely include a letter addressed to Xore staff by the second respondent on 1 November 2011. The letter states the following:

Unitrans have been attempting to liaise with XORE Services throughout the day, however, we have had little success in trying to resolve the issue.

We have, therefore, decided to bring in a new labour broking company, Capital Outsourcing Group, with immediate effect.

All XORE staff are requested to bring their IDs and banking details to work tomorrow (2 November 2012). The team from Capital will be on site and you will be able to sign a new contract of employment with them. As they will need some time to add you to their peril, they will provide each employee with a R 500.00 advance we thank you for your understanding and look forward to keeping you on site under the new company.

[10] The payroll on which the applicants rely to advance the contention of an employment relationship between the individual applicants and the first respondent records a payment made on 31 October 2012 and deductions made in respect of unemployment insurance, PAYE and the like.

[11] The essence of this dispute is the existence or otherwise of an employment contract between the individual applicants and the first respondent. Insofar as the applicants sought to rely on the existence of an employment relationship to sustain the claim, this is not sufficient. The applicant specifically brought their claim in terms of s77 (3) of the Basic Conditions of Employment Act, a provision which extends concurrent jurisdiction to this court, with the civil courts, in disputes relating to employment contracts. To succeed, it is incumbent on the applicants to establish the existence of a contract, a tender of services by

the individual applicants in terms of that contract, and a refusal by the first respondent to pay remuneration despite that tender.

- [12] Turning then to the existence of an employment contract, as I have indicated, the respondents notes that the letter dated 1 November 2011 on which the applicants rely was a letter sent to the individual applicants by Unitrans. That company was never an employer of the applicants, nor was it an agent of the first respondent. In the circumstances, the first respondent contends that there was no contract of employment concluded between any of the individual applicants and the first respondent. Further, the first respondent refers to correspondence addressed by NUMSA to Unitrans on 3 November 2011, the date after the individual applicants allege that they became employees of the first respondent, which set out seven complaints by NUMSA. The letter states the following:

On the 2 November 2011 employees arrived with the intention to the Capital Outsourcing Group and unfortunately no one attended to them instead management decided to engage the services of a selected few and other people whom they picked from a group of unemployed people in the street.... Employees are still prepared to sign a contract of employment with capital outsourcing and will be at the company premises at 10:00 tomorrow.

- [13] In my view, on their own version, the applicants have failed to establish the existence of a contract of employment between any of the individual applicants and the first respondent. In so far as the applicants rely on the letter addressed by Unitrans to the individual respondents on 1 November 2011, I fail to appreciate on what basis this letter binds the first respondent. The first respondent had not appointed Unitrans as its agent with a mandate to conclude employment contracts with the individual applicants. In any event, the letter is no more than an invitation to the individual applicants to appear at the site when offers of employment would be made. In the circumstances, the terms of the letter itself could never have created a contract of employment between the individual applicants of the first respondent. Further, what the correspondence between Unitrans and NUMSA on 2 November 2011 confirms is that in NUMSA's view, there was no employment contract between the first respondent and the individual applicants – that was the very essence of the union's complaint.
- [14] Insofar as the payslips are concerned, it is instructive to note that these are dated 31 October 2011. The applicant's case is that they were employed by the first respondent with effect from 1 November 2011. The existence of a payslip which predates the date of engagement flies in the face of the case that the applicants seek to make. It is far more probable that the payslips were issued for the purpose alluded to by the first respondent i.e. that the first respondent's payroll was utilised to make payments of monies paid to the individual applicants by Unitrans.
- [15] In these circumstances, I fail to appreciate on what basis it can be said that a contract of employment came into existence as between any of the individual applicants and the first respondent. It follows that the application ought to be dismissed.

[16] In so far as costs are concerned, the court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. The first respondent charitably did not pursue the issue of costs, and left the matter in the hands of the court. In my view, the requirements of the law and fairness referred to in s 162 are best satisfied by there being no order as to costs.

I make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES:

For the Applicant: Mr Xolisa Ngako, Ruth Edmonds Attorneys

For the Respondent: Mr G M Kirby-Hirst, Macgregor Erasmus Attorneys

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