

SOUTH AFRICA / JUDGMENT

Phaka and Others v Bracks and Others (JR1171/11) [2013] ZALCJHB 91 (29 May 2013)

[2013] ZALCJHB 91

COURT

Labour Court Johannesburg

BEFORE

Bleazard

CASE / FILE NUMBER

JR1171/11

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no. JR1171/11

In the matter between:

PHAKA AND 19 OTHERSApplicants

and

COMMISSIONER RONNIE BRACKSFirst Respondent

NATIONAL BARGAINING COUNCIL FOR ROAD

FREIGHT INDUSTRY (NBCRFI)Second Respondent

UTI SOUTH AFRICA (PTY) LIMITED

(MOUNTIES DIVISION)Third Respondent

Heard: 19 December 2012

Delivered: 29 May 2013

BLEAZARD, AJ

- [1] In this matter, the applicants seek to review the first respondent's Arbitration Award issued under the auspices of the second respondent under consolidated case numbers D1207 and D1219/JHB/9259/05. Secondly, they seek an Order 'Substituting the first respondent's award with an Order that the Applicants deemed to be employees of the Third Respondent, termination was unfair with the Order of reinstatement'¹.
- [2] The first issue is to identify the "applicants". The case heading referring to "Phaka & 19 Others" is, in fact, a misnomer. In terms of the applicant's Founding Affidavit, the applicants before the Court are, in fact, nine

applicants and they are Sidney Vusimuzi Tukula; Lazarus Ditshego; June Maximillan Padi; Benjamin Sipho Maloma; Enock Maredi; Samuel

Hlohlolongwane; Patrick Mathopa Phaka; Joseph Mokgalo and Patrick Selogane Magampa. 2 Advocate Bruce Leech SC, who appeared on behalf of the third respondent, raised the issue that those of the applicants in this matter who referred a dispute concerning an unfair labour practice could never succeed in a claim for reinstatement as set out in paragraph 2 of the Notice of Motion. He says that in the absence of a referral of a dispute concerning unfair dismissal, the first respondent, and by extension this Court, does not have jurisdiction to reinstate those applicants. For the reasons set out below this does not have to be determined.

- [3] As I understand it, this issue comes to this Honourable Court essentially as a jurisdictional dispute and this Court is required to make a determination whether, objectively speaking, the facts which give the second respondent jurisdiction to entertain the dispute existed. If such facts do exist, the second respondent has jurisdiction to hear the matter and, if not, the second respondent does not have jurisdiction to consider the matter. 3 The issue of the reasonableness of the Award as set out in the Sidumo⁴ judgment raised by both parties does not appear, therefore, to be the correct test.
- [4] Essentially the matter came before the first respondent under the auspices of the second respondent. After a long hearing the second respondent made a finding that the applicants were independent contractors and dismissed the case against the respondent.
- [5] Before proceeding with the matter I must at the outset make the point that the record in this matter that was presented by the parties is far from satisfactory. Unfortunately, due to the voluminous nature of the record which was filed and due to the fact that this matter came to me in my capacity as an Acting Judge, I had not read the complete record at the time when the matter was argued in December 2012. It now appears to me that the record that has been provided by the parties is incomplete, is illegible in some instances, and parts of the witnesses' evidence is missing. Nevertheless, I have taken the view that there is sufficient on record to deal with the fundamental jurisdictional question as to whether the applicants were employees or not.

[6] At the centre of the dispute is whether a written contract that each of the applicants concluded with the third respondent constituted a contract of an independent contractor or an employee. Allied to this is whether, notwithstanding the express provisions of the contract, the applicants were nevertheless employees by virtue of the presumption included in Section 200A of the Labour Relations Act.

[7] The contract is lengthy but there were certain provisions which were referred to by Mr Khoza, who appeared on behalf of the applicants in this Court, which he regarded as indicative of the fact that the applicants were not independent contractors but were employees.

[8] Of particular concern to Mr Khoza were the provisions of clauses 4.1, 4.2, 10.1 and 14 of the contract. These clauses read as follows:

‘4.1. The Contractor shall ensure that collections and deliveries are at all times effected according to the Standard Operating Requirements of UTi Mounties Division in conjunction with the requirements of the relevant route structures in Annexure A. 5

4.2. The Standard Operating Requirements of UTi Mounties Division may be amended from time to time in UTi Mounties Division’ sole discretion. The Contractor undertakes to comply with such amendments. 6

10.1. The authority of the Contractor in terms of this agreement shall be limited to the delivery and collecting of goods to and from the customers of UTi Mounties Division within the areas stipulated in this agreement. 7

14. Participation in contractor assistance program

14.1. It is a condition of this agreement that the Contractor participate in UTi Mounties Division’ Contractor Assistance Program.

14.2.1. The Standard Operating Requirements will be issued by, and maintained by, the Contractor Assistance Program. 8

[9] The other issue which was pertinently raised by Mr Khoza is the effect of Section 200A of the Labour Relations Act. He also referred to Section 83A of The Basic Conditions of Employment Act which contains the same provisions.[10] Section 200A of the Labour Relations Act states as following:

‘200A Presumption as to who is an employee

(1) Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

(a) The matter in which the person works is subject to the control or direction of another person;

- (b) The persons hours of work are subject to the control and direction of another person;
 - (c) In the case of a person who works for an organisation, the person forms part of that organization, The person who worked for that other person for an average of at least 40 hours per month over the last 3 months;
 - (d) The person is economically dependent on the other person for whom he or she works or renders services;
 - (e) The person is provided with tools of trade or work equipment by the other person; or
 - (f) The person only works for or renders services to one person.'
- [11] The presumption referred to above does not apply to persons who earn in excess of an amount determined by the Minister of Labour in terms of Section 6(3) of The Basic Conditions of Employment Act.
- [12] As I understand the position in respect of the applicants in this matter, it was conceded that they fall within the parameters of Section 200A of the Labour Relations Act.
- [13] In this regard the applicants' representative referred to the clauses in the contract which has been set out above and raised, in particular, the hours of work that the applicants were required to work and that those were similar of the employees of the third respondent, that the applicants worked for the third respondent more than 45 hours per week, that the applicants were economically dependent on the third respondent and that the third respondent assisted and provided the applicants with the necessary tools of trade or work equipment. Much of the evidence led before the first respondent by each of the individual applicants canvassed these issues.
- [14] I do not intend for the purposes of this Judgment to repeat the evidence of the witnesses at the Arbitration proceedings. Not only is the transcript filed of Record, but the first respondent has in his Award set out the evidence in some detail. I do not believe that his record of such evidence is in dispute, it is the legal consequences which flow from such evidence that are an issue.
- [15] In the matter of *Niselow v Liberty Life Association of Africa Limited*⁹ , Streicher JA, stated: 'It was not contended that the written agreement between the parties contained a simulated transaction, that it had been amended or that it was vague or ambiguous. The legal relationship between the parties must therefore be gathered from the terms of the written agreement (see *Smit* at 64B).'
- [16] In *SA Broadcasting Corporation v McKenzie* 10 E-H, Myburgh JP, as he then was, stated the following :

‘The legal relationship between the parties must be gathered primarily from a construction of the contract which they concluded (Smit v Workmen’s Compensation Commissioner at 64B; Liberty Life Association of Africa Ltd v Niselow at 683D-E, ‘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’ (Borcherds v CW Pierce & J Steward t/a Lubrite Distributors at 1277H-I). 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 (Goldberg v Durban City Council 1970

(3) SA 325 (N) at 331B-C). As Brassey ‘The Nature of Employment’ at 921 points out, the label is of no assistance if it was chosen to disguise the real relationship between the parties, but ‘but when they are bona fide it surely sheds light on what was intended’.

[17] It is perhaps worthwhile to set out what was said in the seminal decision of Smit v Workmen’s Compensation Commission 11:

‘It is convenient at this stage to recapitulate some of the important legal characteristics of the contract of service (*locatio conductio operarum*) and the contract of work (*locatio conductio operis*):

The object of the contract of service is the rendering of personal services by the employee (*locator operarum*) to the employer (*conductor operarum*). The services or the labour as such is the object of the contract.

1. The object of the contract of work is the performance of certain specified work or the production of a certain specified result. It is the product or the result of the labour which is the object of the contract.
2. According to a contract of service the employee (*locator operarum*) is at the beck and call of the employer (*conductor operarum*) to render his personal services at the behest of the latter.

By way of contrast the *conductor operis* stands in a more independent position vis-à-vis the *locator operis*. The former is not obliged to perform the work himself or product the result himself (unless otherwise agreed upon). He may accordingly avail himself of the labour or services of other workmen as assistants or employees to perform the work or to assist him in the performance thereof.

3. Services to be rendered in terms of a contract of service are at the disposal of the employer who may in his own discretion decide whether or not he wants to have them rendered.

The conductor operis is bound to perform a certain specified work or produce a certain specified result within the time fixed by the contract of work or within reasonable time where no time has been specified.

4. The employee is in terms of the contract of service 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 conductor operis, however, is on a footing of equality with the locator operis. The former is bound by his contract of work, not by the orders of the latter. He is not under the supervision or control of the locator operis. Nor is he under any obligation to obey any orders of locator operis in regard to the manner in which the work is to be performed. The conductor operis is his own master being in a position of independence vis-à-vis the locator operis. The work has normally to be completed subject to the approval of a third party or the locator operis.

5. A contract of service is terminated by the death of the employee whereas the death of the parties to a contract of work does not necessarily terminate it' 12

[18] I shall deal with each of the issues raised by Mr Khoza which he says indicate a contract of employment rather than an independent contractor. First of all, the issue of the hours of work that he states were "controlled" by the third respondent. The third respondent's evidence was that the times for the collection of the documentation from the bank and the delivery thereof was determined not by the third respondent but by its customers with whom the third respondent contracted. Being a courier company transporting sensitive and valuable financial documents for financial institutions, the third respondent had to comply with the requirements of its customers and accordingly anyone who was to perform on any of the routes had to comply with that time schedule. As the applicants had been employees of the third respondent they were aware what was involved and the concept of the routes which were determined by the customers and the delivery times which were mandatory. The applicants contended that after they signed the contract with the third respondent the system (i.e. of the times they were required to work and the routes) was unchanged from when they had admittedly been employees of the third respondent. This is correct. It must be borne in mind, however, that a number of the routes which were required to be undertaken were not performed directly by the applicants after the contracts were signed, but by employees employed by the applicants. Those drivers, it was common cause, were not employees of the third respondent but were employees of the particular applicant. Those employees were not under the control of the third respondent but under the control of their employer, namely the specific applicant.

[19] At paragraph 17 of his Award the first respondent deals with this issue as follows :

'In addition the majority of the Applicants were ex-employees and knew exactly how the business operated. In fact they stated that they took over the same routes that they had previously operated on. In addition each and every contract signed had a route schedule attached to it. I am

therefore surprised that the evidence regarding the routes is now being used with the intention of supporting their claim that the company controlled them, when they knew that the routes formed the standard operating requirements of the contract. I am not at all convinced that the route schedule supports the contention that the Applicants were under control.’ 13 14

[20] A further issue raised by Mr Khoza was that the applicants were economically dependent upon the third respondent.

[21] It is true that by virtue of the time that the applicants spent on the contract which they had concluded with the third respondent, there was very little time for them to engage in other contracts. But what is of significance to me in regard thereto is that not only did the individual applicants apply for renewal of contracts (the contracts were for a period of 2 years) but they, themselves, employed drivers on their behalf to operate on routes of the third respondent. Accordingly, the contracts enabled the applicants to expand their economic power by obtaining another vehicle or vehicles and engaging the services of their own employee or employees. From what I can gather, there was nothing to prevent one of the applicants from giving up one of the routes undertaken by his employee to engage in other economic activity on behalf of that applicant. “Economic dependence” accordingly, does not of its own translate into an employment contract.

[22] A further issue raised by Mr Khoza was that of the procurement by the third respondent of motor vehicles on behalf of the applicants, and that this had to be done in accordance with the Contractor Assistance Program referred to above, meant that Section 200A(f) came into play. Indeed, the procurement of motor vehicles for the applicants appears to be in accordance with the Draft B-BBEE Charter – Road Freight Transport, Logistics and Allied Services for Reward Industry issued under Government Notice 1162 of 2009. That document is filed of record and is at pages 147 to 182 of Bundle C1 of the Record¹⁵. One of the issues raised under that charter is that the “owner driver” must obtain “full ownership of the vehicle at the end of the period”. It would have been a vastly different matter, in my view, if the third respondent had claimed the ownership of the vehicles in

question. It was common cause that although the type of vehicle was prescribed, ownership thereof vested in the applicants (or, in most cases, close corporations of which they were the members and hence the beneficiaries).

[23] A further issue which was raised repeatedly in the evidence was whether the applicants were given copies of their contracts at the time that they concluded those contracts and whether they were given an opportunity to seek advice on those contracts. There was some uncertainty about this. However, those contracts were for fixed periods of two years and new contracts were concluded on a number of occasions in the same terms. There is no doubt from the voluminous documents which have been submitted in this matter that the applicants acted in accordance with those contracts and their subsequent contracts and arranged their affairs in accordance therewith. It is, in my view, highly unlikely that they did not have access to and copies of the contracts.

- [24] The third respondent raised a number of issues in support of its contentions that the applicants were not employees but contractors. First of all, the contract itself which clearly stipulates that the contract is not an employment contract and is an independent contractor contract. In this regard the applicants had previously been employees of the third respondent and when they were invited to participate in the owner-driver scheme must have understood the implications of that. In addition thereto, the contract clearly makes no provision for leave, sick leave or the like which would be part of the contract of employment.
- [25] The third respondent also indicated that the ability of the applicants to employ their own employees to service routes militates against an employment contract. The applicants issued invoices in accordance with their contracts and refer to their “fee” for services rendered for the particular month. Also, they received a reimbursive amount per kilometer for distance travelled which was in accordance with the contract and would not have occurred in an employment environment.
- [26] The applicants, in most cases, renewed their contracts. Those contracts were fixed term contracts of two years.
- [27] In all the instances (except in respect of one Mr Padi where the evidence is not clear) the applicants contracted through a close corporation of which they were the members.
- [28] At no stage during the periods of the contracts did the applicants seek to contend that they were employees or seek to return to the third respondent as employees of the third respondent.
- [29] In the decision of *Denel (Pty) Ltd v Gerber Zondo JP* (as he then was) formulated the issue of jurisdiction on the following basis:
- ‘[19] When a court or other tribunal is called upon to decide whether a person is another’s employee or not, it is enjoined to determine the true and real position. Accordingly, it ought not to decide such a matter exclusively on the basis of what the parties have chosen to say in their agreement for it might be convenient to both parties to leave out of the agreement some important and material matter or not to reflect the true position.
- [20] If a court or other tribunal were to be precluded from looking at matters outside of the parties’ agreement, there would be a serious danger that it could be precluded from determining the true position or the true relationship between the parties and end up making a finding that the parties wish it to make as to the position when in fact the true position is different. That cannot, in my view, be allowed in a case where the duty of the court or tribunal is to determine that which is objectively the position.’ 16

- [34] In the circumstances, I am of the view that the contracts of the applicants viewed holistically do not constitute contracts of employment but contracts as independent contractors. I am also satisfied that although there are factors present which create the presumption as provided for in Section 200A, the third respondent has rebutted the presumption for the reasons which have been enumerated above.
- [35] Consequently, I do not believe there is a basis to review the decision to which the first respondent came to in his Award and that the application of the applicants is dismissed.
- [36] In his Heads of Argument Bruce Leech SC, who appeared on behalf of the third respondent indicated that the matter was of considerable importance to the parties and, even if I was to find in the favour of the third respondent, the third respondent did not seek costs against the applicants.
- [37] Accordingly, I make the following order.

The Application of the applicants to review the Award of the first respondent under the auspices of the second respondent under consolidated case numbers D1207 and D1219/JHB/9259/05 is dismissed;

There is no order as to costs.

Bleazard, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: R Khoza

Instructed by: Retail & Allied Workers Union

For the third Respondent: B Leech, SC

Instructed by: Wright, Rose-Innes Inc

1See page 2 of Notice of Motion at para 2

2See page 2 of Founding Affidavit at para 3

3South Africa Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others [2008] 29 ILJ 2218 (LAC) at para 41.

4(2007) 28 ILJ 2405 (CC).

5See page 187 of the Bundle

6See page 188 of the Bundle

7See page 190 of the Bundle

8See page 191 of the Bundle

91998

(4) S 163 (SCA) at 166

10(1999) 20 ILJ 585 (LAC) at para.10.

11 1979

(1) SA 51 AD at 61 A-H :

12 1979

(1) SA 51 AD at 61 A-H

13See Page 38 of the Award para 17

14 1979

(1) SA 51 AD supra at 61 B-D

15See Pages 147 to 182 of Bundle C1 of the Record

16(2005) 26 ILJ 1256 (LAC)

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