

SOUTH AFRICA / JUDGMENT

Sosti Construction Projects (Pty) Limited v Commission for Conciliation Mediation And Arbitration and Others (JR 1616/13) [2015] ZALCJHB 74 (3 March 2015)

[2015] ZALCJHB 74

COURT

Labour Court Johannesburg

BEFORE

Malan

CASE / FILE NUMBER

JR 1616/13

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REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case Number: JR 1616/13

DATE: 03 MARCH 2015

Not Reportable

In the matter between:

SOSTI CONSTRUCTION PROJECTS (PTY) LIMITED.....APPLICANT

And

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION.....FIRST RESPONDENT

COMMISIONER P MBATSANA.....SECOND RESPONDENT

JACQUES PLAISIER AND 3 OTHERS.....THIRD AND FURTHER RESPONDENTS

Heard: 19 December 2014

Delivered: 03 March 2015

MALAN AJ

Introduction

1. This is an application in terms of section 145 of the Labour Relations Act in which the Applicant seeks to have the arbitration award made by the Second Respondent on 22 July 2013 under case number EATW 4643/13 (“the arbitration award”) reviewed and set aside.
2. In terms of the arbitration award the Second Respondent held that the Third and Further Respondents were dismissed by the Applicant and that their dismissal was both substantively and procedurally unfair.
3. The Applicant was ordered to pay compensation to each of the Third and Further Respondents equivalent to 4 (four) month’s salary. No order was made in relation to costs.

Summary of background facts

4. It appears from the papers that the deponent to the Founding Affidavit, who is also the founder and owner of the Applicant, Mr Soli Nkuna (“Mr Nkuna”), and the Third Respondent, Mr Jacques Plaisier (“Mr Plaisier”) commenced a business relationship some time in 2008.
5. Mr Plaisier at the time was at the time employed by Nokia Siemens Network and to the extent that the Applicant also performed work for Nokia Siemens Network there was a conflict of interest which necessitated the adoption of the rather dubious position that Mr Plaisier was considered a “sleeping partner” in the Applicant.
6. For purposes of the review application the Third Respondent is Mr Jacques Plaisier but the “Further Respondents” are not individually identified. Based on the content of the arbitration award it is apparent that the “Further Respondents” (and therefore effectively the Fourth, Fifth and Sixth Respondents respectively) are Cornelius Plaisier, Cecilia Plaisier and Corne Plaisier.
7. It is apparent that the Third and Further Respondents are all related and are described as one family.
8. It is furthermore apparent from the record of the evidence lead at the arbitration proceedings (“the record”) that it is uncontentioned that the Third and Further Respondents all for a period of time performed work for and received payments from the Applicant.
9. It furthermore appears that the relationship between the Applicant and the Third and Further Respondents terminated on some basis in March of 2013.

The Arbitration proceedings

10. It is apparent from the record that the Third and Further Respondents all gave direct oral evidence at the arbitration proceedings.
11. The Applicant was represented at the arbitration proceedings by Mr Saintjay Manyasha (“Mr Manyasha”) who identified himself in the record as the HR Manager for the company.

12. Mr Manyasha gave evidence in the arbitration proceedings but conceded under cross examination that he had joined the Applicant only in April 2013. It follows logically that Mr Manyasha did not have direct knowledge of the functioning of the Applicant prior to that point and any versions that he put to witnesses or that he testified to in relation to events at the Applicant prior to his appointment must be considered hearsay evidence. Notably Mr Nkuna did not give evidence in the arbitration proceedings.
13. The Third and Further Respondents all gave evidence to the effect that they each had a specific job description and reporting lines and earned monthly remuneration for working for the Applicant.
14. The thrust of the Applicant's case at arbitration, as it appears now to be in the review proceedings, is that the Third and Further Respondents were not employed by the Applicant but were in effect beneficiaries of a different type of legal relationship. The basis of this contention appears to be that the initial relationship between Mr Nkuna and the Third Respondent was not an employment relationship and that the Fourth to Further Respondents in some instances acted in ways which suggested a degree of independence. It is also claimed in the founding affidavit that a settlement agreement was entered into when the Third Respondent left the Applicant's service but no evidence in this regard was placed before the First Respondent.
15. The manner of termination of the relationship between the Third and Further Respondents and the Applicant was described in the arbitration proceedings as having essentially constituted a termination of payments to the Third and Further Respondents combined by a refusal by Mr Nkuna to further contact or liaise with them at all. Although reference was made to this issue in argument before this Court, with the apparent intent of persuading the Court that Mr Nkuna's actions may not in terms have constituted a dismissal, the issue only attains relevance in the event that the Court finds that the arbitrator had correctly held that the Third and Further Respondents were employed by the Applicant.

The basis of the Review application

16. Insofar as the primary criticism of the arbitrator's award in this instance is in effect that he misconstrued his own jurisdiction to hear the matter by concluding that the Third and Further Respondents were employees of the Applicant the review test in relation to a rational decision maker as formulated by the Supreme Court of Appeal in the matter of *Herhold v Nedbank Limited* (congress of SA Trade Unions as amicus curiae) (2013) ILJ 2795 (SCA) and the Labour Appeal Court in the subsequent judgment in the matter of *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* (2014) 35 ILJ 943 (LAC) does not apply in the

circumstances in relation to this main ground of review.

17. Given that the Second Respondent is not entitled to expand his own jurisdiction to any extent the first question before the Court is crisply whether he had correctly held, based on the evidence before him, that the Third and Further Respondents were employees and that he in the circumstances had jurisdiction to entertain their claim.
18. If the Second Respondent was correct in holding that, based on the evidence before him, the Third and Further Respondents were employees of the Applicant the further question that then logically arises is whether a dismissal occurred.
19. There is nothing before the Court on the papers that suggests that, in the event that the Commissioner is correct in his assessment that an employment relationship exists and that a dismissal occurred his findings in relation to the issue of the fairness of such dismissal is open to challenge. It appears to be factually uncontentious that no pre dismissal procedure was followed and no case has been put forward to suggest that a fair reason for such dismissal existed.

The definition of an employment relationship

20. The Labour Relations Act in the definitions contained in section 213 defines an employee as follows:

“‘employee’ means-

- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer,

and 'employed' and 'employment' have meanings corresponding to that of 'employee';”

21. The aspect of the definition provided in this regard that has over time provided an ongoing source of debate, and which may have relevance to this matter, is the distinction to be drawn between independent contracting and employment. The distinction arises from the common law distinction between the *locatio conductio operis* (a contract to perform work) and the *locatio conductio operarum* (a contract of employment) and may at first blush appear deceptively simple. In basic terms the former type of agreement is a contract to provide specified work whilst the latter places the productive potential of an individual at the beck and call of an employer. In practice it is however often much harder to draw hard and fast distinctions and, in situations where characteristics of both type of relationship are present in a single relationship the “dominant impression” approach is probably the most practical approach to follow to arrive at a conclusion regarding the true nature of the relationship. The dominant impression approach requires consideration of a range of characteristics of the relationship under scrutiny to determine if the “dominant impression” is that of employment or independent contracting.

22. Various characteristics that are typical of the contracting or employment relationship have been identified by our courts over time and have been absorbed into the presumptions which are now found at section 83A of the Basic Conditions of Employment Act and section 200A of the Labour Relations Act. By a somewhat peculiar application of legislative logic the presumptions do not apply to employees who earn above the earnings threshold established in terms of section 6(3) of the Basic Conditions of Employment Act. The presumptions none the less represent a useful summary of the characteristics which our courts have generally accorded to employment relationships. For purposes of employing the “dominant impression” approach the presumptions, whether directly applicable to the specific relationship under scrutiny or not, therefore represent an extremely useful point of reference.

23. Section 83A (1) and (2) of the Basic Conditions of Employment reads as follows:

“83A Presumption as to who is employee

- (1) A person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present:
 - (a) The manner in which the person works is subject to the control or direction of another person;
 - (b) the person's hours of work are subject to the control or direction of another person;
 - (c) in the case of a person who works for an organisation, the person is a part of that organisation;
 - (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
 - (e) the person is economically dependent on the other person for whom that person works or renders services;
 - (f) the person is provided with tools of trade or work equipment by the other person; or
 - (g) the person only works for or renders services to one person.
- (2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6 (3).”

The meaning of dismissal

- 24. Dismissal at common law constitutes a unilateral act by which an employer terminates an employment relationship.
- 25. The Labour Relations Act in section 213 thereof defines dismissal in section 186 as follows:

“186 Meaning of dismissal and unfair labour practice

(1) 'Dismissal' means that-

(a) an employer has terminated employment with or without notice;

[Para. (a) substituted by s. 30 (a) of Act 6 of 2014.]

(b) an employee employed in terms of a fixed-term contract of employment reasonably expected the employer-

(i) to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or

(ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee;

[Para. (b) substituted by s. 30 (a) of Act 6 of 2014.]

(c) an employer refused to allow an employee to resume work after she-

(i) took maternity leave in terms of any law, collective agreement or her contract of employment; or

(ii)

[Sub-para. (ii) deleted by s. 95 (4) of Act 75 of 1997.]

(d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or

(e) an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee; or

[Para. (e) substituted by s. 30 (b) of Act 6 of 2014.]

(f) an employee terminated employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.

[Para. (f) added by s. 41 (b) of Act 12 of 2002 and substituted by s. 30 (b) of Act 6 of 2014.]”

Analysis and conclusion

26. On an overall conspectus of the evidence as reflected by the record it appears that the only direct evidence in relation to the manner in which the relationship between the Applicant and the Third to Further Respondents operated and ended was the evidence of the Third and Further Respondents. It appears from the record of this evidence that the Third and Further Respondents did in fact perform work for the Applicant over a period of time on an unbroken basis. It furthermore appears from their evidence that they held particular positions that related to specific job content and that they generally all received monthly

payments for rendering their services. Their evidence was further to the effect that they had specific reporting lines within the Applicant's organisation.

27. The cross examination of the Third and Further Respondents was of little consequence and failed to challenge material parts of their evidence. To the extent that the Applicant put up only the hearsay evidence from an HR Manager who was employed after the relationship between the Applicant and Third and Further Respondents had terminated, the Second Respondent could not prefer a contrary version over the evidence of the Third and Further Respondents.
28. Although the relationship between the owner and founder of the Applicant and the Third Respondent may not have commenced as an employment relationship it is apparent from the record of the Third Respondent's evidence at the arbitration that the relationship had evolved over time and that he had become involved in the operating of the Applicant's business in a more direct manner. The involvement of the other family members of the Third Respondent in the business of the Applicant followed and their evidence illustrates what appears to have been employment relationships.
29. It is in the nature of review proceedings that the merits of the Commissioner's decision can only be assessed based on the actual evidence that was before him at the time of the arbitration hearing.
30. The overall effect of the Third and Further Respondents' evidence was that they were working for the Applicant, received remuneration from the Applicant for the services that they rendered on a monthly basis, that they held specific positions and that they reported to specific individuals in the Applicant's organisation. The fact that the relationship between the Third Respondent and the Applicant may originally been an investor or "silent partner" relationship does not displace the largely uncontroverted evidence which indicates that at the time that the relationship between the Applicant and the Third and Further Respondents terminated their relationships with the Applicant had the hallmarks of an employment type relationship.
31. The Second Respondent's finding to the effect that the Third and Further Respondents were employees of the Applicant therefore cannot be faulted.
32. There was also direct evidence before the Second Respondent from the Third and Further Respondents that their services with the Applicant terminated on the basis that the Applicant at a point refused to pay them further and the Mr Nkuna thereafter refused to liaise, contact or have anything further to do with them. It has to be stated that this conduct on the part of the Mr Nkuna is difficult to interpret as anything but an expression of a decision by Mr Nkuna to terminate the relationship with the Third to

Further respondents. Mr Nkuna clearly did not intend for the relationship to proceed as before and must have known that his actions effectively terminated the relationship. Mr Nkuna's actions can, in circumstances where the Third to Further Respondents were to be considered employees of the Applicant, only be interpreted as a dismissal of the Third to Further Respondents.

33. The finding that a dismissal had in fact occurred and that the Applicant had failed to prove that such dismissal was for a fair reason or effected in accordance with a fair procedure was similarly correct on the face thereof.

34. In the circumstances the following order is made:

34.1. The application is dismissed.

34.2. There is no order as to costs.

Malan AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Adv. B S Tshauke

Instructed by: Lingerfelder & Baloyi Inc

For the Respondent:

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Prepared on 14 October 2026 · Esheria