

SOUTH AFRICA / JUDGMENT

Walljee and Other v Capacity Outsourcing and Another (D451/09) [2012] ZALCD 2; (2012) 33 ILJ 1744 (LC) (1 January 2012)

[2012] ZALCD 2

COURT

Labour Court Durban

BEFORE

D H Gush

CASE / FILE NUMBER

D451/09

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Of interest to other judges

case no: D451/09

In the matter between:

RUWEYDA CHANTEL WALLJEEFirst Applicant

TREVEN RAJOOSecond Applicant

MELISSA MOONSAMYThird Applicant

and

CAPACITY OUTSOURCINGFirst Respondent

CONLOG

.....Second Respondent

Heard: 22 September 2011

Delivered: January 2012

Summary: Application for joinder of second respondent: refused

GUSH J

The applicants in this matter referred a dispute concerning their alleged automatically unfair dismissal by the first respondent to this Court for determination. In their application, the applicants seek retrospective reinstatement alternatively compensation.

The applicants referred a dispute to the CCMA for conciliation. A certificate of non-resolution was issued and the dispute was

enrolled for arbitration. Before the arbitration commenced a Commissioner of the CCMA ruled that the CC may not have jurisdiction

in that the applicants alleged that the dismissal was automatically unfair and were advised to refer the matter to the Labour Court.

The referral to the Court was made outside the prescribed time limits and the applicants applied for condonation for the late

filing of the application. The application for condonation was not opposed and is granted.

Contemporaneously with their application for condonation, the applicants apply to join the second respondent.

The relevant background relating to the application for condonation is as follows:

It is common cause as averred by the applicants in their founding affidavit that they were employed by the first respondent, who is a labour broker, and that they performed their duties at the second respondent's premises. The second respondent is referred to by the applicants as the client of the first respondent.

It is further common cause that the second respondent introduced a policy which precluded deployment by the temporary employment

service of immediate family members of permanent employees of the second respondent.

The applicants aver that their services were terminated by the first respondent in accordance with or as a consequence of this

policy.

In support of their application for the joinder of the second respondent, the applicants rely on the following:

The applicants state that the reason for the dismissal was that they 'have family relatives at the workplace' and

regard 'the reason to be arbitrary'.

As a result, the applicants maintain that their 'case is that the first and second respondents committed an automatically unfair dismissal on arbitrary grounds being family relations as provided for in section 187 (l) (f) of the Labour Relations Act.'¹

Accordingly, the applicants state that 'it is important that the second respondent be joined in these proceedings as well because they are the people who seem to have started the issue of dismissing us on the grounds of family relations...'²

Mr Jafta in his heads of argument simply repeats these averments and submits that as a result that the second respondent has a direct and substantial interest in the matter it should be accordingly joined.

In opposing the applicants' joinder application, the second respondent raised two points in limine: viz.

Firstly regarding the citation of the second respondent: The second respondent records that it's correct citation is Merlin Gerin (Pty) Ltd trading as Conlog;

Secondly that the provisions of section 198 of the Labour Relations Act³ (LRA) apply.

The second so called point in limine goes to the merits of the application.

It was not disputed that the first respondent is a temporary employment service and as the applicants were employees of the first

respondent and therefore it is clear that the provisions of section 198 apply.

As a client of the first respondent and in the absence of any allegation that the first respondent has contravened any of the

provisions of section 198 (4),⁴ the second respondent is not jointly or severally liable and cannot be jointly or severally liable with the first respondent for the alleged unfair dismissal. The applicants insofar aver that they were automatically unfairly dismissed by the first respondent they are confined to seeking such redress as the LRA may allow from the first respondent only. See *Nape v Intcs Corporate Solutions (Pty) Ltd*⁵ where the court held:

'But for the provisions of this section [198(4)], the person who renders service could have been regarded as being employed by both the client and the labour broker. In some cases, mentioned in subsection (4), the Act makes the client and labour broker jointly and severally liable to the employee but not in cases of dismissal. Where the employee is dismissed, the employee's cause of action is only against the labour broker and not against the client.'

In circumstances, as the second respondent was not their employer and as section 198 applies and the applicants have no right of redress against the second respondent, it cannot be said that the second respondent has a direct and substantial interest in any order this Court may make regarding the applicants' claim that they were unfairly dismissed by the first respondent.

There is no just or fair reason why in this matter costs should not follow the result and I accordingly make the following order:

The applicant's application for joinder of the second respondent is dismissed with costs.

D H Gush

Judge

APPEARANCES

APPLICANT: P.O. Jafta; Jafta Incorporated Attorneys

SECOND RESPONDENT: I Lawrence; Edward Nathan Sonnenbergs

1Founding affidavit para 25 page 11.

2Founding affidavit para 26 page 12.

3Act 66 of 1995.

4Section 198 (4) reads '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.'

4Section 198 (4) reads '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.'

5(2010) 31 ILJ 2120 (LC) para 42.

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