

SOUTH AFRICA / JUDGMENT

**Workforce Group (Pty) Ltd v Commission
for Conciliation Mediation and Arbitration
and Others (J2699/09) [2011] ZALCJHB 148;
(2012) 33 ILJ 738 (LC) (22 September 2011)
[2011] ZALCJHB 148**

COURT

Labour Court Johannesburg

BEFORE

A Van Niekerk

CASE / FILE NUMBER

J2699/09

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VAN NIEKERK J

Not reportable

IN THE LABOUR COURT OF

SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO J2699/09

In

the matter between:

THE
WORKFORCE GROUP (PTY) LTD
.....APPLICANT
and
THE
COMMISSION FOR CONCILIATION,
MEDIATION
AND ARBITRATION
.....1ST
RESPONDENT
COMMISSIONER
F VAN DER MERWE N.O2ND
RESPONDENT
JOHNATHAN
MALKIN 3RD RESPONDENT
Date
of hearing: 26 August 2011
Date
of judgment: 22 September 2011

JUDGMENT

VAN NIEKERK J

Introduction

- [1] The applicant seeks to have a ruling made by the second respondent ('the commissioner') reviewed and set aside. In his ruling, the commissioner found that the third respondent was an 'employee' as defined in by the Labour Relations Act ('LRA'). On that basis, the commissioner ruled that the first respondent, the CCMA, had jurisdiction to entertain an unfair dismissal dispute referred to the CCMA by the third respondent.
- [2] Both parties had filed heads of argument in the present proceedings on the erroneous assumption that the review was to be heard on the basis that the reasonableness test established by the judgment in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) applied. At the hearing of the application, I raised with counsel the decision by the Labour Appeal Court in *South African Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 ILJ 2218 (LAC), in which the LAC held that in regard to a commissioner's finding on jurisdiction, the question is not whether the commissioner's finding was reasonable but whether on the facts the applicant was an employee. The basis of this approach is that a ruling on jurisdiction made by the CCMA is made for convenience – the CCMA is a creature of statute and cannot decide its own jurisdiction. Whether the CCMA has jurisdiction is a matter for this court to decide. In other words, the issue before the court is whether objectively speaking, there existed facts would give the CCMA the jurisdiction to entertain the dispute i.e. that established that the third respondent (Malkin) was an employee as defined by s 213 of the LRA.
- [3] The parties agreed that I should reserve judgment in the application and that they would file supplementary heads of argument addressing in the issue as defined in paragraph [2].

Reviewing incomplete proceedings

- [4] Mr Bagraim, who appeared for the third respondent, submitted that as matter of general principle, the court ought not to intervene in uncompleted arbitration proceedings and on that basis, the application should be dismissed and the mater remitted to the CCMA. Generally speaking, this is the correct approach and one that is consistently applied by this court. The difficulty I have is that the ruling under review was made in 2009. Should the matter be remitted, there is little doubt that it will be referred to this court on the same point. In my view, while the applicant is to be admonished for what amounts to a piece-meal review, it is in the interests of justice and the expeditious resolution of the dispute between the parties that I make a decision on the merits.

Applicable legal principles

[5] The scope of the definition of ‘employee’ in s 213 of the LRA was recently discussed in *Pam Golding Properties (Pty) Ltd v Erasmus & others* (2010) 31 ILJ 1460 (LC). In that decision, the court referred to *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others*

(2008) 29 ILJ 2234 (LAC), where the LAC applied three criteria to determine the existence of an employment relationship for the purposes of s 231: the employer’s right of supervision and control, whether the employee forms an integral part of the organisation, and the extent to which the employee was economically dependent on the employer. In his article ‘An Accident of History: Who is (and Who Should Be) and Employee under South African Law’ (2004) 25 ILJ 787, Paul Benjamin argues, at p 803:

A genuinely self-employed person is not economically dependent on their employer because he or she retains the capacity to contract with others. Economic dependence therefore relates to the entrepreneurial position of the person in the marketplace. An important indicator that a person is not dependent economically is that he or she is entitled to offer skills or services to persons other than his or her employer. The fact that a person is required by contract to only provide services for a single ‘client’ is a very strong indication of economic dependence. Likewise, depending on an employer for the supply of work is a significant indicator of economic dependence.

[6] It is also well established that when the existence or otherwise of an employment relationship is determined, the court has regard to the substance rather than form. The terms of any agreement between the parties, the labels that they use to define their relationship and use of any vehicle through which services are rendered by one to the other are of no consequence – what matters is the reality of the relationship between them (see *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC)).

Evidence

[7] Only Malkin and a Mr Ferreira, the applicant’s legal manager, gave evidence at the arbitration hearing. Malkin testified that he was employed by the applicant in September 2008 at a salary of R45 000 per month, as a procurement manager. He did not sign a contract of employment, and there had been no discussion on a consultancy arrangement. He told the previous CEO, Katz, that he wanted a salary of R45 000 net; Katz told him that he would have to invoice the company, adding VAT. He did so. Malkin also testified that he was listed in the applicant’s internal telephone directory as the ‘procurement department’,

that he worked office hours, took leave and was paid, and that he was paid a cell phone, car and petrol allowance with effect from December

2008. Malkin testified that he was under the chief financial officer’s supervision and control, that he worked an average of 45 hours per week that he earned no other income and that he submitted reports on the applicant’s stationery and used the applicant’s letterheads. He was totally dependent on the applicant. During November 2008 the auditors began asking

questions about the fact that no PAYE was deducted and paid over on his behalf. In May 2009, a new CEO, Diamond, was appointed. Various meetings were held with Diamond, who produced a consultancy agreement for Malkin to sign. It is common cause that Malkin did not sign the agreement. In July 2009, Malkin became ill. The tax issue was never resolved. He was not paid for July 2009 and was presented with a letter terminating his contract on grounds of repudiation.

- [8] Mr Ferreira, the applicant's legal manager, testified on behalf of the applicant. He stated that he was called to Katz's office and introduced to the third respondent, and instructed to draft a consultancy agreement. He stated further that he gave a copy of a draft agreement to the third respondent, who stated that he wished to consider the tax implications of the agreement. Despite numerous requests for Malkin to sign the agreement, he failed to do so. Ferreira testified that if Malkin had been engaged as an employee, he would have been requested to sign an employment contract, which would have made provision for standard benefits applicable to employees, including retirement and health care funding. Ferreira stated further that Malkin had consulted an attorney and tax adviser shortly after receiving the consultancy agreement and that he was advised to produce an invoice because he was a consultant and not an employee. Further, Malkin had been employed on a specific project, he was not under the direct control of the applicant and he was free to render services to other parties.
- [9] Much of the evidence concerns the terms on which Malkin was paid. It is common cause that he sent invoices to the applicant, in which VAT was included. What is in dispute is whether this was the agreed basis of payment, or whether Malkin was simply acting on Katz's instruction. In my view, the answer to that question is not relevant to a determination on the facts as to the existence of an employment relationship. Nor is the correspondence between the parties and their advisers or the nature of the advice sought by either of them relevant. How the applicant and the third respondent respectively viewed the nature of their relationship or how they preferred it to be constructed is not determinative. What is relevant for present purposes, in terms of the approach adopted in the SITA judgment, is the reality of the relationship as determined by the factual circumstances in which the third respondent provided services, and an evaluation of those facts in terms of the criteria listed by Davis JA.
- [10] Turning to the present matter, perhaps the first point that should be made is that even if, as the applicant contends, Malkin was engaged for a fixed term for the duration of a specific project, it does not follow that, for that reason, he was not an employee. On the contrary, the LRA acknowledges relationships of this nature and extends protection against the unfair deprivation of work security to them.

- [11] Secondly, while it may be correct that Malkin at no stage alerted anyone to the fact that he should have received an employment agreement, or that there had been a mistake in giving him a consultancy agreement, or that he never asked why he was not in receipt of medical aid or retirement benefits, it does not necessarily follow that Malkin was not an employee as defined by the Act.
- [12] Malkin's evidence that he was part of the organisation was not seriously challenged. In particular, he was provided with an office and his tools of trade, a telephone, an email address, use of the internet, and he generally kept office hours. The significant degree of integration into the applicant's organisation is indicative of the existence of an employment relationship. Similarly, the nature and extent of the control and direction over Malkin's activities, especially by Van Wyk, the chief financial officer, were not seriously challenged. Nor was Malkin's evidence that he devoted his full time and attention to the applicant's business and that he was economically dependent on the applicant seriously challenged. While on the applicant's version Malkin had the right to perform work for other parties, the fact of the matter is that he did not. He clearly depended on the applicant for his work and his income.
- [13] In these circumstances, in my view, Malkin has discharged the onus of establishing that he was an 'employee' as defined by the LRA. It follows that the matter should be remitted to the CCMA for the arbitration hearing to continue.
- [14] In relation to costs, the court has a wide discretion in terms of s 162 to make orders for costs according to the requirements of law and fairness. Ordinarily, on the basis that costs follow the result, the applicant would be liable for the third respondent's costs. When this matter was called on 26 August 2011 and the parties directed to file supplementary heads of argument to deal with the issue before the court, they were expected to interrogate the evidence before the commissioner and to make submissions on the question whether objectively speaking, there were facts before the commissioner that served to establish that Malkin was an employee. The heads filed on behalf of Malkin failed to address this point, and were confined to an attack on the piecemeal nature of the review. In these circumstances, I intend to make no order as to costs.

I make the following order:

The third respondent was an employee of the applicant.

The matter is remitted to the first respondent for a continuation of the arbitration proceedings before the second respondent.

There is no order as to costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Appearances:

For the applicant: Adv K Lapham, instructed by Hunts (inc. Borkums) Attorneys

For the respondent: Mr M Bagraim, Bagraims Attorneys

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