

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: CA14/00

In the matter between

LAD Brokers (Pty) Ltd

Appellant

and

Robert J Mandla

Respondent

Judgment

VAN DIJKHORST AJA

- 1.This is an appeal with leave of this court against a finding by the Labour Court that the respondent had been unfairly dismissed by the appellant and an order that the appellant pay to the respondent compensation in the amount of R103 500.00 with costs.
- 2.The issue was whether the respondent had been employed by the appellant or whether he was an independent contractor as envisaged in subsection (3) of section 198 of the Labour Relations Act 66 of 1995 (the Act).
- 3.At the outset an ancillary matter has to be disposed of. The appellant applies for condonation for the late filing of its notice of appeal and heads of argument.The latter were filed 9 days late and the explanation is acceptable. The notice of appeal was filed late by some 4 months and 24 days. The explanation is that the appellant had successfully petitioned this court for leave to appeal and when this

was granted his attorney had been unaware of the requirement that in such a case a notice of appeal had to be filed until this point was raised on behalf of the respondent. It boils down to this: The appellant's attorney did not bother to study rule 5(1) of the rules of this court. This lack of application is to be deprecated. In mitigation it can be stated that there was no prejudice to the respondent nor inconvenience to this court. The record was prepared and filed timeously. The grounds of appeal were fully set out in the application for leave to appeal and the petition (and on that occasion replied to by the respondent) and the real issues properly delineated in the heads of argument filed by the appellant. The appeal was eminently arguable. In these circumstances it would be unfair to visit the appellant with the sins of his attorney. For these reasons we allowed the appeal to proceed. Condonation is hereby formally granted in the two applications that are before us.

4.The facts are unusual. The appellant conducts business and renders services to its customers as a labour broker, operating in the engineering and draughtsman industry.

5.A United Kingdom-based company, Weatherford U.K. Limited (Weatherford) which had no prior business interests in South Africa nor any business premises or bank account, sought the services of two service technicians for an offshore oil drill platform off Mossel bay. It recruited the respondent and another technician, Mc Donald, in November 1998 through a reference by a friend of the respondent. The respondent and Mc Donald were called to interviews by one Graham Laws of Weatherford where their positions, employment conditions and remuneration were discussed. The salary and allowances were agreed upon. It was also agreed that the respondent and Mc Donald would be employed by Weatherford and when their employment would start. The remuneration payable to the

respondent would be in the form of a monthly retainer, irrespective of the number of days actually worked.

6.The respondent and Mc Donald were then informed by Laws of Weatherford that they would be employed through a labour broker and that the latter would contact them in the immediate future for this purpose. Weatherford then approached the appellant with the request that the appellant facilitate the employment and payment of the respondent and Mc Donald, for a fee. The appellant was to render monthly invoices to Weatherford setting out its fee, the remuneration payable to the respondent and any extra allowances which might be payable to the respondent, of which particulars would be provided by Weatherford.

7.The appellant's Mr Fleming then contacted the respondent telephonically, introduced himself as the labour broker and informed the respondent that he would be giving the respondent a contract to sign and that the respondent and Mc Donald would be working as independent contractors. The respondent had had no prior knowledge of the appellant, had not worked for the appellant before and only came into contact with the appellant because of its employment at Weatherford. The respondent had not been and was not on the appellant's database, was never recruited or interviewed by the appellant and no conditions of employment were negotiated or determined between the appellant and respondent. In fact the respondent started working for Weatherford even before concluding a written agreement with the appellant.

8.The respondent was given a contract called "Independent Contractor - Contracting Agreement" which contained the appellant's standard terms and conditions. This contract was concluded on 1 December 1998 having been signed by the respondent and on behalf of the appellant.

9. The appellant and Weatherford in turn concluded a written contract in terms of which the appellant undertook to hire to Weatherford and Weatherford undertook to let from the appellant "...the services of our independent contractor Robert Mandla in the capacity of a service technician with effect from 1 December 1998" (The Brokerage Agreement).
10. The respondent and Mc Donald rendered services to Weatherford on instructions and under the supervision of Weatherford and on the terms and conditions of employment as determined and dictated by Weatherford. The appellant on a monthly basis rendered invoices to Weatherford for the "services" of the respondent and Mc Donald on the basis agreed upon. Weatherford would pay the amount due into the appellant's off-shore bank account. The appellant in turn would effect payment to the respondent and Mc Donald. Weatherford would also in its own discretion determine the amount of any allowances or bonuses to be paid to the respondent.
11. The respondent and Mc Donald rendered services to Weatherford from 1 December 1998 until the end of April 1999 under the sole supervision and control of the latter as and when required by Weatherford.
12. On 26 March 1999 Weatherford gave notice to the appellant that it would be terminating the "Independent Contracting Agreements" of the respondent and Mc Donald with effect from 30 April 1999. The appellant then terminated the contracts with the respondent and Mc Donald on 6 April 1999 with effect from 30 April 1999. The respondent took up the matter with Weatherford and got nowhere. He then instituted proceedings in the Labour Court against the appellant.

13.The following sections of the Act are relevant:

“Employee” is defined in section 213 as “ (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; (b) any other person who in any manner assists in carrying on or conducting the business of an employer...”

Section 198 of the Act provides as follows: ” (1) In this section, ‘temporary employment service’ means any person who, for reward, procures for or provides to a client other persons-

(a) who render services to, or perform work for, the client; and

(b) who are remunerated by the temporary employment service.

(2) For the purposes of this act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person’s employer.

(3) Despite subsections (1) and (2) a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person.”

14.The appellant concedes that it is a temporary employment service as defined in section 198 but contends that on the facts of this case an employment relationship existed between the respondent and Weatherford and that the relationship between the respondent and itself was that of an independent contractor. The Labour Court rejected the latter argument and agreed with the former.

15.To determine this issue the terms and conditions of the relevant contracts should be studied. The legal relationship between the parties is to be determined primarily

from a construction of the contract between them. cf SA Broadcasting Corporation v McKenzie (1999) 20 ILJ 585 (LAC); Niselow v Liberty Life Insurance Association of South Africa Ltd (1998) 19 ILJ 752 (LAC) 754C. The contract between the appellant and respondent bears the title: "Independent Contractor/Contracting Agreement." Clause 1.3 records specifically "that the contractor is an independent contractor and not an employee of LAD Brokers, and is, as such, not entitled to, inter alia, benefits referred to in clause 6". Clause 1.2 records that "nothing in this agreement, whether express or implied, shall be construed as creating the relationship of employer and employee between the parties."

Clause 6 refers to the benefits applicable to the appellant's permanent employees, and specifically excludes the respondent therefrom.

In terms of clause 3.2 the respondent would be remunerated for all work outside the normal hours of attendance "at a tariff agreed " by Weatherford, not the appellant.

It is also recorded that for purposes of the agreement the appellant would only have supervision and control over "certain areas" of the respondent's activities.

The appellant never registered the respondent for unemployment insurance benefits or tax nor did it afford the respondent any of the benefits applicable to the appellant's permanent employees.

16. The Labour Court referred to the various tests formulated by the courts to identify an employment contract. The learned judge stated on the basis of Smit vs Workmen's Compensation Commissioner 1979 (1) SA 51(A) at 62D-G that it had been held that the right to supervision and control was one of the most important *indicia* that a particular contract is in all probability a contract of service (employment contract). The greater the degree of supervision and control to be exercised by the employer over the employee, the stronger the probability will be

that it is a contract of service .

17. The learned judge further referred to the so-called dominant impression test with reference to *Ongevallekommissaris vs Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA 446 (A) 457A and *Medical Association of South Africa and others vs Minister of Health and others* (1997) 18 ILJ 528 (LAC) 536C-E, and quoted extensively from the judgment of this court in *South African Broadcasting Corporation vs McKenzie supra* at 590F - 591D.
18. On the basis of these authorities the learned judge concluded that this is clearly a unique and sui generis tripartite relationship where the person who is provided by the temporary employment service to a client renders service, not to the temporary employment service, but to the client (although he is remunerated by the temporary employment service.) It is accordingly a fiction that the person concerned renders services to the temporary employment service even when it is the employer of the person whose services are provided to the client through the temporary employment service, according to the learned judge. On the facts he thus found that the relationship between Weatherford and the respondent was that of employer and employee in terms of the definition of employee contained in section 213 of the Act. The respondent provided his services to Weatherford not on the basis of the performance of a certain specified work (selling the fruits of his labour) or on the basis of producing a certain specified result (as it would have been in the case of an independent contractor) but placed his personal services at the disposal of Weatherford and was throughout under the supervision and control of Weatherford's senior personnel. On this basis he was an employee of Weatherford. One cannot fault this part of the reasoning of the learned judge. I have due regard to the fact that the brokerage agreement refers to the respondent as an "independent contractor". It is our duty to have regard to

the realities of the relationships and not regard ourselves as bound by the label chosen by the parties.

19. The learned judge, however, found that the appellant also had control over the respondent in certain respects, which control was anathema to the concept of an independent contractor. In this respect the court referred to clauses 10.5, 10.6, 13.1, 13.2.1 and 13.2.4 of the standard contract between the parties in terms of which “independent contractors” like the respondent were required to obey instructions given by the appellant and also to adhere to the standards set by it (in conjunction with the client).

20. Clause 10 deals with the appellant’s right to terminate the agreement should the respondent fail to meet or comply with the appellant’s service standards (10.5) or should the respondent commit any act which in the reasonable opinion of the appellant adversely affects or is likely to affect the goodwill and/or reputation of the appellant or any one of the employees or contractors of the appellant (10.6).

21. Clause 13 sets out the obligations of the contractor. Inter alia they are that the respondent shall observe the standards set by the appellant from time to time in the conduct of its business (13.1), that he shall observe and comply with the instructions of the appellant in respect of the performance of his obligations in terms of this agreement and at all times promote the interest of the appellant (13.2.1) and that he shall observe all applicable laws, ordinances, decrees, rules and regulations and service standards relating in any manner to the performance by him of his obligations in terms of this agreement (13.2.4).

22. On the basis of the clauses referred to above the learned judge concluded that the “independent contractors” including the respondent were clearly under the control and supervision of the appellant to a degree that one could expect to find in an

employer/employee relationship. They were subordinate to the will of the appellant and obliged to obey the lawful commands, orders or instructions of the appellant which clearly had the right of supervising and controlling the “independent contractor”. Therefore the court found that there is thus no indication in the least that such “independent contractor” was notionally on an equal footing with the appellant as could be expected in terms of a contract of work.

23. In view of the contents of the clauses set out above the learned judge expressly slotted the facts into the important characteristics of a contract of employment set out in point 4 in *South African Broadcasting Corporation vs McKenzie supra* which reads: “(4) The employee is subordinate to the will of the employer. He is obliged to obey the lawful commands, orders or instructions of the employer who has the legal 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 independent contractor, however, is notionally on a footing of equality with the employer. He is bound to produce in terms of his contract of work, not by the orders of the employer. He is not under the supervision or control of the employer. Nor is he under any obligation to obey any orders of the employer in regard to the manner in which the work is to be performed. The independent contractor is his own master.”

24. I have a difficulty with the approach of the learned judge in this respect. In my view he takes the words quoted out of their context and beyond that which was intended by this Court. It is not unusual for independent contractors to be subject to some measure of contractual control in respect of standards, employees, working hours and the like. That is not the type of control referred to by this Court in the quoted portion of the judgment. The control envisaged in point 4 is

immediate and recurring. It is incorrect to describe contractual terms which are of a limiting nature or introduce some sort of supervision in respect of set standards as derogating from the notional footing of equality between the contracting parties in an independent contractual relationship. Such limitations upon conduct or standard do not bring about the supervision or control envisaged by this Court. This much is clear from the judgment referred to itself. McKenzie was held to be an independent contractor although his contract provided for supervision and instructions.(paras 33, 35)

25.I would hold that the respondent was not subject to such supervision and control of the appellant as would create an employment relationship and thereby disregard the clear wording of the contract between them.

26.This is, however, not the end of the matter. The question to be answered is what does section 198 intend to achieve in its exclusionary subsection (3) read with subsection (1). Does the person who is an “independent contractor” and who “renders the service or performs the work” stand in an independent contractor relationship with the “client” or with the “temporary employment service” or both?

27.Two factors point to the first of the three options: Subsections (1) and (2) clearly refer to a person who renders services to the client. The deeming provision would not be necessary were the services rendered to the temporary employment service. The latter pays the remuneration and there would therefore not be any doubt about the existence of an employment contract. It is only where the services are rendered to one person but another pays the remuneration that there is scope for uncertainty and need for a deeming provision. As the deeming provision of subsection (2) is in itself wide enough to include independent contractors with whom the Act is not primarily concerned, subsection (3) provides for their

necessary exclusion. The reference to independent contractors is therefore to independent contractors who render services or perform work for the client. Thus interpreted the awkward position of an employee working for one person but being remunerated by another and faced with a denial of both that they are his employers, will be addressed. So will be the situation where a fly-by-night employer utilizes a (reputable) labour broker and absconds.

28. For the sake of certainty the legislature clearly intended labour brokers and the like who pay the remuneration to be held liable as employers under the Act. Subsections (4), (5) and (7) of section 198 seek to draw the net tighter around the temporary employment services.

29. To interpret section 198(1) - (3) to include independent contractors who are such in relation to temporary employment services would ignore the attribute that the contractors must render services or perform work for the client (not the temporary employment service who pays).

30. To determine whether the service provider is an independent contractor of the temporary employment service is therefore as an end in itself a futile exercise. Even if he is, should he not also act as independent contractor viz a viz the client, the exclusionary subsection (3) does not apply. Of course the relationship between the temporary employment service and the service provider may give some indication of the relationship between the latter and the client.

31. Section 82 of the Basic Conditions of Employment Act 75 of 1997 contains provisions similar to those of section 198 of the Act discussed above. The interpretation of section 198 set out herein does not in my view conflict with the intention reflected in section 82.

32.The finding by the Labour Court that Weatherford employed the respondent and that their relationship was not that of an independent contractor was not disputed. I agree with that conclusion. The appellant paid his remuneration. The finding of the court that although the appellant did not “procure” the services of the respondent it “provided” his services to Weatherford was not attacked on appeal. In the circumstances the provisions of section 198(2) are applicable and for the purposes of the Act the respondent was the employee of the appellant.

33.Appellant’s termination of the respondent’s contract of employment with effect from 30 April 1999 constituted dismissal in terms of section 186(a) of the Act. The appellant completely failed to comply with the provisions of section 189 which prescribes the procedures for dismissals for operational reasons. There was no consultation at all. The finding that the dismissal was both procedurally and substantively unfair was not attacked.. Section 194(2) read with section 192(1) of the Act was applied by the Labour Court which awarded 12 months remuneration. No argument was addressed to us on this aspect of the case.

34.There is no reason to interfere with the order of the Labour Court. The appeal is dismissed with costs.

VAN DIJKHORST AJA

I agree

I agree

ZONDO JP

COMRIE AJA

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Date of argument: 23 May 2001

Date of judgment: 29 June 2001