

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: JA 50/03

In the matter between :

WYETH SA (PTY) LTD
and

Appellant

MANQELE, T
MOLETSANE, R NO

First Respondent
Second Respondent

THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION
SECURITY RETAIL TRANSPORT &
ALLIED WORKERS UNION OF
SOUTH AFRICA

Third Respondent

Fourth Respondent

NICHOLSON JA; PILLAY AJA; NKABINDE AJA

JUDGMENT

NKABINDE AJA:

INTRODUCTION AND FACTUAL BACKGROUND

[1] This is an appeal against the judgment of the Labour Court in which that Court dismissed an application to review the ruling by the second respondent (“the commissioner”) that the first respondent, Mr T Manqele (“Manqele”), is an employee as defined in terms of s

213 of the Labour Relations Act No. 66 of 1995 (“the LRA”).

- [2] The facts of this case, briefly dealt with hereunder, are relatively simple but give rise to interesting and controversial points of law.
- [3] On 14 March 2000 and pursuant to an interview the appellant made a written offer of employment (“the contract”) to Manqele for a position of a sales representative in the Nutritional Division at its Midrand offices. The commencement date was 1 April 2000. The contract deals, *inter alia*, with employment duties, termination of employment, remuneration, hours of work, medical aid fund, free life assurance, overtime, sick leave *et cetera*. The appellant sought written acceptance of the offer. On 15 March 2000 Manqele accepted the offer by signing the contract in a space provided.
- [4] The appellant undertook to provide Manqele with a company motor vehicle for company business and reasonable use for private purposes as part of his remuneration package.
- [5] Prior to the offer on 14 March 2000 and the acceptance thereof on 15 March 2000 the appellant advised the employee to look for a new motor vehicle for a maximum purchase price of R124 000, 00 as the company which financed the motor vehicle was not prepared to finance second-hand motor vehicles. The employee selected a BMW 316 motor vehicle which upon inspection, by the financing company, turned out to be a second hand motor vehicle. Accordingly the appellant’s Human Resources Manager, Mr G Whitefield (“Whitefield”), maintained that such vehicle could not

be financed. Manqele was advised again to find a new motor vehicle. On 14 March 2000 he identified an Opel Astra motor vehicle. It is then that Whitefield, allegedly believing that the issue of a new motor vehicle had been resolved, made the aforementioned offer of employment to Manqele which the latter accepted on the next day. A few days thereafter Whitefield was advised by the financing company that the selected 'Opel Astra motor vehicle had gone out of production some time ago and could therefore not be a new motor vehicle' as allegedly represented by Manqele. Whitefield made enquiries about the Opel Astra. According to him he considered Manqele's alleged misrepresentation in a serious light. He then discussed the matter with senior management. Prior to 1 April 2000, being Manqele's date of commencement, Whitefield terminated the contract of employment because 'the parties had been unable to reach consensus as to the condition of the motor vehicle as stipulated in the letter of employment'. Manqele nevertheless reported for work on the commencement date. He was advised by the appellant's human resources officer that 'he would not be employed by the appellant and that he should leave the premises'. He then left the premises.

—

- [6] Manqele alleged an unfair dismissal in terms of s 191(1) of the LRA and referred the matter to the third respondent, the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), for conciliation. He was and continues to be assisted by the fourth respondent, Security Retail Transport & Allied Workers

Union of South Africa (“RAWU”). The matter was set down for conciliation but the appellant, according to the certificate of outcome, failed to attend the conciliation. The dispute remained unresolved. It was then referred to arbitration.

[7] At the arbitration the appellant raised a jurisdictional point contending that the CCMA lacked jurisdiction to conciliate the dispute because no employment relationship had come into existence between itself and Manqe. The parties agreed that this point be determined on the papers.

[8] The Commissioner, in dismissing the point raised, determined that-

- “30. From the definition... it is apparent that the Act envisaged a dismissal as also including cancellation of a contract of employment.
31. In *casu* this is exactly what happened, the respondent terminated the contract of employment.
32. ... only the employee can be dismissed. In my view Mr Manqe became an employee the moment he accepted an offer of employment.”

[9] On review in terms of s 158(1) (g) of the LRA the appellant raised two grounds, contending that the commissioner committed:-

- (a) a gross irregularity in handing down a ruling in circumstances where another commissioner had heard oral submissions from the parties’ respective representatives concerning the merits of the matter ; and
- (b) a material error of law entailing non-performance of his duties alternatively that he arrived at an unjustifiable conclusion in determining that Manqe was an “employee” of the appellant as defined in s 213 of the LRA.

[10] The Labour Court dismissed the application with costs and found

that Manqele, as a party to a valid and binding contract of employment, is an “employee” for the purpose of a claim under Chapter VIII of the LRA.

[11] On appeal, leave having been granted by the Court *a quo*, the appellant’s main ground of appeal is that the Court *a quo* erred in finding that the definition of employee as contemplated in s 213 of the LRA includes a person who has entered into a contract of employment but has not commenced employment. It is contended that the court *a quo* ought to have found that the commissioner, in finding that Manqele was an employee on the basis of him having concluded a contract of employment with it even though the former had not yet commenced working, committed misconduct in the performance of his duties, alternatively, committed gross irregularities in the proceedings, and further alternatively, exceeded his powers.

[12] Basically the appeal concerns two questions –

- (a) whether or not the contract of employment was concluded between the appellant and Manqele when it was cancelled by the former prior to the date of commencement; and
- (b) whether the provisions of the LRA are available to a person whose contract of employment is terminated prior to the commencement of employment and specifically whether the definition of “employee” includes persons in the position of Manqele .

WAS A CONTRACT CONCLUDED?

[13] The first issue is whether a contract of employment was concluded or not. In law the legal relationship between the parties may be gathered, *inter alia*, from a construction of the contract which they have or might have concluded (See *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) at 64B; *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 (LAC) at 683D-E; *SA Broadcasting Corporation v McKenzie* (1999) 20 ILJ 585 (LAC) at 591E). Regard must also be had to the realities of the relationship and not what the parties have chosen to call the contract (See *Dempsey v Home & Property* (1995) 16 ILJ 378 (LAC); *Brassey 'The nature of Employment'* (1990) 11 ILJ 889 at 921). At common law an employee in a contract of employment commits a breach thereof he reneges on his duty of placing his personal service at the disposal of the employer. The employer on the other hand breaches the contract of employment if he reneges on his undertaking to pay the salary or wages agreed in consideration for services rendered.

[14] The appellant's contention, as evident from the averments in the founding affidavit deposed to by Whitefield, is, firstly, that the contract of employment was not concluded or finalised because 'an important term of the agreement concerning the vehicle ... still had to be finalised' and that 'the parties could not reach an agreement on the price or type of vehicle to be purchased'. Counsel for Mangele submitted that a contract of employment had been

concluded. It is beyond question that the terms sought to be introduced on behalf of the appellant by Whitefield do not form part of the written contract. The undertaking by the appellant, evidently as part of its obligations in terms of the contract, was to provide ManqeLe with a company car for both company business and reasonable use for private purposes. According to the parol evidence rule 'when a contract has been reduced to writing, the writing is in general regarded as the exclusive memorial of the transaction and no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such documents be contradicted, altered, added to or varied...' (See *Union Agreement v Vianini Pipes (Pty) Ltd* 1941 AD 34 at 47). Accordingly, the appellant is not entitled to introduce or add new terms or vary the terms of the contract. In any event that, in my view, did not materially change the purpose of the contract least of all the essence of the intention and the realities of the relationship between the parties.

- [15] There is no doubt that the parties had concluded a contract of employment when the appellant reneged before the commencement date.

WAS MANQELE AN EMPLOYEE?

- [16] Having concluded that an employment contract was concluded between the appellant and ManqeLe, the next question for consideration is whether ManqeLe was an employee as defined in s

213 of the LRA. The appellant's contention is that he was not because he had not worked and was neither remunerated nor entitled to remuneration as contemplated in the definition. In essence the contention on behalf of Manqele is that the definition should be interpreted extensively to include a person in the position of Manqele.

[17] 'Like the yogi contemplating his navel', says C D Drake in *Wage-Slave or Entrepreneur?* (1968) 31 *The Modern Law Review* 408 'although without the same apparent satisfaction, the labour lawyer is necessarily drawn to the contemplation of the mystery comprised in the word "servant" or "employee" (See Brassey, *supra*, at 889). Although that was stated in the context of comparing an "employee" with an independent contractor it certainly characterizes the quest for an understanding of the definition in this case.

[18] Section 213 defines an 'employee' 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,...”.

The Employment Equity Act No. 55 of 1998 and the Skills Development Act No. 97 of 1999 contain the same definition of 'employee'.

PREVIOUS DEFINITIONS OF EMPLOYEE

[19] In determining what the definition of employee really means it is

necessary to investigate the manner in which the word has been defined in previous statutes. The earliest labour legislation that is relevant is the Transvaal Industrial Disputes Prevention Act No. 20 of 1909 in which an ‘employee’ was defined to mean ‘any white person engaged by an employer to perform, for hire or reward, manual, clerical, or supervision work in any undertaking, trade, or industry to which this Act applies...’.

[20] The earliest Union Act, the Industrial Conciliation Act No. 11 of 1924, was amended by the Industrial Conciliation (Amendment) Act No. 24 of 1930, a further Amendment Act No. 7 of 1933 and finally repealed by the Industrial Conciliation Act No. 36 of 1937 which was further repealed by the Labour Relations Act No. 28 of 1956. The Industrial Conciliation Act No. 11 of 1924 defined an “employee” in s 24 to mean ‘any person engaged by an employer to perform, for hire or reward, manual, clerical or supervision work in any undertaking, industry, trade or occupation to which this Act applies, but shall not include a person whose contract of service or labour is regulated by any Native Pass Laws and Regulations, or by Act No. 15 of 1911 or any amendment thereof or any regulations made thereunder, or by Law No. 25 of 1891 of Natal or any amendment thereof, or any regulations made thereunder, or by Act No. 40 of 1894 of Natal or any amendment thereof...’.

[21] In Act No. 36 of 1937 “employee” was to defined to mean ‘any person employed by, or working for any employer, and receiving, or being entitled to receive, any remuneration, and any other

person whatsoever who in any manner assists in the carrying on or conducting of the business of an employer but does not include a person, whose contract of service or labour is regulated by Act No. 40 of 1984 of Natal, or, in terms of section two of the Masters and Servants Law (Transvaal and Natal) Amendment Act, 1926 (Act No. 26 of 1926), is regarded for the purpose of Act No. 40 of 1984 of Natal as a contract between master and servant, or is regulated by the Native Labour Regulation Act, 1911 (Act No. 15 of 1911), or by the Natives (Urban Areas) Act, 1923 (Act No. 21 of 1923), or by any amendment of, or any regulation made under, any of those laws; and “employed” and “employment” have corresponding meanings...’.

- [22] A totally new dispensation followed in 1956 in the Act finally called the Labour Relations Act 28 No. of 1956 (‘the 1956 LRA’) in which an “employee” was defined to mean ‘any person (other than a Bantu) employed by, or working for any employer and receiving, or being entitled to receive any remuneration, and any other person whatsoever (other than a Bantu) who in any manner assists in the carrying on or conducting of the business of an employer; ...’. The definition was changed during the years after 1956 as the government of the time came to accept black persons as employees (See s 1(c) of Act No. 94 of 1979, as amended by section 1 (f) of Act No. 57 of 1981 and by section 1 (a) of Act No. 2 of 1983). Section 1 (a) of Act No. 2 of 1983 defines “employee” to mean ‘any person who is employed by or working for an employer and receiving or entitled to receive any remuneration,

and, subject to subsection (3), any other person whomsoever who in any manner assists in the carrying on or conducting of the business of an employer...’. The sensible trend of having a similar definition in the Basic Conditions of Employment Act 3 No. of 1983, which was replaced by the Basic Conditions of Employment Act No. 75 of 1997(“the BCEA”), was also implemented.

[23] A perusal of the predecessors of the present definition reveals that in none of them was it contemplated that a person only became an “employee” once he commenced his duties. There is no suggestion that Manqeale was to work for or render services to any one other than the appellant. He was controlled by the appellant. I might interpolate here that it seems to me that Manqeale might well have been said to be working when he was carrying out one of his duties i.e. that of choosing a motor vehicle. That was, however, not fully argued and need not be dealt with further.

[24] When all is said and done the question remains whether it is possible, after nearly a century of jurisprudence in which a person became an “employee” once a contract was concluded either orally or in writing, that the legislature decided to change the position and accord him that status only when he commenced work? In order to determine this question it is necessary to consider the principles of interpretation.

PRINCIPLES OF INTERPRETATION

[25] It is trite law that in interpreting the provisions of a statute the Court should apply the golden rule of construction. This rule is restated by Joubert JA in *Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800(A)* at 804B-C, as follows:

“The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, eg where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.”.

(See also *Bader Bop (Pty) Ltd v NUMSA & Another* (2002) 23 ILJ 104 (LAC) at para 16; *University of the North & Others v Ralebipi & Others* (2003)24 ILJ2132 (LAC)). I agree with this as a starting point.

[26] The Court is also justified in considering the definition in context. Of relevance to the determination of the issue at hand are the provisions of s 186 (1) (a), 3 and 200A (1) of the LRA and s 23(1), read with sections 2 and 39 of the Constitution of the Republic of South Africa No. 108 of 1996 (“the Constitution”).

Section 186 (1) (a) defines ‘dismissal’ as meaning that-

“an employer has terminated a contract of employment with or without notice.” (my emphasis)

The LRA contains an interpretative instruction in s 3 which provides that –

“Any person applying this Act must interpret its provisions –
 a) to give effect to its primary objects ;
 b) in compliance with the Constitution; and

- c) in compliance with the public international law obligations of the Republic.”.

Section 200A (1) of the LRA which was inserted by s 51 of Act 12 of 2002 provides for a presumption as to who an employee is. Factors that brought the presumption into existences, eg, the employer’s right of supervision and control, might as well be taken into account in deciding whether a person is an employee or not (see P Benjamin ‘ An Accident of History: Who is (and Who Should Be) and Employee under South African Labour Law’ (2004) ILJ Vol. 25 787 at 802 and 804).

[27] Section 23 of the Constitution provides that ‘[e]veryone has the right to fair labour practice’ and s 2 provides that the Constitution is the Supreme Law. Section 39 enjoins the Court, when interpreting the bill of rights and any legislation and when developing the common law or customary law, to promote the values that underlie an open democratic society based on human dignity, equality and freedom, to consider international and foreign law and promote the spirit, purport and object of the Bill of Rights, respectively.

[28] Zondo AJP, as he then was, in *Xaba v Portnet Ltd* (2000) 21 ILJ 1739 at para 3.22 remarked that ‘[t]here is a limit to which the wording of a statute or rule may be disregarded in the process of an application of purposive interpretation’. He considered that ‘such limit is necessary if we are to heed, as I think we should, the unanimous warning of the Constitutional Court given in *S v Zuma and Others* 1995 (2) SA 642 (CC)’. In the latter case the

Constitutional Court, *per* Kentridge AJ, as he then was, was commenting at 652H-653A on the remarks by Froneman J in *Qozeleni v Minister of Law and Order and Another 1994 (3) SA 625(E) at 635B-C*. The remarks were that ‘the previous constitutional system of this country was the fundamental ‘mischief’ to be remedied by the new Constitution’. Agreeing specifically that the Constitution must be interpreted so as to give clear expression to the values it seeks to nurture for a future South Africa, Kentridge AJ remarked, at 653H-653A, that-

“While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that

general language must have a single ‘objective’ meaning. Nor is it easy to avoid the influence of one’s personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.

...We must heed Lord Wilberforce’s reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to ‘values’ the result is not interpretation but deviation. If I may again quote *S v Moagi* ... I would say that a constitution

‘embodying fundamental rights should as far as its language permits be given a broad construction.’.

[29] In *Ceramic Industries Ltd t/a Beta Sanitary Ware v NCBAWU (2) (1997)18 ILJ 671 (LAC)* at 675G-H this Court, per Froneman DJP remarked, *inter alia*, that ‘[w]here constitutional validity is not an issue it seems that an interpretation that accords best with the general purpose of the Act (as set out in s 1) and the more specific purpose of a particular section, should be followed.’.

[30] The Constitutional Court in *National Education Health and Allied Workers Union v University of Cape Town & Others 2003 (3) SA 1(CC)* at para [41] remarked, *per* Ngcobo J, that-

“The declared purpose of the LRA ‘is to advance economic development, social justice, labour peace and the democratization of the workplace’. This is to be achieved by fulfilling its primary objects, which include giving effect to s 23 of the Constitution. It lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution and South Africa’s international obligations. The LRA must therefore be purposively construed in order to give effect to the Constitution. ...”.

In *NUMSA & others v Bader Bop (Pty) Ltd & another (2003) 24 ILJ 305 (CC)* O’ Regan J remarked at para [37] that if the Act-

“...is capable of a broader interpretation that does not limit fundamental rights, that interpretation should be preferred. This is not to say that where the Legislature intends legislation to limit rights, and where that legislation does so clearly but justifiably, such an interpretation may not be preferred in order to give effect to the clear intention of the democratic will of parliament. If that were to be done, however, we would have to be persuaded by careful and thorough argument that such an interpretation was indeed the proper interpretation and that any limitation caused was justifiable as contemplated by s 36 of the Constitution.”.

FOREIGN JURISPRUDENCE

[31] It is necessary, for the purpose of this judgment and in line with the constitutional imperatives, to have regard to comparable statutory enactments and case law in other countries as the jurisprudence in such countries may be an important resource in developing the South African Labour law with regard to issues under

consideration. Section 153 (1) of the English Employment Protection (Consolidation) Act 1978 (as amended) (“EEPA”) defines an ‘employee’ as –

“an individual who has entered into or works under (or where the employment has ceased) worked under a contract of employment.”.

‘Dismissal’ is defined in s 55 of that Act. Attention in that section is focused on the ‘termination of the contract of employment’.

[32] It must be borne in mind that the definition in s 153 (1) of the EEPA, *supra*, does include ‘an individual who has entered into... a contract of employment’. The situations are, therefore, not truly *in pari materia*. The importance, however, resides in the fact that the English Courts are anxious to keep such cases in their labour court structures and not leave it to some other common law jurisdiction to determine the issue.

[33] A case that is instructive is *Sarker v South Tees Acute Hospitals NHS Trust* [1997] IRLR 328, which shares common features with the instant case. Ms Sarker applied for and was offered a post by the respondent employer (the Trust). Subsequent to the offer which she accepted, the Trust sent her a formal letter of appointment to which was attached a document setting out the particulars of employment referring to a commencement date of 1 October 1995. Before she started work the Trust sought a commitment from her that she would work in the post for a minimum of six months. The particulars of employment in her contract provided that she was required to give two months’ notice of termination of employment.

A few days thereafter she was told that the Trust was withdrawing the offer of employment. She instituted an action in the Industrial Tribunal alleging breach of contract and wrongful or unfair dismissal on the assertion of her statutory right to notice. She claimed that she was entitled to pursue a claim for damages for breach of contract under the Industrial Tribunal which, in terms of s 131 (2) (a), has jurisdiction in respect of a 'claim for damages for breach of a contract of employment or any other contract connected with employment'. The Industrial Court found that she had concluded a contract of employment with the Trust but that her claim was not one which arose or was outstanding on the termination of the employee's employment because as at the date of the alleged breach, there had been no termination of her employment as employment had never begun. She appealed against that decision. The Trust cross-appealed against the finding that the correspondence between the parties, as distinct from an agreement to enter into a contract of employment on 1 October, amounted to a contract of employment.

- [34] On appeal the Employment Appeal Tribunal ("EAT") dismissed the cross appeal, allowed the appeal and remitted the case to the Industrial Tribunal to deal with the unfair dismissal claim. The EAT held that-

"The Industrial Tribunal had erred in holding that it did not have jurisdiction to consider the appellant's claim for damages for breach of contract in circumstances in which she had contracted to work for the respondent employers but the contract was terminated before she had commenced work under it."

DOMESTIC JURISPRUDENCE

[35] Counsel for the appellant, Advocate A Myburgh, contended that Manqele was not an employee as envisaged in s 213 of the LRA. Placing reliance, *inter alia*, on the decision in *Whitehead v Woolworths (Pty) Ltd* (1999) 20 ILJ 2133 (LC) he submitted that in interpreting the provisions under consideration the ordinary, literal and grammatical interpretation should be adopted. Mr Sebola, of RAWU and who appeared on behalf of Manqele, argued that this Court should interpret the provisions under consideration by adopting a purposive approach. He submitted further that the interpretation suggested on behalf of the appellant would render the long established Human resources and Business Practices, of formulating and advertising positions, interviewing, selecting and appointing applicants for such jobs, nugatory. He argued further that the risk, if such interpretation is adopted, will be too high for prospective employees who would not be considered employed even after having gone through all the HR processes, resulting in a conclusion of a contract of employment, and still not be considered employees until the day and time they report to work, render their services or subordinating their productive capacity to the employer.

[36] The issue under consideration has been alluded to in a number of cases which include *Whitehead, supra*, and *Jack v Director-General Department of Environmental Affairs* [2003] 1 BLLR 28 (LC) but has not as yet, as far as I have been able to ascertain, been

dealt with as such. In *Whitehead*, the court found the definition to be totally unsatisfactory. In *Jack*, it considered the definition ‘irrational and constitutionally untenable’. I deal hereunder with the facts of these cases out of consideration for the common feature between them and the instant case.

- [37] In *Whitehead*, *supra*, the applicant (“Whitehead”) having been interviewed, was offered a job of Human Resources Information and Technology Generalist. She did not accept the offer because she considered the remuneration offered inadequate. The job was re-advertised and, among the applicants, one Dr Y applied. Whitehead displayed some interest in the position. The employer (Woolworths) indicated to her that there were still applicants to be interviewed before a final decision was made as to who should be offered the position. She was interviewed again and two days later the officer who interviewed her left a message on her voicemail which, according to her, gave the impression that she had been selected for the position. In a subsequent interview that officer indicated to her that Woolworths was concerned about the fact that she was pregnant. She was then offered a fixed-term contract that would have expired on the expected date of her confinement. At that stage the said Dr Y had not yet been interviewed. Whitehead rejected the offer. Dr Y was appointed to the position after his interview. Whitehead then claimed that she was unfairly dismissed, alternatively, that she had been unfairly discriminated against on the basis of sex.

[38] The Labour Court found that Whitehead could not claim to have been dismissed as she was not an employee as defined in s 213 of the LRA. In dismissing her claim of an unfair dismissal that court remarked, at 2173A-C, *inter alia*, that a person, in terms of the definition of the employee-

“... is only an employee when such person actually works for another person. The employee must therefore have rendered a service to another which services are not that of an independent contractor. In addition to working for another the employee must also “receive” or “be entitled to receive” remuneration. The remuneration must correspondingly mean remuneration for work done or tendered to be done. In the circumstances where an offer of employment is made to another and the offer is accepted, a contract of employment may come into existence but the parties to that contract do not enjoy the protection of the Act until such time as the offeree actually commences her performance or at least tenders performance in terms of the contract.”

[39] On appeal the Labour Appeal Court in *Woolworths (Pty) Ltd v Whitehead* [2000] 6 BLLR 640 (LAC) *per* Zondo AJP, as he then was, remarked at para [13], apparently on the basis *inter alia*, that Whitehead was not offered the position by Mr Inskip, that the Labour Court correctly dismissed Whitehead’s claim for unfair dismissal. That case is distinguishable from the instant case, *inter alia*, because in the latter, as I have found, a contract of employment was indeed concluded.

[40] In Jack, *supra*, the question which arose was whether Jack was an employee at the time of breach. Jack had applied for the position

and had been told that his application was successful. Two weeks after being informed of the success of his application, the Department sent him a formal letter of appointment. On the basis of such letter Jack handed a notice to his erstwhile employer. Two days before he was due to commence working the Department notified him that his appointment had been revoked. When challenging the dismissal and claiming relief under the BCEA the Department raised the defence that the Labour Court lacked jurisdiction because Jack was not an employee. Pillay J correctly observed that Whitehead, *supra*, was distinguishable on the facts and the law with Jack. She remarked that if the finding in Whitehead were to prevail in the circumstances of Jack -

“the effect will be that the applicant for employment will be better secured by legislation than one who has concluded a contract of employment. Such differentiation is irrational and constitutionally untenable.”

EVALUATION OF DEFINITION

[41] With the above provisions, principles and case law in mind I now turn to consider the main issue in this matter, namely: whether the definition under consideration includes a person in the position of Manqele. As apparent from case law, *supra*, the definition of ‘employee’, as it stands, creates uncertainty in the practice of labour law. The adoption of a literal interpretation of the provisions under consideration as suggested on behalf of the appellant seems to exacerbate the problem rather than to resolve it. A person in the position of Manqele might have resigned from his former

employment on the basis of him having concluded a contract of employment. He would find himself in a worse position than an applicant for a position advertised.

[42] Manqele's rights are clearly protected in terms of the Constitution(s 23). Section 3(b) of the LRA requires this Court to interpret the provisions of the LRA in compliance with the Constitution in order to give full effect to the legislative purpose to 'ensure the protection, promotion and fulfilment of constitutional rights'(See National Education Health & Allied Workers Union v UCT 2003 (3) SA (CC) at para [14]). The constitutional right 'to fair labour practice' in s 23 is not capable of precise definition as the complex nature of labour practices does not accommodate any rigid regulation of what is fair or unfair in any particular circumstances. I agree with Mr Sebola that the interpretation suggested on behalf of the appellant would favour the employer and would be contrary to the letter and spirit of s 3 of the LRA and would thus not give effect to s 23 (1) of the Constitution.

[43] In my view the words in the definition of 'employee' in s 213 of the LRA, when given their ordinary and grammatical meaning, become ambiguous and inevitably result in manifest hardship and absurdity when read in conjunction with other provisions, for example, the words in the definition of "dismissal" in s 186, *supra*. The appellant, in this regard, contends that the contract envisaged in s 186 is a contract in terms of which the employee is working for the employer for remuneration. Reliance is placed upon the remarks by Commissioner Jammy in *Herbst v Elmar Motors (1999) 20 ILJ 2465 (CCMA)* at 2468J -2469C, that-

"When these two definitions are read together, a contract in terms of 'employment' must, in my view, be a contract in terms of which any person ... works for another person' and 'receives, or is entitled to

receive, any remuneration’ or ‘any ... person ... assists in carrying on or conducting the business of an employer. That concept ... must of necessity be interpreted as requiring that, before a person can be dismissed, an employment relationship must have commenced on the basis of the actual rendition of work or service or assistance in the conduct of the employer’s business, by the person alleged to have been employed. Dismissal cannot ... occur when all that has come into existence is (sic) a contract in anticipation of the performance of work or the assistance in carrying on or conducting business, which the definition of ‘employee’ in s 213 of the Act contemplates. In other words, the ‘contract of employment’ referred to in s 186 ... is a contract in terms of which the employment relationship between the parties has commenced, that is to say, the employee is working for the employer for remuneration or is assisting him in the carrying on or conducting of his business.”

[44] I do not, with respect, agree with the views expressed by Jammy C. Section 186 does not provide that the other party must already be or have been an employee when dismissal takes place. Had that been the intention of the lawgiver provision therefor could have been made. In any event I do not consider that this Court is bound by the views expressed in Herbst. It does not appear to me also, with respect, that the Learned Commissioner, when expressing the above views, addressed his mind fully to the constitutional imperatives I have alluded to and the remarks by Justices O’Regan and Ngcobo, *supra*.

[45] Given the resultant gross hardship, ambiguity and absurdity in the adoption of the literal interpretation, I am of the view that this Court is thus entitled to depart from such a literal and ordinary

construction and extend the literal construction of the definition as including a person who has concluded a contract of employment which is to commence at a future date. Common sense, justice and the values of the Constitution would, in my view, best be served by extending the literal construction to include such a person. That interpretation will be in line with the meaning of ‘dismissal’ in s 186 (1) (a). It will, also in my view, avoid limiting the constitutional right to ‘unfair labour practice’ to a person who works or has rendered services and is entitled to remuneration. The focus, in s 186, like its English counterpart, is on the ‘termination of a contract of employment’. Grogan *‘Employment Law’ Vol 19 part 3 pp 15-17* opines that ‘had the contract not been repudiated, the-would be employee would have become an employee.’ Grogan continues to draw an analogy between a person in the position of Manqele and unborn children. He states that -

“... in a sense, a situation is similar to unborn children, to whom the law is prepared to extend legal rights by way of a fiction. The only way the courts can now remove the absurdity to which Pillay J refers in Jack’s case – that unsuccessful applicants for employment are awarded greater rights under the LRA than those who have actually been appointed – is to extent the statutory definition by means of a similar fiction. They might be assisted by the fact that the Constitution gives “everyone” – not only employees the right to fair labour practices.”

I could not agree more.

[46] The EAT in Sarker, *supra*, puts it this way -

“... The respondents’ argument that this was an agreement to enter into a contract of employment on 1 October 1995 is not a persuasive one: no further contract between the parties was required. As and when the

appellant turned up for work on 1 October, she would have been performing the contract already entered into, not making a fresh offer which the respondents would then accept by allocating her to work and paying her. The mere fact that the duties would only be performed on a date subsequent to this contract having been entered into cannot take it outside the concept of a contract of employment. If it were otherwise, a very large number of contracts would not be contracts of employment, even though they were entered into perhaps only one day before the individual began actually performing his or her duties for the employer.

There is a single contract, of which there may be an anticipatory breach if one party gives unequivocal notice that he will not perform his side of it. That was exactly the situation which occurred in *Hochster v de la Tour* [1853]2 E & B 678.”.

[47] During the course of the argument counsel for the appellant contended further that Manqele should have brought his claim to the Labour Court under the provision of s 77 of the BCEA. Manqele, in his claim of unfair dismissal in terms of s 191 of the LRA, sought reinstatement or compensation.

[48] It must, of course, be recalled that since service is a prerequisite for remuneration under the employment contract, it follows that if the employer refuses to receive the employee into service he commits a serious breach of the agreement (See *Kinemas Ltd v Berman* 1932 AD 246). Until the case of *National Union Textile Workers v Stag Packing (Pty) Ltd and others* 1982 (4) SA 151 (T) it was difficult to secure specific performance in the form of reinstatement (See *Rogers v Durban Corporation* 1950 (1) SA 64 (N)). After that date an employee who was dismissed before commencing his duties could secure reinstatement either at

common law or in the Industrial Court in terms of the 1956 LRA.

- [49] The effect of holding that the present definition precludes granting relief to a person in the circumstances of Mangele would certainly be startling given the progressive advance of fairness in labour practice especially under the new dispensation since 1994. That he would have to seek solace under section 77 of the BCEA seems improbable.
- [50] The whole tenor of progress in labour law is to fair labour practices and justice for employees and employers and away from a narrow construction of the word “works”. Although the word is in the present tense, in common parlance we often say of a person who has left A to work for B that he now works for B even though he has not actually commenced his duties.
- [51] The narrow construction totally ignores the phrase ‘is entitled to receive any remuneration’ which, in my view, means that such a person has not yet commenced actually working but when he does so he will be entitled to pay. It does also mean someone who is never paid but has commenced working but that however would seem to me to be a rather more strained construction. It seems to me that the legislature, when defining the word “employee” was striving for simple language and not drastically changing the definition.
- [52] The ultimate conclusion this Court arrives at is that the definition

of employee in s 213 of the LRA can be read to include a person or persons who has or have concluded a contract or contracts of employment the commencement of which is or are deferred to a future date or dates. The construction which counsel for the appellant seeks to place on s 213 is, in the circumstances, untenable as it leads to manifest ambiguity, absurdity and hardship.

[53] In the view I take of the matter Manqele was justified in approaching the CCMA.

[54] Accordingly the appeal is dismissed with costs.

NKABINDE AJA

I agree

NICHOLSON JA

I agree

PILLAY AJA

Date of hearing: 17 November 2004

Date of judgment: 23 March 2005

Appearances:

For the Appellant : Adv A Myburgh instructed by Sonnenberg Hoffmann Galombik

For the Respondents : Mr M S Sebola of RAWU