

Reportable

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO.: J1907/2010

In the matter between:

LSRC & ASSOCIATES

Applicant

and

ANNA CHRISTINA WILHELMINA BLOM

Respondent

JUDGMENT

Rabkin-Naicker, AJ

[1] On the 23 September 2010, Bhoola J ordered that execution proceedings against the applicant (the partnership) be stayed pending the finalisation of this opposed application. The partnership seeks an order:

“Directing that the Respondent provides the Applicant with the following documents within 10 days of date of this order:

- 4.1 *valid tax directive from the South African Revenue Service ("SARS") in respect of the settlement agreement of R60 000.00 made an award of the Council for Conciliation Mediation and Arbitration ("CCMA") on 11 September 2010 (CCMA Award – Annexure "H" of the Founding Affidavit);*
- 4.2 *proof of disclosure of income tax to SARS for the period February 2008 to August 2010;*
- 4.3 *proof of payment of income tax to SARS on the income disclosed in 5.2 above;"*

Background

- [2] The respondent (Blom) worked as a bookkeeper for clients of the partnership, and also performed administrative functions for it, including credit control.
- [3] In or about July 2010, the partnership was awarded a licence in terms of section 13(b) of the Pensions Fund Act by the Financial Services Board enabling it to administer pension funds. According to the applicant *"in keeping with good business practices"* it sought to formalise the oral contracts which they had in place with certain of *"its service providers"*, including Blom, and instructed its attorneys to draft written *"Independent Contractor Agreements"*.
- [4] Blom indicated she wished to obtain legal advice on the contract before signing it, and pursuant to this informed the partnership that she had been told not to sign the draft contract. The partnership was not sure how such failure to secure a written contract would affect its Financial Services Board licence and informed Blom that she was suspended until further notice, and that a hearing would be convened.

- [5] Blom referred a dispute to the CCMA. At the “conarb” proceedings, the parties entered into a settlement agreement which was in the CCMA standard form, under the title ‘monetary settlement’. In terms of the settlement agreement, the partnership agreed to pay Blom the amount of R60 000.00, in two instalments of R30 000.00 on the 7th and 25th of September 2010 respectively.
- [6] The agreement included a no variation clause, as well as a clause stating that the parties consent to the agreement being made an arbitration award in terms of section 142A(1) of the Labour Relations Act. A further clause contained in the agreement, provides that the parties agree that in the event of non-compliance with this agreement, *“the party defaulting will pay the full costs incurred by the other party in enforcing this agreement”*.
- [7] The partnership avers in its founding papers that it was not its intention to confer jurisdiction upon the CCMA in concluding the agreement with Blom, and that it certainly did not recognise that Blom was ever an employee of the applicant.
- [8] Subsequent to the settlement agreement, and towards the end of August 2010, the partnership met with its tax consultant who informed them that the partnership was required by law to deduct tax from the settlement award. Blom was subsequently contacted by telephone and requested to obtain a tax directive in this regard.
- [9] The advice given to the partnership was that in the event that Blom had failed to disclose her income to SARS and failed to pay tax on her income, SARS could look to the partnership for payment and it in turn would have to claim reimbursement from Blom.
- [10] It was estimated that the partnership would have a contingent liability to

SARS of approximately R241 000.00 in the event that Blom had failed to disclose and pay tax from her income, as she had earned some R698 915.00 in “fees” from the applicant since February 2008.

- [11] Given this liability, the partnership refused to pay the settlement amount to Blom until she had obtained a tax directive and the monies were paid into the trust account of its’ attorneys of record. On or about 3 September 2010, Blom applied to certify the CCMA award and then issued a writ of execution, which writ led to the launching of this application, initially on an urgent basis.
- [12] The partnership avers in its’ papers that it had been considering a review of the CCMA award but had subsequently resolved not to proceed with the review application. It also does not challenge the binding nature of the settlement agreement. I return to deal with the implication of its’ stance in this regard below.
- [13] In the application before court, the partnership as dominus litis, initially submitted that the court should make a finding that the respondent was an ‘independent contractor’. This argument was wisely abandoned given that its’ logical conclusion, had the argument held sway, would have been a finding that the labour court did not have jurisdiction to hand down the order sought.
- [14] This partnership’s approach appears to have been directed at assisting it in respect of its tax liability. In similar vein, it was Blom’s case on the papers, that she was at all relevant times an employee of the applicant and the work that she carried out under the instructions of the applicant was of a continuous nature, and not project or contract based. She avers that she had never submitted any invoices for work done for the applicant. She maintained a coy silence as to whether she had paid any tax to the fiscus on monies received from the partnership.

- [15] It is undisputed that on the date of the conarb proceedings, 17 August 2010, when the commissioner facilitated an agreement between the parties, it was agreed that the partnership would be given a period of 14 days in which to apply for a tax directive.
- [16] Blom further avers that she decided to approach SARS herself and duly completed the required form for the application for a tax directive. She states: *"I was informed in response to my said application by SARS that since the applicant failed to properly register for tax, I could not be issued with a tax directive. Instead of issuing me with a tax directive the relevant SARS official indicated that SARS would agree to the said R60 000 being declared in my 2011 return and then be taxed"*.
- [17] In reply, the partnership states that insofar as the applicant has no employees, it was the partners' *bona fide* belief that there was no requirement for it to register or to pay PAYE. It further alleges that: *"the fact that the applicant and the respondent entered into a settlement agreement at the CCMA does not change the complexion of the contract which existed between applicant and respondent. Respondent remains an independent contractor"*.
- [18] Further to a statement issued by SARS, which is in respect of the year of assessment 2010, and does not cover the whole period within which Blom was working for the partnership, the partnership in a supplementary affidavit, explains that it refused to pay the R60 000.00 to SARS as requested by Blom as this would not *"expunge the liability of the respondent to SARS or the liability which the applicant has, or any liability which the applicant may have to SARS if respondent were to be considered by SARS to be an employee"*.

Evaluation

[19] This application follows in the wake of a referral to the CCMA and a section 142A certification making the settlement agreement an award that may be enforced as if it were an order of the Labour Court in terms of section 143(1) of the LRA. Section 142A of the LRA provides as follows:

“(1) The Commission may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any dispute that has been referred to the Commission, an arbitration award.

(2) For the purposes of subsection (1), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is entitled to refer to arbitration in terms of either section 74 (4) or 75 (7).”

[20] In **Molaba and Others v Emfuleni Local Municipality (2009) 30 ILJ 2760 (LC)** van Niekerk J considered the meaning of ‘settlement agreement’ contained in section 142A. The court found that it is only settlements of disputes about a matter of mutual interest that are either arbitrable, or justiciable by this court that may be the subject of an arbitration award in terms of section 142A. **(at paragraphs 5 and 6)**

[21] Despite the partnership’s belief that the dispute between the parties is not one between an employer and an employee, (i.e. a matter of mutual interest), its’ failure to challenge the Award’s validity on any basis permitted in law, means that the terms of the settlement agreement are enforceable as if the award were an order of this court.

[22] It is evident from the content of the papers that there is an expectation that this court can make findings which will assist in dealing with the question as to which party is liable to pay tax to the Commissioner of SARS, in respect of the remuneration earned by the Blom. The expectation is misplaced.

[23] In **Motor Industry Staff Association and Another v Club Motors, a division of Barlow Motor Investments (Pty) Ltd (2003) 24 ILJ 421 (LC)**, the court held that neither an express or an implied term in a settlement agreement can override the statutory obligation to deduct tax from a gross settlement figure. The case concerned an agreement (pursuant to a retrenchment) and the entitlement of an employer to deduct income tax before paying the balance to an employee. Rogers AJ found that:

“In my view, the critical question in cases such as the present one is whether on a proper construction of the agreement the amount which the employer has undertaken to pay to the employee is an amount net of tax. If not, the ITA compels the deduction of tax. The amount that must be deducted is the amount determined by the commissioner in terms of para 9(3) of the fourth schedule. In terms of that paragraph the commissioner's determination is final. If the determination is withdrawn or varied after the employer has already accounted to the commissioner for the tax, the employee will be entitled to credit or a refund pursuant to the provisions of para 28(1) of the fourth schedule.” **(at paragraph 14)**

[24] It is common cause in this application that the amount of R60,000.00 was a gross amount, and that a tax directive had to be applied for. The obligation to pay such tax, and on whom it falls, must be determined in line with the provisions of the Income Tax Act 58 of 1962 (ITA). Paragraph 2(1) of the 4th Schedule to the Income Tax Act, requires that, if services are rendered by an employee, the person to whom the services are required must deduct employees' tax. Paragraph 4 of the 4th Schedule states that an amount required to be deducted or withheld in terms of paragraph 2, shall be a debt due to the State and the employer concerned shall be absolutely liable for the due payment thereof to the

Commissioner.

[25] The determining factor, as to whether a person rendering services is an employee or independent contractor, is the definition of “remuneration” in paragraph 1 of the Fourth Schedule of the ITA. This provision was amended by section 54(1)(d),(e), (f) and (g) of the Taxation Laws Amendment Act 8 of 2007, which came into operation on 1 March 2007. The 4th Schedule now prescribes that an independent contractor’s income will be deemed to be remuneration and will therefore be subject to employees’ tax, if:

(a) The services are required to be performed mainly at the premises of the person by whom the remuneration is paid/ payable or of the person to whom such services were or are to be rendered; and

(b) the person who renders or will render the service is subject to the control and supervision of any other person as to the manner in which his/her duties are performed or as to his/her hours of work.

(section 12.3 of SARS Guide for Employers in respect of employees tax (2011 tax year; effective date 2010.03.01)

[26] The lack of ‘fit’ between the criteria used to distinguish between an employee and an independent contractor for purposes of income tax and labour law has been derided. It has been argued that these criteria should be the same, and that the uncertainty created by the different criteria used is detrimental to all parties concerned. **(C Louw: “An independent contractor under labour law and the Income Tax Act- Is there a difference”. 2009 (72) THRHR461)**

[27] While this may be a laudable objective, there are important reasons why it is not attainable. Not least of these are the aims and objectives of the

LRA and its' provenance as a statute drafted to give expression to the Constitution, and in particular the constitutional right to fair labour practices. This provenance means that the characterisation of an employment relationship for the purposes of the LRA will often be at variance with one geared to ensure the necessary for the levy of taxes for the fiscus.

[28] This point is most clearly brought home if regard is has to the decision in **Kylie v CCMA and Others 2010 (4) SA 383 (LAC)**. In that case, on the basis that a constitutional right to fair labour practices vests in everyone, the distinction was drawn between a 'contract of employment' and an 'employment relationship', and the LAC found that, despite the illegal nature of their work, sex workers are recipients of certain employee protections contained in the LRA. The court held that s 23 of the Constitution is there to protect the dignity of all workers, and it and the ancillary provisions of the LRA enjoin the courts to be particularly vigilant in safeguarding the dignity of the most vulnerable classes of employees, such as sex workers. (**Paragraphs 40 and 41**)

[29] In essence, the jurisprudence of the labour courts cannot be relied upon to decide on the tax obligations of parties. Exactly which of the litigants before this court will be ultimately liable to pay the tax on the settlement amount will be determined by the SARS. This court will not enter into the adjudication of tax disputes, an arena properly regulated under the ITA and other tax legislation, nor make orders incidental to an investigation into the parties' liability to pay income tax.

[30] In the result I make the following order:

a) The application is dismissed;

b) Costs of the application to be paid by the applicant.

Rabkin-Naicker A.J.

Date of Hearing: 18/3/2011

Date of Judgment: 11 April 2011

Appearances:

For the Applicant: Adv C Dreyer

Instructed by: Hutcheon Attorneys

For the Respondent: Adv N Basson

Instructed by: Du Plessis and Associates Inc