

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Reportable
Case No P530/09

In the matter between:

J & J NFREEZE TRUST
and

Applicant

THE STATUTORY COUNCIL FOR THE
SQUID AND RELATED FISHERIES OF SA

1st Respondent

JONATHAN GRUSS N.O

2nd Respondent

NEVILLE MICHAEL OLKERS

3rd Respondent

Date of reasons: 20 July 2011

REASONS FOR THE ORDER

Molahlehi J

Introduction

1] On 26 November 2010, this Court made an order in the following terms:

“The applicant’s application to review and set aside the second respondent’s ruling issued under case number SCS113/08 is dismissed with costs.”

2] The order was made following the application in terms of which the applicant sought to review and set aside the ruling issued by the second

respondent (the arbitrator) under case number SCS 113/08 dated 27 September 2009. In terms of that ruling, the arbitrator found that the first respondent had jurisdiction to entertain the alleged unfair dismissal dispute referred to it by the third respondent. The applicant contended that the first respondent did not have jurisdiction because the third respondent was not an employee but an independent contractor.

- 3] The third respondent has also applied for condonation for the late filing of his response to the applicant's review application. In my view, based on the explanation given by the third respondent and the circumstances surrounding the delay, I see no reason why condonation for the late filing should not be granted.

Background facts

- 4] It is common cause that prior to his dismissal, the third respondent provided the applicant with services of a skipper in vessel Langusta II. The relationship between the applicant and the third respondent lasted for a year. After his dismissal by the applicant, the third respondent referred an alleged unfair dismissal dispute to the first respondent for determination. At the hearing before the arbitrator, acting under the auspices of the first respondent the applicant raised a point *in limine* concerning the jurisdiction of the first respondent to entertain the dispute. As indicated, the applicant contended that the first respondent did not have the jurisdiction to entertain the matter because the third respondent

was not an employee but an independent contractor.

- 5] In support of its contention that the third respondent was not an employee but an independent contractor, the applicant presented before the arbitrator two witnesses. The two witnesses are Mr Shaw and Mr Nel.
- 6] The first witness of the applicant was Mr Nel, a trustee of the applicant, testified that the third respondent was paid on a commission basis which was calculated on the squid caught. According to him, Mr Shaw, the shore skipper was responsible for the vessel and when the vessel was at sea the skipper was in charge.
- 7] Mr Nel further testified that once the vessel was at sea, the third respondent made his own decision and that the shore skipper or himself did not have control over him. This according to Mr Nel included both the working hours and the crew to assist him. However, the third respondent required his (Mr Nel) approval if he was to come back in to the harbor.
- 8] As concerning a document titled "Skipper's contract" which the third respondent relied upon in asserting that he was an employee, Mr Nel testified that that document was nothing but "just couple of rules . . . So it is just guidelines." And during cross examination, when put to him that the third respondent was appointed on a probationary period of three months and thereafter to be appointed permanently, Mr Nel stated that: "Not permanently. I said we are going to see how it is going for three months, if

he can produce, that is the main . . .” And later during cross examination, when questioned about the contract, he said that he was not referring to the written contract but to the verbal contract concluded with the third respondent. This was after he had earlier stated that he was the author of the written contract.

- 9] Mr Nel conceded during cross examination that during the period of the relationship, the third respondent had worked only for the applicant and economically depended on the applicant. In addition, the third respondent was entitled to receive an additional R10,00 per kilogram choka caught.
- 10] Mr Shaw, the second witness of the applicant testified that the third respondent was an independent contractor who received payment from the applicant based on whatever fish was caught. In other words, he was paid a commission and not a salary.
- 11] In relation to the nature of the relationship between the applicant and the third respondent, Mr Shaw testified that he typed the document on which the third respondent relied on as his contract of employment. He testified that it was never intended to be a contract of employment but rather served as a document containing “instructions so that he knows what to do and also to give percentages and the stuff.”
- 12] Mr Shaw further testified that the crew of the boat was recruited by the

- third respondent and that he (the third respondent) was responsible for managing them on his own behalf but however the applicant paid the crew on behalf of the third respondent.
- 13] As concerning the payment of tax, Mr Shaw testified that they deducted it on the basis of a tax directive from SARS. And in relation to the “Salary Advice” which the third respondent received, he testified that the words “salary” and “employee” as used in the document was never intended to convey that the third respondent was an employee.
- 14] The third respondent on the other hand testifying on his own behalf, stated that he was phoned by Mr Shaw and informed that his employment contract was terminated. As an employee, he was amongst others entitled to family and sick leave, both of which he took during the course of his employment by the applicant. He took sick leave during 2007 and during that period, the boat slipped, meaning that the boat did not go to the sea. During 2008, he took family responsibility leave because of the death of his grandfather.
- 15] In relation to the nature of the relationship he had with the applicant, the third respondent understood it to be permanent, of course after the initial probationary period of three months. In terms of the contract of employment, the third respondent says that he was required to take a 21 days trip and needed permission if he was to return earlier than that.

Grounds for review

- 16] The applicant contended that the jurisdictional ruling was reviewable because the arbitrator unreasonably and unjustifiably failed to have proper regard to the evidence of the applicant pertaining to:

“20.1 The fact that Mr Shaw is not regarded as a shore skipper since he is only doing maintenance on the boat. He is also not an employee of the Applicant, but an independent contractor.

20.2 the fact that Mr Shaw concluded and employment agreement with the Third Respondent without having had the necessary authority from the Applicant to do so;

20.3 the fact that the crew are employees of the Applicant and that the skipper does not form part of the crew and is therefore not an employee of the Applicant;

20.4 the fact that Mr Shaw issued a letter to the Third Respondent certifying that the Third Respondent is a permanent employee of the applicant, without hearing he had the necessary authority from the Applicant to do so;

20.5 the fact that the third respondent only and commission on total catch of squid caught;

20.6 the fact that the Third Respondent's duties were project based and that there were no specific working hours, either done that troops to see approximately twenty one (21) days at a time;

20.7 the fact that three (3) month period related to the notice period that the Third Respondent had to give the Applicant when he wished to terminate the Independent Contractor Agreement with the

Applicant.”

- 17] The applicant further contended that the arbitrator failed to have proper regard to the legal authorities, the nature of the contract/relationship between the skipper and the owner of the boat including the general practice in the fishing industry. The applicant further criticised the finding of the arbitrator that Mr Shaw had the authority to conclude an employment contract on behalf of the applicant. The contract which the arbitrator relied on in concluding that there was an employment relationship was according to the applicant not authorised.

The arbitration award

- 18] The arbitrator in his analysis of the evidence which was presented before him starts by indicating that the evidence which was tendered by both Mr Nel and Mr Shaw was not helpful in determining the jurisdictional point which the applicant had raised. In making the finding that the relationship that existed between the parties was an employment relationship the arbitrator relied on a number of court decisions. The first authority he had regard to is that of *Atlantic Fishing Enterprise v CCMA and Others*,¹ and *Shaw Geswindt and Evervest 32 (Pty) Ltd.*² The two cases dealt with the same issue as the present, which related to skippers in the squid fishing industry.

¹ Unreported Case number P809/02.

² Unreported Case number P410/03.

19] In *Atlantic Fishing Enterprise*, the court held that the starting point in determining whether someone is an employee or independent contractor is the very contract that the parties have concluded. The label given to the relationship is not determinative of the nature of the relationship but rather according to the court, the objective facts of what the true nature of the relationship is.

20] In considering factors that assist in determining the true nature of the relationship between the parties the arbitrator had the following to say:

“25. As it related to the first criteria relating to supervision and control, a degree of supervision and control in my view considering operational requirements of the Respondent’s business does not necessary imply that an employment relationship existed or exists. However, based on the contract, the applicant was not only responsible for the production of a result (quality and quantity of fish caught). h also lend us personal services by managing the Respondent’s employees whiles out at sea. This Mr Nel conceded under cross examination. He (Applicant) had the power to hire and fire crew on behalf of the Respondent. He was further responsible to control the food and to calculate the wages of the Respondent’s employees. He in my view was also a manager for the Respondent. The Applicant, in my view, formed an integral part of the organisation of the employer; he was responsible as the skipper to find fish (squid). In order for the crew to catch, therefore, without his involvement,

the respondent would not be able to successfully engage in the commercial fishing undertaking.

26 the undisputed evidence of tendered by the Applicant that it was corroborated by the agreement is that the Applicant was required to give three months notice before resigning. He testified that during 2007, he approached the shore skipper concerning the offer to skipper another vessel, the terms thereof was far better than the terms offered by the Respondent. He was told that he had to give three months notice, and as a consequence thereof, he could not accept the other offer. The implication of the three months notice period is that the Applicant could not terminate his involvement with the Respondent without giving three months notice. The Applicant could not from one trip to another change vessels (clients), and therefore considering the three-month notice period, and considering that a trip was for 21 days he was economically dependent upon the Respondent.

27 The three month trial period clause in the contract and thereafter being permanent instated, implies that a probation period applied to the Applicant engagement with the Respondent. Having regard to such terms and considering the nature of an independent contractor's relationship in general with Clients and that no reciprocal notice period was required on the part of the Respondent, the only logical deduction, one can conclude is that the three months period amounted to a probation for purposes as contemplated in terms of Item 8 of Schedule 8 of the Code of Good

Practice.”

Evaluation

21] The approach to be adopted in dealing with review of jurisdictional ruling has been set out in *SA Rugby Players' Association (SARPA) and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd and Another*,³ where the court held that the CCMA being a creature of statute did not have the power to determine its jurisdiction but may do so for convenience. In other words, the CCMA or the bargaining council cannot grant itself jurisdiction which it does not have. This means the question of whether the CCMA or a bargaining council has jurisdiction is a matter to be determined by the Labour Court. The Labour Court determines the existence or otherwise of the jurisdiction of the CCMA or the bargaining on the basis of the existence of objective facts.

22] In *Salam Insurance Life Insurance Limited v CCMA and Others*,⁴ the court held that in determining jurisdictional reviews, the Labour Court was called upon to decide *de novo* whether there was an employer/employee relationship between the parties. In other words, as stated by this Court in the recently unreported case of *Pick It Up v Marwashe*,⁵ the test in reviews concerning the jurisdiction of the CCMA or the bargaining council is not that of a reasonable decision maker as is the case in the general review cases but whether the objective facts as they existed formed the basis

3 [2008] 9 BLLR 845 (LAC).

4 Unreported Case JA38/08,

5 Unreported Case number, JR1613/09.

upon which the CCMA or the bargaining council could assume jurisdiction. It would seem even the issue of the correctness or otherwise of the decision of the commissioner is in this respect irrelevant. In other words the court in the jurisdictional review may well find that the decision of the commissioner or the arbitrator was correct, but it is critical that the court has to apply its own mind and determine whether the objective facts as presented gave the commissioner or the arbitrator the jurisdiction upon which the dispute could be entertained by the CCMA or the council.

- 23] It therefore follows from the above discussion that, I am called upon to determine whether the objective facts provided the first respondent with the necessary jurisdiction to entertain the alleged unfair dismissal dispute of the third respondent.

Determining the nature of the relationship between the parties.

- 24] In terms of section 213 of the Labour Relations Act⁶ an employee is defined 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; and

(b) any other person who in any manner assists in carrying on or conducting the

⁶ 66 of 1995.

*business of an
employer, and
"employed" and
"employment" have
meanings
corresponding to
that of "employee".*

- 25] Historically, various tests have been used in determining whether the relationship between the parties is that of an employer/employee or otherwise. At some stage in the development of labour jurisprudence, the control test was favoured by the courts in the determination of the true nature of the relationship between the parties. In terms of this test, the extent of the control which the alleged employer had over the employee was determinative as to the true nature of the relationship. It would seem the use of this test lost favour because of its failure to take into account the technological changes that had over the years taken place in the field of work. The control test was criticised in *Smit v Workman's Compensation Commissioner*,⁷ for being too wide a concept. After evaluating the usefulness of the control test and accepting that whilst it served as an indicator of the nature of the relationship, the Court then summarised some of the important legal characteristics of both the employment relationship and independent contractor relationship. In this respect the court had the following to say:

⁷ 1979 (1) SA 51 (A).

“1. *The object of the contract of service is the rendering of personal services by the employee (locator operarum) to the employer (conductor operarum). The services or the labour as such is the object of the contract. The object of the contract of work is the performance of a certain specified work or the production of a certain specified result. It is the product or the result of the labour which is the object of the contract.*

2. *According to a contract of service the employee (locator operarum) is at the beck and call of the employer (conductor operarum) to render his personal services at the behest of the latter.*

By way of contrast the conductor operis stands in a more independent position vis-à-vis the locator operis. The former is not obliged to perform the work himself or produce the result himself (unless otherwise agreed upon). He may accordingly avail himself of the labour or services of other workmen as assistants or employees to perform the work or to assist him in the performance thereof.

3. *Services to be rendered in terms of a contract of service are at the disposal of the employer who may in his own discretion decide whether or not he wants to have them rendered.*

The conductor operis is bound to perform a certain specified work or E produce a certain specified result within the time fixed by the contract of work or within reasonable time where no time has been specified.

4. *The employee is in terms of the contract of service subordinate to the will of the employer. He is obliged to obey the lawful commands, orders or*

instructions of the employer who has the right of F 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 conductor operis, however, is on a footing of equality with the locator operis. The former is bound by his contract of work, not by the orders of the latter. He is not under the supervision or control of the locator operis. Nor is he under any obligation to obey any orders of the locator operis in regard to the manner in which the G work is to be performed. The conductor operis is his own master being in a position of independence vis-à-vis the locator operis. The work has normally to be completed subject to the approval of a third party or the locator operis.

5. A contract of service is terminated by the death of the employee whereas the death of the parties to a contract of work does not necessarily terminate it.

6. A contract of service also terminates on expiration of the period of service entered into while a contract of work terminates on completion of the specified work or on production of the specified result.”

26] In responding to the shortcoming of the control test, the organizational test was developed. The enquiry in the use of the organization test entails enquiring into whether the person who contends to be an employee forms an integral part of the business.

27] The other test that has been used by the courts is the dominant

impression test which received attention and approval in *Ongevalle Kommisaris v Ondelinge Versekkringemaatskap AVBOB*.⁸ The essence of this test is to determine whether on the facts and the circumstances of a given case the dominant impression presents the existence of an employment contract or an independent contractor.⁹

28] In *State Information Technology Agency (SITA) (Pty) Ltd v CCMA and Others*,¹⁰ the court held that:

“[10] I turn therefore to deal with the question, as to who the employer was pursuant to the facts as set out in this case. The major obstacle facing appellant concerned the judgment of this court in Denel (Pty) Limited v Gerber, 2005 (26) ILJ 1256 (LAC), in which this court adopted a “reality test” to a situation of where a company or a closed corporation is interposed between an employer and an employee. The court took the view that, even where there was an agreement where one legal entity such as a company or close corporation and the alleged employer for the provision of services, it was open to the court to find that the person who effectively was the owner of the company or a close corporation was an employee of the other company, with which his or her company or close corporation had such an agreement. The mere fact that use is made of a legal entity such as a company or close corporation to provide services,

⁸ 1976 (4) SA 446 (A).

⁹ See also *Bezer v Cruises International CC* (2003) 24 ILJ 1372 (LC)

¹⁰ 2008) 29 ILJ 2234(LAC) at para 10-11..

was no bar to the conclusion by the court that a particular individual who was contracted to a company or close corporation, or who owned the company or close corporation in terms of which he was obligated to provide services to the alleged employer, was an employee of the company, which was contractually entitled to receive such services.

In short, the court in Denel supra, approached the vexed question of the employment relationship on the basis of the substance of the arrangements between the parties as opposed to the legal form so adopted. That particular judgment has been the subject of legal analysis. See in particular André van Niekerk, 2005 (26) ILJ 1094, who in turn refers to a most comprehensive and thoughtful analysis by Paul Benjamin in the 2004 (25) ILJ 787.

Benjamin's contention is that the Denel judgment is congruent with Section 213 of the Labour Relations Act which inter alia defines an employee as any other person who in any manner assists in carrying on or conducting the business of an employer. Benjamin, (whose article was written before the decision in Denel), notes that the issue of the employment relationship has become crucial to labour law partly because of the concept of outsourcing and because, in many cases, a traditional employer/employee relationship no longer operates in the labour market. He refers in this connection to international standards developed by the ILO and, in particular, to recent conventions which "show a conscious policy to extend their application to workers not employed in convention employment relationships" at 801.

[11] Benjamin then makes a further useful point in relation to the determination of this question:

“A starting point is the distinguished personal dependence from economic dependence. A genuinely self employed person is not economically dependent on their employer because he or her 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 the 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 required by contract, who only provide services for a single client, is a very strong indication of economic dependence. Likewise, depending upon an employer for the supply of work is a significant indicator of economic dependence”

29] The Court per Davis JA went further to say:

“For this reason, when a court determines the question of an employment relationship, it must work with three primary criteria:

- 1. An employer’s right to supervision and control;*
- 2. Whether the employee forms an integral part of the organisation with the employer; and*
- 3. The extent to which the employee was economically dependent upon the employer.”*

30] The applicant is contending that the third respondent was not an employee relied on the above authorities, including those of the Labour court dealing specifically with squid fishing vessels. The applicant submitted that with no exception the Labour court has held that skippers of such vessels were independent contractors. The other case which the applicant relied on in contending that the third respondent was not an employee was that of *Shaun Geswindt v Everest 32 (Pty) Ltd* in which the court found that the skipper in the squid fishing vessel was an independent contractor.¹¹ In support of its point that it is common practice in the squid fishing industry that skippers are independent contractors, the applicant relied on a number of arbitration awards where the commissioners dealing with the same issue found that the skippers were independent contractors.

31] As concerning the facts of this case, the applicant says that it had a verbal agreement with the third respondent in terms of which he (third respondent) was engaged as the skipper on the squid vessel for 12 months and earning an amount of R618,000 based on commission. Furthermore, the applicant contended that:

- it did not deduct UIF from the salary of the third respondent.
- It had no control over the third respondent whilst he was at sea.
- The third respondent employed his own crew.
- The third respondent was not entitled to leave pay.
- Third respondent determined his own pay in terms of how much

¹¹ See note 2. above

squid he caught.

- The third respondent was at liberty to work on any other vessel of his choice.
- The third respondent's tax liability was determined in terms of the tax directive.
- The third respondent did not require permission of the applicant. If you wish to attend to the above.

32] The transcript of the hearing before the arbitrator reveals that there were two conflicting versions between the parties. These conflicting versions can in my view be resolved through evaluating the credibility of the witnesses of the respective parties. There is no doubt in my mind that the two witnesses of the applicant were in a number of material respects unreliable. Their credibility, with respect, is in serious doubt. The version of the employee is more probable than that of the applicant's witnesses.

33] In my view, substantively the objective facts of this case reveal that the relationship that existed between the parties was that of an employer/employee. The finding made by the commissioner in determining the jurisdiction of the statutory council for convenience is undoubtedly correct and I align myself with it. The contract of employment categorizes the third respondent as an employee. His duties as defined therein, as follows:

- cleaning the vessel before entering the harbour.
- Quality control of fish;
- controlling food, stock and tackle-provided by the applicant;

- Managing fellow employee use employed by the applicant;

34] The contract also provides for the probationary period of three months and thereafter, if the third respondent performed satisfactorily, he would be appointed permanently. He would be instated and that is what happened. The contract also makes provision for three months notice period, should the third respondent wish to terminate the contract earlier.

35] The fact that no UIF deduction was made from the third respondent's salary and that the tax deducted was by way of the tax directive, is in my view not decisive in the determination of the true nature of the relationship between the parties. It should also be noted that the fact that there is a general practice in the industry, as the applicant contended that skippers are independent contractors, is not law and therefore each case has to be evaluated on its own merits.

36] The facts in this matter weigh significantly in favour of the finding that the relationship between the parties was that of employer/employee. Although the applicant sought to water down the value of the written agreement between it and the third respondent as concerning the true nature of their relationship, that fact is significant in a number of respect. The written agreement, whilst not determinative of the true nature of the relationship between the parties, on its own, is significant if regard is had to other facts associated with its provisions. It is this agreement that made

the third respondent an integral part of the applicant including making him economically dependent on the applicant. The income the third respondent received was effected through a salary advice which categorized the third respondent as an employee. Another significant fact to be taken into account in this respect is the concession made by Mr Nel that the third respondent rendered his personal services to the applicant. The fact that the third respondent had to give a three months notice if he was to resign, means that he could not skipper any other vessel as and when he so decided. The applicant could not dock the vessel as and when he so wished. In addition, the applicant confirmed the status of the third respondent as an employee with the estate agent when the third respondent was looking for a house. The third respondent was responsible for managing the crew on behalf of the applicant and not for catching the fish. The crew was responsible for catching the fish.

37] In as far as the number of decisions that had been made concerning other skippers who had been found to be independent contractors, it is my view that the assessment of the true nature of the relationship is not based on statistical imperatives but rather each case has to be considered on its own merits.

38] It was accordingly for the above reasons that the order quoted above was made.

Molahlehi J

Judge of the Labour Court of South Africa.

Appearances

For the Applicant : Applicant's Manager :

For the Third Respondent: TD Portgieter Attorneys