

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Not Reportable
Case no: D615.08

In the matter between:

HLANZEKA CLEANING COMPANY (PTY) LTD

Applicant

and

JABULANI NGWANE N.O.

1st Respondent

COMMISSIONER FOR CONCILIATION,
MEDIATION AND ARBITRATION

2nd Respondent

NGONIWE ZANDILE MAPHUMULO

3rd Respondent

MANDY N MADLALA

4th Respondent

NOMBUSO MGENCE

5th Respondent

BONGEKILE NDLOVU

6th Respondent

MAVIS THEMBEKA DLOMO

7th Respondent

NOBUHLE F MGENCE

8th Respondent

REVIVAL N NDLOVU

9th Respondent

GUGU P MCHUNU

Tenth Respondent

BONGIWE G NGEMA

eleventh Respondent

JABULILE V MAGCABA

Twelfth Respondent

QONDENI MCHUNU

Thirteenth Respondent

Date of Hearing: 14 June 2011

Date of Judgment: 29 June 2011

JUDGMENT

PATHER A.J

Introduction

[1] This is an application to review and set aside the first respondent's award dated 15 July 2008, made in his capacity as a commissioner of the second respondent, and to substitute it with an award to the effect that the 3rd to 13th respondents (the employees) were not dismissed by the applicant, alternatively to refer the matter back to the second respondent to be heard before a commissioner other than the first respondent (the commissioner).

Background facts

[2] The employees commenced employment with the applicant at different times, some as early as 2004. They would usually be allocated duties for the day at the applicant's gate where they waited to be given work. Sometimes they worked one day per week, other times, more than one day, even a full week and sometimes, even overtime in addition to working a full week. On 24 February 2008, the employees were informed that they would no longer be employed from the applicant's gate; that they were required to forward their names to a labour broking company named

Adecco, and that the applicant would procure their services from this Adecco. The employees duly went to Adecco but were unable to secure registration as employees of Adecco. They then returned to the applicant's Mr Molwena, who, as supervisor in the applicant's employ, was responsible for allocating duties to them at the gate. The employees informed Molwena that as the Adecco programme failed to materialise, he should terminate their services legally. From the evidence, it would seem that nothing came out of the meeting between the employees and Molwena, and as a result, they, the employees, referred a dispute relating to their unfair dismissal to the second respondent.

The arbitration

[3] At the arbitration hearing before the commissioner, and after testifying on behalf of the applicant, Molwena was cross-examined by Ms Nombuso Madladla, one of the employees who was nominated by the rest of them to be their representative. It was put to Molwena that he had subsequently informed the employees that Adecco had refused to accept them, as it already had its own pool of employees. It was further put to Molwena that he had then informed them that the applicant had no more work for them. The following exchange appears from the record:

“Answer: ...I called Adecco to come to a meeting with Respondent. We had an agreement that they would take you and register you. I gave them your ID's and asked them to register you and I told you to go to Adecco as I would no

longer be able to employ you. You didn't come back to me to say Adecco didn't materialise. Only two or three people came back to me.

Question: What are (you) going to say if I say Adecco refused to take us?

Answer: You should have come back to me to say you experienced problems.

Question: We told you and you said there was no more job for us and we approached CCMA."

[4] Later, testifying for the employees, Madladla stated that they had gone to Adecco for the whole week at the end of which one of its officials informed them that they were not needed as Adecco had its own employees. She stated further that Molwena had informed them, the employees, that the applicant had no more work for them and that they could "just go and wait at Adecco". She had not been aware that the applicant sourced labour from Adecco.

[5] It was the applicant's case at the arbitration hearing that the employees were not dismissed; that they were only utilised when their services were required. The applicant further denied that it had informed the employees that there was no work for them; it was only required that they should register with Adecco.

The grounds of review

[6] These are:

"6.1 By finding that the issue to be decided between the Applicant and the Third and further Respondents was whether or not there was an employment relationship.

6.2 By finding that the Third and further Respondents had been dismissed by the Applicant”,

the commissioner committed reviewable irregularities.

[7] In its Heads of Argument, the applicant contends that “the essence of the dispute seems to revolve around a misunderstanding” between the parties. It was contended that the employees seem to have regarded the information that they would no longer be recruited from the gate but through Adecco, as a dismissal. Mr Pillay on behalf of the applicants submitted that a senior representative of the applicant, (presumably Molwena), had requested that the employees present themselves at Adecco, to formalise the relationship so that the applicant was able to recruit them from Adecco and not from the gate of the applicant’s premises as in the past. Referring to Grogan’s *Workplace Law*, 10th ed (Juta,Cape Town 2009), Part D, Chapter 10 – Dismissal, Mr Pillay argued that a dismissal occurs when an employer makes it clear that the employees’ services are no longer required; in this case, no such evidence was presented to the commissioner. Referring to various aspects of the record, Mr Pillay argued that:

- There was no unequivocal termination of the employees’ services by the applicant;
- The employees had no issue with this fact that contrary to their belief, they were not dismissed (line 10, page 11 of the Index to Bundle);
- And, finally at lines 10-14 of page 10, the applicant indicates to the employees that although it will not be able to employ them from the gate in future, Adecco would register them.

[8] Mr Pillay further referred the Court to the case of *NUCCAWU v Transnet LTD t/a Portnet*.¹ In this case, casual employees who had contracted under a written contract of employment were asked to conclude a new contract which limited their terms of employment. After analysing their status, the court found:

“In effect what we have is that the applicant’s members constituted a special class of employees; a class of employees who were not guaranteed that they would be employed but had the right to be considered for employment on a day-to-day basis, if respondent had a need for them... I come to the conclusion because I believe that the definition of ‘employee’ in the Act is wide enough to include persons who are retained on the books of an employer to render services albeit on an *ad hoc* basis.”²

It was submitted that the evidence before the commissioner was that the employees were simply required to register with Adecco, the labour broker, after which the applicant would consider them for employment on an *ad hoc* basis. As such, the employees, so the argument proceeded, had no right to employment, but merely the right to be considered for employment. All that the applicant sought was to restructure its recruitment of casual labour.

[9] Arguing for the employees, Mr Jafta pointed to that part of the record at page 10, lines 16 to 20 of the Index to Bundle, where the employees’ version was put to the applicant, namely that the applicant had informed them in unequivocal terms that

¹ (2000) 21 ILJ 2288 (LC).

² Id at para 6.

there was “no more job” for them. He submitted that the case of *NUCCAWU v Transnet* differed in that in that case, the employees concerned were employed for 3 days per week in terms of a contract. However, in the present case, it was not disputed that the employees were employees in terms of the Basic Conditions of Employment Act and the LRA.

Evaluation

[10] In my view, given the evidence that the employees would, some for up to seven years, wait at the gate to be called and be allocated duties on some days of the week but not always, they therefore, while not guaranteed employment, had the right to be considered for employment as and when the need arose. Accordingly, in terms of their continuing relationship with the applicant, the employees had such right to be considered for employment by the applicant, and no one else. In other words, the applicant had no right to unilaterally change the terms of the relationship so as to avoid its obligation towards the employees, some of whom had been in its employ for long periods. If the applicant had wanted to restructure its operation in relation to the recruitment of casual labour, it was entitled to do so, provided it acted within the parameters of the LRA and consulted with its employees – be they permanent or casual. The employees were not guaranteed employment from the applicant, except on an *ad hoc* basis, which until then suited their needs. However, by insisting that they register on the Adecco data base before the applicant could utilise their services again, the applicant attempted to free itself of its responsibility towards a class of employee whose existence it had encouraged for up to seven years previously.

Molwena conceded that at least some of the employees had informed him that the Adecco registration had not materialised. The evidence indicates that he did nothing to remedy the situation. In the interim, the employees had waited for employment via the offices of Adecco to materialise, to no avail. They ended up without work for a week, with little or no prospects of ever obtaining work from the applicant through Adecco, as the applicant seems to have assured them. Adecco had informed them that it had no need for them as it had its own employees. Moreover, they were unable to obtain work even on an *ad hoc* basis in terms of the applicant's new recruitment policy of not allocating work to casuals at the gate as all allocations would in future be done through Adecco. It was not disputed that the employees, on returning to the applicant after a fruitless attempt to become registered on Adecco's data base, had been informed that there was "no more job" for them at the applicant. While not guaranteed work from the applicant except on an *ad hoc* basis in terms of the dicta in the NUCCAWU v *Transnet* case above, the chances of the employees ever obtaining work through the agency of Adecco, if they had succeeded in being registered on its data base, seems remote. After all, Adecco, as an established operation must surely have had its own reserves of casual labour for placements. Therefore, the evidence that an Adecco official informed the employees that it had no need for them is probable. In any event, employment through a labour broker such as Adecco presents its own challenges for employees, not the least of which is being placed at a site at the whim of the labour broker's clients. Which then leads to the question: why was it necessary for the applicant to have referred the employees to Adecco in the first place if in fact it did not intend to terminate their services or if it will continue to allocate

work to them, as stated? If the reason was genuinely to formalise the recruitment of casual labour, then apart from consulting with the affected employees, the applicant would have been expected to invite Adecco to the consultation process so as to ensure that the affected employees were aware of the restructuring, and that new employment contracts through the agency of Adecco could be made available to them. Furthermore, the legal implications of the proposed new employment relationship between the employees and Adecco, intended to replace their relationship with the applicant would have been explained fully. As it is, the applicant fobbed them off to Adecco, who in turn had nothing to offer them. In the process, the employees were not being allocated work because of the applicant's revised recruitment policy relating to casual labour; they were simply left without the prospects of further work being allocated. In my view, the applicant's conduct amounts to a dismissal of the employees. And, since no procedure was followed prior to presenting the employees with such a *fait accompli*, the dismissal was at least procedurally unfair. The applicant cannot escape liability for unfairly dismissing the employees, simply because, apart from the statement that there were no more jobs for them, it chose not to inform them in unequivocal terms that their services were being terminated by their having to apply for new employment with Adecco.

[11] While it is true that the commissioner exceeded his powers by deciding that the issue in dispute was whether the employees were "employees" as defined in the LRA, this cannot be said to have prejudiced the applicant. The commissioner's acting *ultra vires* seems to have arisen as a result of his own doubts about the relationship, hence

his indirectly alluding to the dominant impression test in concluding that the employees were “employees” as defined in the LRA.

[12] However, based on the evidence presented to him, the commissioner’s decision that the dismissal was procedurally and substantive unfair is without doubt, one that a reasonable decision- maker could have reached.

[13] In the premises, I make the following order:

1. The application is dismissed; and
2. The applicant is to pay the costs.

PATHER A.J

Appearances:

For the Applicant : Adv.P.O.Jafta

Instructed by : Jafta Incorporated

For the Respondent : Adv.I Pillay

Instructed by : Deneyz Reitz Attorneys