

**REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA**

JUDGMENT

Reportable

Case no: JR561/2011

In the matter between

KENNETH WIENAND

Applicant

and

PHARMA NATURA (Pty) Limited

Respondent

Heard: 2012-07-12

Delivered: 2012-07-12

Summary: Review of a jurisdictional ruling. The test applicable to jurisdictional ruling review. Where a Commissioner has found that there was no employer and employee relationship-a jurisdictional fact, the Court of review is guided by the facts objectively viewed. The fact that a Commissioner found that he has no jurisdiction is of no consequence. Where an employee receives a salary through a Close Corporation such does not suggest that the remuneration aspect was not agreed upon. The test applicable to determine the legal question of an employer and an employee restated. The ruling was reviewed and set aside.

JUDGMENT

MOSHOANA AJ

- [1] This is an application brought in terms of Section 158(1)(g) of the Labour Relations Act, in terms of which the applicant one Kenneth Douglas Wienand, seeks a review against a jurisdictional ruling made by the second respondent.
- [2] In terms of the aforesaid ruling, the second respondent concluded that since there was no employer and employee relationship, the third respondent being the National Bargaining Council for the Chemical Industry, did not have jurisdiction to entertain a dispute between the applicant and the first respondent.
- [3] In brief, the facts of this matter are that the applicant was appointed as the financial manager of the first respondent. It seems common cause between the parties that at the time of his appointment, the first respondent was facing some financial difficulties. To that extent, the applicant himself testified at the arbitration proceedings, that he would have negotiated a package of R75 000, 00, but because of the financial crisis that were presented to him, he negotiated or he settled for R65 000, 00 per month.

- [4] It is also common cause that after a period of a year or so, of a relationship I must call at this stage of the judgment, the applicant sought to have his salary increased, given the undertakings that were apparently given to him that after a survey his salary might be increased.
- [5] Now, it is apparent to the court, that given the discussions around the increment, the first respondent deemed it appropriate at that time to then terminate the relationship. The applicant being aggrieved by the termination of the relationship approached the third respondent for assistance.
- [6] As I have pointed out earlier in this judgment, what became an issue before the second respondent was whether there was an employer and employee relationship. It is correct as submitted by Mr Levine for the first respondent that the second respondent acted in the most prudent way by asking the parties to still lead evidence in order to determine this issue.
- [7] The parties deemed it necessary to lead evidence in order to assist the second respondent in a sense, to come to a conclusion on this jurisdiction fact.
- [8] Mr Malan appearing for the applicant, impressed on me that if one has regard to certain conclusions that he pointed to in the award, it is very clear that the commissioner was wrong in some of the

conclusions that he had arrived at, which led him to the finding that there was never an employer and employee relationship.

[9] Of course, as I have pointed out, the applicant was aggrieved by the ruling and approached this court to exercise its powers of review. The test for review has been dealt with in a number of judgments in this court, but then it came to a focal point by the much celebrated judgment of *Sidumo* where the issue is one of reasonableness.

[10] However, there are authorities of this court and the Labour Appeal Court, that correctly so, held that when it comes to a jurisdictional ruling, the test in *Sidumo* does not apply. What is required is for a court like this one to assess the facts objectively in order to determine whether a jurisdictional fact has been established, in this instance, the fact is whether there was an employer and employee relationship?

[11] Mr Levine appearing for the first respondent agreed that that is the test as it was highlighted by Mr Malan in his supplementary heads. Now the only question before this court is, whether on the facts objectively viewed an employment relationship existed between the applicant and the first respondent.

[12] The only way in which this court can determine that issue, is obviously to have regard to the facts that are placed before it. The

applicant approached this matter by way of a review, and in that regard, the court would have to have regard to the evidence that was presented at the arbitration proceedings, together with any documentary evidence that supports any contention either way.

[13] What became very clear during the submissions and also from the review papers was that the applicant was placed at the disposal of the first respondent through an employment agency. There is evidence to the effect that the employment agency required to be paid for its services.

[14] In the course of the submissions I raised an issue with Mr Levine that the court understands that such entities would place only employees and or staff at a disposal of a company. The court has never come across a situation where employment agencies will place at a disposal of a company, another company. But I will return to the issue of the Close Corporation later in this judgment.

[15] The applicant having been placed in that position by the employment agency, as a financial manager, was paid a fixed amount which of R65 000, 00 per month until to a point when he was terminated. It is common cause that the remuneration that the applicant was paid, was not paid directly to him, but was paid through a close corporation.

[16] This issue of being paid through a close corporation, somewhat

arrested the attention of the commissioner, to come to the conclusion that there was no employer and employee relationship. In my view, the issue of remuneration as an *essentialia* of a contract of employment becomes important at the point of agreement, not at the point where how it is being paid.

[17] By way of example, an employee can direct the employer to pay his salary, the entire salary to an entity like a trust. That does not suggest that the issue of remuneration was never agreed. It is not always the case that an employee would be paid directly, but what is important as an *essentialia* of a contract of employment, is that there must be an agreement on the remuneration payable.

[18] From the facts Mr Levine conceded that there was a fixed amount that was payable over a period of time, so the only conclusion that one can arrive at is that the issue of remuneration was agreed upon. The fact that it was paid through a Close Corporation, in the court's view, is of no consequence in terms of determining whether the issue of the salary or remuneration had been agreed.

[19] Mr Levine in his submission agreed to the proposition by this court, that the issue of whether there was an employer and employee relationship has since become somewhat a legal question. Although it needs to be bolstered by facts it has become a legal question in the sense that the courts over the years have developed tests that they use for the purposes of determining that

very difficult question.

- [20] Often times, employers faced with a possibility of the application of the Labour Relations Act, the Basic Conditions of Employment Act or the Employment Equity Act, it becomes easy for them to simply say that there was never an employer and employee relationship.
- [21] It was for this reason that the courts have developed tests over the years and it was for this reason that one saw the provisions of Section 200A of the Labour Relations Act arising from the test that has been applied for one to be presumed to be an employee.
- [22] In the judgment of my brother Molahlehi J, in the *National Education Health and Allied Workers Union v Ramodise and Others*,¹ this court was confronted with a similar question. Although in the contrary the court there was dealing with an application where Nehawu was seeking to reverse a conclusion by a commissioner to the effect that there was an employer and employee relationship.
- [23] The court relied upon what the LAC had to say in the matter of *State Information Technology Agency (Pty) Limited v The Commission for Conciliation, Mediation and Arbitration and Others*.² The judgment the Labour Court said the following:

¹ 2010 (31) ILJ 695 (LC).

² 2008 (29) ILJ 2234 (LAC).

'The Labour Appeal Court in *State Information Technology Agency (Pty) Limited v The Commission for Conciliation, Mediation and Arbitration and Others* 2008 (29) ILJ 2234 (LAC) confirmed the approach it had adopted in *Denel*, Davis JA in that case after upholding the views expressed by *Benjamin in 2004* (25) ILJ held that the decision in *Denel* is congruent with the provisions of Section 213 of the Labour Relations Act and that when determining the issue of employment relationship the court must work with three primary criteria. The three criteria are set out at paragraph 12 of the judgment as follows:

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

In this matter, I intend to be guided by these primary criteria. Turning to the facts of this case and considering the first criteria of supervision and control.

[24] My reading of the papers and I did not understand Mr Levine to submit otherwise, is that since the relationship started up to the point of its termination, the applicant was performing the assigned functions under the control, it seems to me, of the CEO. One of

³ Id at para 20.

the issues that he was to deal with was the turnaround strategy.

[25] I do not see how an employee or the applicant in this instance, would have been able to finalise or deal with the issue of the turnaround strategy, without being supervised amongst others, by the CEO or even, for that matter, the board of the company.

[26] The other aspect is that of control. It is very clear from the evidence that was presented, that there were certain number of hours that the applicant had to dedicate. But the most telling aspect for this court is that when the applicant had to take leave, he had to seek permission and it became clear that until it was approved the applicant could not just up and leave. Therefore there was a measure of control in terms of the applicant's employment.

[27] The argument by Mr Levine that the issue of leave was simply just to indicate that the applicant was absent and there are no consequences to be attached to that should be rejected. If one has regard to the block appearing on the leave forms, which I invited Mr Levine to address me on, requires authorisation by somebody who is above the applicant. The CEO had to approve that over a period when the applicant took leave. There is not dispute about that.

[28] Now as far as this court is concerned, there was supervision and

control from the facts that are presented in this case. The second criterion is whether the applicant formed an integral part of the organisation with the employer. I heard from the submissions and also had regard to the structures of the company that the applicant was sitting amongst others in the executive committee meetings.

[29] The applicant somehow took part in some of the decisions that one could say had to do with the running of the employer as an organisation. In that regard, I find it very difficult to conclude that the applicant did not form an integral part of the organisation.

[30] The third criterion is the extent to which the employee was economically dependent on the employer. I suppose that what broke the camel's back in this matter, a salary increment, is evidence enough to demonstrate that the applicant was depending economically on the employer.

[31] He sought to be given an increase, given the fact that when he negotiated at the time, he somehow sold himself short with R10 000, 00 but at the time he understood the situation.

[32] Now his continued economic survival was dependent on him further negotiating an increase and because the first respondent was unhappy with the fact that the applicant was forging ahead with his contention that he has to be given an increase, his services were terminated.

[33] The issue of whether there was dismissal does not arise in these proceedings. But in passing, I can state that the termination letter that I have seen in these papers, although carefully crafted to suggest that it was terminating his services, is nothing else but termination in terms of Section 186(1) (a) of the Labour Relations Act, which is a dismissal. But as I have pointed out, that issue does not arise in these proceedings at this stage.

[34] In conclusion, it is my view that the jurisdictional fact existed and it was incumbent upon the second respondent with those facts, to have come to no other conclusion but that there was an employer and employee relationship and that the third respondent had jurisdiction.

[35] On the issue of costs, both parties submitted that costs should follow the result and I do not see any reason why I should be averse to such submissions.

Order

[36] In the result I come to this conclusion and order the following:

1. The ruling issued by the second respondent is hereby reviewed and set aside.
2. There was an employer and employee relationship between the applicant and the first respondent, thereby the third

respondent does have jurisdiction to arbitrate the alleged unfair dismissal dispute, referred to it by the applicant.

3. The first respondent is to pay the costs of this application.

G N MOSHOANA AJ

Acting Judge of the Labour Court.

APPEARANCES

For the Applicant: Mr F Malan of Edward Nathan Sonnenberg,
Sandton.

For the Third Respondent: Mr C Levin of Clifford Levin Attorneys,
Cheltondale.