REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1660/10

In the matter between:

THE INDEPENDENT INSTITUTE OF EDUCATION (PROPRIETARY) LIMITED	Applicant
and	
MBILENI, N	First Respondent
WILSON, M	Second Respondent
THE COMMISSIONER FOR CONCILIATION MEDIATION AND ARBITRATION	Third Respondent

Heard: **21 June 2012**

Delivered: **9 November 2012**

Summary: Review of award – jurisdictional ruling – whether the second respondent an employee at the material time – cases such as 'Kylie' and Wyeth distinguished

JUDGMENT

<u>RabkinNaicker, J</u>

[1] This is an application to review and set asidean arbitration award issued by the first respondent (the Commissioner) in respect of an alleged unfair dismissal dispute. The Independent Institute of Education (Pty) Ltd (the applicant) challenges the award on a number of grounds. The award reads as follows:

> "6.1 I therefore order the respondent, Independent Institute of Education to pay to the applicant, Myles Wilson compensation equal to 11(eleven) month's salary, which was his outstanding term of contract.
>
> 6.2 The amount translates to R44 443-60 per month + R488 879-60 (Four hundred and eighty eight thousand and eight hundred and seventy nine rand and sixty cents which will be payable within 14 (Fourteen) days of the award being served on the parties.

[2] The Commissioner determined that the issues to be decided in the arbitration proceedings were whether the second respondent (Wilson) was an employee as defined by the Labour Relations Act, and if so, whether the termination of his contract was unfair.

[3] The issue of whether Wilson was an employee remains one that this court has to consider in determining whether the CCMA had jurisdiction to arbitrate the matter. In this regard, in view of the jurisprudence on jurisdictional challenges in review applications, the parties were agreed I have to determine whether the jurisdictional finding by the Commissioner was correct or not.[1] As far as the findings on the fairness of the dismissal, the enquiry,if necessary, will be founded on the review tests enunciated by this court and the Labour Appeal Court.

[4] In the Award, the Commissioner reasons as follows on the jurisdictional issue:

[1] SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others; SA Rugby Players Union and Another (2008) 29 2218 (LAC)

"5.1 The issue to be determined is whether the applicant was an employee and whether his contract should have been terminated in accordance with section 188 of the Labour Relations Act, Act 66 of 1995.

5.2 It is common cause that the applicant had entered into a contract of service with the respondent. According to my understanding of the respondent's argument, the contract of service provided for both a fixed term contract as an employee until the handover period which ended on the 31st December 2008, and a contract for service which was due to be terminate on the 31st December 2010.

5.3 The status of the applicant was not defined in the contract. It was however defined in the Agreement of Sale as that of an employee even though it was for a limited period. The question still remains did this definition apply after the handover period ? The issue is not clear from the service contract itself. The first paragraph of the service contract read as follows:

"The terms defined in the Sale of Business Agreement to which this agreement is Annexure 04, shall bear the same meaning in this annexure"

5.4 The Sale Agreement defined the applicant as an employee and according to the Service Contract the terms defined in the Sale Agreement bears the same meaning. I then looked at the Sale of Business Agreement on page 41 clause 16, it stated as follows:

"With effect from Effective Date, Ron, Herbie, Tony and Miles undertake to enter into written contracts of employment with the purchaser in terms of annexure '01' to '04' hereto". [The applicant's contract is termed annexure"04"].

5.5 Reading from the above clause, one would interpret the intentions of the parties as being that of entering into a contract of employment. A

> further question is whether the parties conducted the said relationship as that of employment or not."

[5] Having considered relevant case law relating to a contract of employment and a contract of service [2] and the various tests enunciated including the dominant impression test, the Commissioner went on to find as follows:

> "5.8 The most important consideration is whether the person who alleges to work for another actually places his productive capacity at the disposal of the other.
>
> 5.9 In casu the contract stated that the applicant may not work for any other person during the period in question. He further could not work for the respondent unless specifically instructed. He was required to apply for leave and make himself available at the behest of the respondent for job interviews. He was taxed as an employee and received a salary advice. He also paid Unemployment Insurance Fund, which is meant for employees.
>
> 5.10 It is therefore my view that the applicant was an employee of the respondent at the time of termination of his contract."

<u>Background to the dispute</u>

[6] Wilson was employed as the Financial Director of Trinity House Schools. During 2008, the applicant acquired the business consisting of the Trinity House Schools in terms of a written 'Sale of Business' agreement dated 22 May 2008. Wilson was a 12% shareholder in the vendors of the Trinity House business and therefore derived financial benefit from the proceeds of the sale.

[7] In the terms of the Sale of Business agreement, the applicant and Wilson concluded an agreement entitled a "fixed term service agreement" (the

[2] Denel (Pty) Ltd v Gerber (2005) 26 ILJ 1256 (LAC); SABC v McKenzie (1999) 20 ILJ 585 (LAC)

service agreement). It was submitted on behalf of Wilson that the service agreement in effect, and in law, attempted to disguise what was in fact an employment relationship. The service agreement read as follows:

> "The terms defined in the Sale of Business Agreement to which this agreement is annexure "04" shall bear the same meaning in this annexure.
>
> 1. **INTRODUCTION**
>
> Pursuant to the acquisition by the company of the Business as defined in the Sale of Business Agreement; the Company and Miles agree to enter into the following agreement which is recorded in writing as follows.
>
> 2. **DURATION**
>
> Unless as elsewhere provided herein, this agreement shall commence on the Effective Date and terminate on 31 December 2010.
>
> 3. **DUTIES**
>
> Pursuant to the Sale of Business Agreement, the Company will utilize Miles in his current capacity as Financial Director of the Business for a period of four months from the Effective Date in order to ensure a smooth transition and handover of the Business to the Company, which period may be extended by written agreement between the parties (the "Handover Period"). During the Handover Period Miles shall-
>
> 3.1.1 report to the Chief Executive Officer of the Schools Division of the Company, Mr. Alexander Isaakdis, or his nominee;
>
> 3.1.2 Comply with all reasonable instructions issued to hiM from time to time by the company;
>
> 3.1.3 Render his services to the Company for a minimum period of 4(four) days per week, which days will be determined by the Company; and
>
> 3.1.4 adhere to the terms and conditions of the Company's Code of Conduct and Policies.
>
> 4. **RETAINER AND/OR REMUNERATION**

4.1 During the Handover Period, the company will pay Miles an amount of R 55 000.00 per month, monthly in arrears. In addition, the Company will pay Miles' contributions to his medical aid and provident fund.

4.2 Upon completion of the Handover Period and unless as otherwise provided in this Agreement, the Company will pay Miles a monthly retainer of R 35, 000.00 (Thirty Five Thousand Rand), which will be paid in arrears. In addition, Miles shall remain on his current medical aid and provident fund, the contributions of which will be paid by the Company.

5. **ALTERNATE APPOINTMENT**

5.1 The parties record and agree that-

5.1.1 theCompany operates a number of educational institutions. If the company is in a position, prior to 31 December 2010 and following completion of the Handover Period, to secure suitable, alternate employment on terms and conditions acceptable to the Company and Miles at another educational institution of the Company, this Agreement shall either terminate on the date of such appointment of Miles to that position, or be suspended whilst Miles remains employed in that position. In the event of a termination or temporary suspension of this agreement arising under this clause 5.1.1, the Company sell not pay the retainer referred to in 4.2 above to Miles;

5.1.2 if the Company cannot procedure suitable alternate employment for Miles in terms of 5.1.1 above, it is recorded that the Company is associated to a company that operates a number of recruitment businesses, who will assist Miles, upon completion of the Handover Period, in finding suitable alternate employment and Miles undertakes to co-operate in this process. If Miles is placed in suitable alternate employment, this agreement shall terminate upon Miles commencing employment in such position and neither party have any claim against the other arising from the termination thereof; or

5.1.3 if Miles, of his own accord, secures suitable alternate employment with a third party prior to 31 December 2010, this agreement shall terminate and neither party shall have any claim against the arising from the termination thereof, provided however that Miles undertakes not to procure alternate employment prior to completion of the Handover Period.

6 ANNUAL LEAVE

Miles shall be entitled to 20 (twenty) working days leave per twelve- month cycle which shall be Governed in terms of the Company's leave policy. All annual leave will be taken during School holiday and subject to the approval of Mr.Isaakidis or his nominee.

7 AUTOMATIC TERMINATION

Notwithstanding anything else contained in this agreement, this agreement will automatically terminate-

7.1.1 if any of the Resolutive Conditions and pursuant to the Sale of Business Agreement occur, in which event, neither party shall have any claim against the other arising from the termination of this agreement.

7.1.2 If Miles commits a breach of any of his obligations under this agreement;

7.1.3 In any circumstances justifying such termination at common law;

7.1.4 If Miles is guilty of conduct which is likely to bring himself or the Company into disrepute;

7.1.5 If Miles is convicted of an offence involving dishonesty; or

7.1.6 If Miles becomes precluded in terms of any statute from holding office as a director."

[8] In as far as the applicant was concerned the agreement of service terminated automatically in terms of clause 7 above, in that Wilson breached his obligations when he made no effort to co-operate with the applicant in finding alternative employment.

[9] In **City of Tshwane Metropolitan Municipality v SA Local Government Bargaining Council & Others**[3] the court found that in a jurisdictional review its task was to determine whether on an assessment of the facts and relevant considerations the arbitrator had jurisdiction to arbitrate the dismissal dispute. Myburgh AJ was of the view however, that a reviewing court was not necessarily confined to the record of the proceedings and could admit extrinsic evidence regarding the true facts in deciding whether an arbitrator has exceeded his jurisdiction in making an award.[4] In this matter, I will first have regard to the Record of the arbitration proceedings in order to examine those facts relevant to my determination on the jurisdictional issue.

[10] The Record reveals that the attorney representing Wilson in the arbitration, Mr. Graham, elicited certain information from aMs Durand, the senior HR manager of the schools division of applicant. It was Ms Durand's evidence that Wilson when challenged as to whether he was cooperating in finding new employment,had stated that he'd been having a "gap year". The cross-examination of Ms Durand reads as follows:

"Mr. Graham: you see I've put it to you that what the respondent is now seeking to do is over – dramatize this gap year. The fact of the matter is, he could not work for anybody else could he?

Ms Durand: He could have.

Mr. Graham: Well turn to your…

[3](2012) 33 ILJ 191 (LC)
[4] At paragraph 5

Ms Durand: Had he got another position okay he could have as per my e-mail and as per the service contract.

Mr. Graham: Let us qualify that.

Ms Durand: Sure.

Mr. Graham: Until he found what is called alternative employment in the contract he could not do any work could he?

Ms Durand: He could not do temporary work because otherwise he would have forfeited the amount of what that we were paying him every month.

Mr. Graham: So whilst he was looking for work he could do what he liked, could he not?

Ms Durand: Correct.

Mr. Graham: And so he was quite entitled to do what he liked.

Ms Durand: As per my e-mail to him he said does that mean then that I can go and play golf or do whatever and correctly so. However, in that we did state okay and to the best of my knowledge my understanding was that if you take a gap year and you are required to look for employment you should at least be looking for it. That is my – as I say that is just my understanding."

[11] A further part of the Record of the examination in chief of Wilson deals with the requirement of finding suitable alternative employment as provided for in the service agreement:

"Mr. Graham : Let us just slow down. How was that described in the contract? It was described as and the words at the end of the first paragraph……starting from 'suitable' The next three words, just emphasize those please

Mr. Wilson: To secure suitable alternative employment on terms and conditions……..

Mr. Graham: Again, alternative for what? Alternative to what? What was that?

Mr. Wilson: Well, alternate to what I was currently doing.

Mr. Graham: And what were you currently doing?

Mr. Wilson: Well, I was earning a retainer and not doing anything."

[12] It is common cause that during the handover period which terminated on 31 December 2008, the applicant continued to pay Wilson the salary he had earned before the sale of the business. After completion of the handover period on the 31 December 2008, on applicants version, Wilson was not required to work for applicant and nor did he work for it. He was instead paid a monthly retainer of R35,000.00, which was less than his former salary. It was further common cause that Wilson had signed a restraint of trade agreement as part of the sale of the business agreement.

[13] The payment of the retainer of R35,000.00 per month was subject to the obligation on Wilson to cooperate with the applicant to find employment not in breach of the restraint. It is submitted in the founding papers that after the handover period, the agreement between them was that a retainer was paid to Wilson for a fixed period of time, unless suitable alternative employment was secured, for Wilson within that period, in which event the obligation to pay the retainer would cease.

[14] A key allegation by the applicant was that after 31 December 2008 Wilson did not perform any work for the applicant, nor did he in any manner assist in carrying on or conducting the business of the applicant. During 2009, the applicant alleges that Wilson was not contactable, and did not return calls and was not cooperating in seeking potential employment opportunities. As a consequence of this non – cooperation, the service contract was

terminated with effect from 31 January 2010 and the payment of the retainer was stopped.

[15] In his answering affidavit, Wilson avers: " (I) continued to work for the applicant for around three months after the handover period to assist with reconciling the receipts and payments of the old Trinity with those of the new Trinity in order to finalize the adjustment account in accordance with clause 9 of the sale agreement. It is correct that over and above these duties, I was never asked to work the applicant again."

[16] Clause 9 of the Sale Agreement deals with the adjustment account and provides for the Purchasers and Sellers to prepare and verify in writing an account as at finalization of the sale in terms of which final adjustments were made to the Purchase consideration. It is important to remember that Wilson was one of the shareholders of the business and a recipient of part of that consideration.

[17] The evidence given by Wilson relating to work done after the handover period is extrinsic to the Record. Accepting this evidence in terms of the Plascon Evansrule i.e. that he did work after the handover period, when payment to him had dropped to the retainer level, this was on the probabilities done because the necessary work in terms of clause 9 was essential to complete before the finalization of the purchase consideration of which he was a beneficiary. It was done *qua* seller of the business and not *qua* employee. This finding is consistent with Wilson's evidence at arbitration relating to his unwillingness to do work for the applicant after the handover for no extra monies, a concern which he raised with the applicant at a meeting as reflected in the Record:

> "Mr WILSON:… because my salary had been dropped from R55 000.00 to R35 000.00 I wanted to understand because they could call on me that if they called on me whether I was actually going to get paid for the time I was called in because otherwise they could call me in every day and pay me substantially less than what I used to be paid, so the idea was to try and understand that if they were going to use my

services whether they were actually going to pay me a market – related and in that I did refer to it as an hourly rate as a contractor.

MR GRAHAM: And that is your email?

MR WILSON : That is my email..(INAUDIBLE)..

MR GRAHAM: And what was their response to that?

MR WILSON : Okay. The response to me there was:

"Yes but only if this work relates to work for the 2009 financial period" Whichwas thenew one –
"and not for outstanding work or queries relating to the 2008 financial year." Which was the hand-over period.

MR GRAHAM: And was there any reference to a rate?

MR WILSON : Well it never ever happened because they did not call on me so there was no reference to a rate…"

[18] In its replying papers the applicant deals with the allegation that Wilson worked after the handover period stating that: "This new allegation was not presented as evidence during the hearing. It is directly contradicted by the second respondent's evidence during the hearing. As such, I submit that the second respondent is attempting to mislead the court by changing his version from what is recorded in the transcribed record. I refer to paragraph 9 of the supplementary affidavit and to the transcribed record from which it is clear that the second respondent admitted under oath that after 31st of December 2008, being the end of the handover period, he was never requested nor required to work by the applicant and he did not further the business of the applicant."

[19] Indeed, the Record reflects that when asked whether he conceded that after 31 December 2008, i.e. after the end of the handover period, he was never asked by the respondent to work again, Wilson stated: " that is right, yes."

Evaluation

[20] The LRA defines an employee as follows:

> "(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 business of an employer,
>
> and 'employed' and 'employment' have meanings corresponding to that of 'employee';"

[21] I am quite satisfied on the evidence before me that after the handover period and at the time of the termination of the service contract, Wilson did not work for the applicant, nor did he assist in terms of the wider clause (b) of the definition, in carrying out or conducting its business. The question as to whether he received 'remuneration' at the relevant time, needs to be considered. The LRA provides that 'remuneration' means "any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State, and 'remunerate' has a corresponding meaning;" Again, the requirement of working for a person applies, and in view of the above I find that the retainer he received did not constitute remuneration.

[22] It was submitted on behalf of Wilson that the court should take cognizance of the widening ambit of the definition of an employment relationship by this court and the LAC.[5] The ambit of the alleged employment relationship in this matter should, it was argued, be interpreted with a constitutional slant.

[23] I find that this matter stands to be distinguished from those cases which have dealt with illegal contracts and protection of vulnerable workers.[6] In this case,

[5] For example in 'Kylie' v CCMA & Others (2010) 31 ILJ 1600(LAC)
[6] Such as Kylie supra and Discovery Health v CCMA & Others (2008) 29 ILJ 1480 (LC)

we are considering whether the service agreement between the parties was at the relevant time a disguised employment contract, and whether the relationship between the parties was one of employment after the short term employment contract ended with the completion of the handover period.

[24] This matter also falls to be distinguished from the factual matrix in **Wyeth SA (Pty) Ltd v Manqele& others**[7] in which the LAC was concerned with whether a person who had not yet commenced employment i.e. who had not strictly performed work for the employer, could be 'dismissed' in terms of the LRA. The LAC found per Nkabinde AJA, that the definition of an employee in s213 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.[8] Such a reading was consistent with the values of the Constitution.

[25] In contrast to the **Wyeth**, on the evidence before me and in terms of the service agreement, Wilson did render services to the applicant in terms of a short term contract of employment until the end of the handover period, and after the end of the handover period he no longer rendered any services qua employee or contractor. This is reflected in the distinction made in the service agreement between the word 'remuneration' attached to the salary paid to him during the handover period, and the word 'retainer' describing the lower amount he was paid after the handover period in terms of that agreement to which he was signatory.

[26] In my judgment, this case is not one in which the Court should search for a constitutional slant in order to further expand the meaning of 'employment relationship' in our law. I find that Wilson was not an employee at the time of termination of the service agreement and was not dismissed. He did not enjoy the protection of section 23 of the Constitution – the right to fair labour practices. In addition, he was far from belonging to a vulnerable group in our society, such as those accorded limited protection in Kylie by dint of the use of

[7](2005) 26 ILJ 749 (LAC)
[8]At paragraph 45

a constitutional slant. The CCMA had no jurisdiction over the dispute in question.

[27] Given my findings above there is no need for me to consider the further grounds of review raised in this application. I therefore make the following order:

1. The award under case number GAJB55-44-10 is hereby reviewed and set aside.

2. The Second Respondent is to pay the costs.

H. RabkinNaicker

Judge of the Labour Court

Appearances

Adv J Brickhill instructed by Bowman Gilfil n Inc. for the applicant

Adv,GFourie instructed by Donald Graham Attorneys for the Third Respondent