REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG)

JUDGMENT

Not reportable

Case no.:JS246/2011

NEVILLE WISEMAN DANIELS **APPLICANT**

and

THE STANDARD BANK SOUTH AFRICA LIMITED **FIRST RESPONDENT**

EOH ABANTU (PTY) LTD t/a HIGHVELD PFS **SECOND RESPONDENT**

Heard: **26 June 2012**

Delivered: **06 June 2013**

JUDGMENT

ROCHER, AJ

[1] The Applicant seeks condonation for the late filing of his Statement of Case in which he initiated alleged unfair dismissal proceedings in this Court against First and Second Respondents, which Statement of Case was filed outside the time frames set out in Section 191(11)(a) of the Labour Relations Act, 1995, as amended ("the LRA"). Both the First and Second Respondents oppose the granting of condonation.

[2] Applicant's expertise is in the information technology or IT sector. After certain "pre-contractual" contact involving certain telephone calls and an interview between the First Respondent (hereafter "Standard Bank") and the Applicant, the Applicant

signed a “Letter of Understanding and Undertaking” and a “Declaration of Secrecy” on 5 August 2011 in favour of Standard Bank. Both documents constituted solemn undertakings by the Applicant to ensure the integrity of Standard Bank’s confidential information which Applicant may come into contact with by virtue of his access to its computer systems or otherwise.

[3] Intermingled with his dealings with representatives of Standard Bank, the Applicant also had contact with the Second Respondent (hereafter “EOH”) on 3 September 2010 when a representative of EOH promised to send Applicant a contract of employment. On 6 September 2010, the Applicant received two documents from EOH, namely, a “Confirmation of Contract Position” form on EOH’s letterhead and a “Personal Credential Verification” form on Standard Bank’s letterhead. In the Confirmation of Contract Position, the document indicates that the ‘contract period will be for 01 October 2010 [indecipherable] till 30 September 2011.’ On 7 September 2010, the Applicant received a document from EOH, entitled “Memorandum of Agreement – Contingency Employment”.

[4] In the Memorandum of Agreement, EOH indicates that it is desirous of engaging the services of ‘The Consultant on a flexible, atypical basis,’ and refers to the Applicant throughout as “The Consultant”. In terms of the Memorandum of Agreement, the consultant/Applicant is to render services to EOH’s Client, whom is defined as ‘[EOH]’s client to whom The Consultant is rendering services from time to time’. Nowhere is the identity of the client disclosed. These documents were all signed by Applicant and duly returned to EOH.

[5] On 23 September 2010, yet further documents were furnished to the Applicant by EOH on its letterhead, namely a “Personal Detail Form”; a “Contractor information V[F]orm”; and a “Leave Provision Form”. In these documents, respectively, Standard Bank and Applicant’s ‘job description’ were referred to as follows:

> Personal Detail Form:
>
> “Invoicing Company – Standard Bank”
>
> “Job Description – Project Manager”;
>
> Contractor Information Form:

"Division – Standard Bank – Africa"

"Job Title – Project Manager;

Leave Provision Form:

"Client Company – Standard Bank".

[6] The Applicant started working at Standard Bank's premises on 1 October 2010. He rendered service at Standard Bank from 1 October 2010 until 19 November 2010. On 22 October 2010, Applicant received a letter from EOH on its letterhead advising him that:

> 'It is with regret that we advise you that our client Standard Bank notified us that your current contract with them will be terminated on 31 December 2010.
>
> Your relationship with [EOH] is not terminated and as part of our comprehensive service to our clients we would like to offer our assistance in finding a new position.
>
> If you would like to make use of our services in this regard, you are welcome to forward your Curriculum vitae to Jacoline Coetzer by email at ... Contact number. ..
>
> Please be assured of our continued service and assistance.'

[7] No reason was given by EOH why '[Applicant's] current contract with [Standard Bank] will be terminated on 31 December 2010.'

[8] In response, Applicant sought alternative employment and on or about 12 November 2010, Applicant addressed a letter to representatives of both Standard Bank and EOH, giving notice of his resignation on one week's notice as follows:

> 'Good day Derik Espag, Christopher Ross, Nicola de Wet,
>
> Please accept this as my formal notice of my resignation from the position of Project Manager at Standard Bank, South Africa, effective 1 week from today. My last working day will be November 19th 2010.
>
> It is with sadness that this has had to happen so soon. Due to circumstances with reference to the Letter received from [EOH] on the 22 October (Re: Contract Terminated at Standard Bank), I have been forced to seek alternate employment.

> An opportunity has presented itself, and due to the limited window of opportunity I have been requested to commence my new employment on the 22 November 2010.
>
> I trust that this is in order as my position has been terminated.'

[9] The Applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA") on 19 November 2010, citing both Standard Bank and EOH in his referral form. The CCMA enrolled the dispute for conciliation on 17 December 2010, on which date the presiding CCMA commissioner certified the dispute as unresolved and issued a Certificate of Outcome in terms of Section 135(5) of the LRA, but solely against EOH. Only the Applicant attended conciliation.

[10] The Applicant 'delivered' his statement of case, initially, by way of filing by telefax with the Labour Court on 30 March 2011, although he subsequently filed the original documents by hand on 4 April 2011. Applicant ought to have delivered his statement of case by no later than 17 March 2011. The First Respondent delivered a response to the statement of case on 20 April 2011; and the Second Respondent delivered a Response to the statement of case on 21 April 2011.

[11] The Applicant launched these proceedings on 16 August 2011 (although Applicant initially sought to apply for condonation within the body of the statement of case itself.) The First Respondent delivered an opposing affidavit on 24 August 2011. The Second Respondent delivered an opposing affidavit on 26 August 2011.

[12] The Applicant raised the issue that the Respondents' responses were late and he is correct in this regard. The issue *in casu* is whether Applicant's late filing of his statement of case ought to be condoned.

[13] In respective of the affidavits opposing condonation, Standard Bank delivered its opposing affidavit on 24 August 2010; and EOH delivered its opposing affidavit on 26 August 2011. Both opposing affidavits in response to the condonation application were within the time limits provided for by Rules for the Conduct of Proceedings before the Labour Court.

[14] As stated, this matter concerns the question of whether the Applicant ought to be granted condonation for the late filing of his statement of case.[1] Legal arguments concentrated on the explanation for the delay and the prospects of success, or otherwise. It was submitted on behalf of Standard Bank and EOH that insofar as the Applicant's delay is concerned, his explanation is unacceptable, while the Applicant's attorney conceded that his explanation was somewhat porous, but sought to rely on what was submitted to be Applicant's good prospects of success against Respondents. As will be apparent, Standard Bank and EOH also contended that Applicant did not enjoy any prospects of success against either entity, respectively, for different reasons.

[15] While a Certificate of Outcome was issued at conciliation on 17 December 2010, Applicant referred his dispute to the Labour Court on 30 March 2011 and he was, accordingly, thirteen days' late. The reasons given by the Applicant for his delay are that:

15.1 He was advised by the CCMA Commissioner that he would require legal representation to refer the matter to the Labour Court, and that owing to the conciliation having fallen on the eve of the Christmas and New Year period, most legal firms were closed during the period;

15.2 During January 2011, he enquired as to the cost of legal services in such a labour matter from attorneys and rendered service to his new employer during February to March of 2011 in order to have sufficient funds to consult with an attorney, which he duly did on 11 March 2011;

15.3 He thereafter, on the advice of the attorney he consulted, attempted to have the Certificate of Outcome amended to reflect Standard Bank in addition to EOH without any success (notwithstanding that 30 days had elapsed from the date of referral to the CCMA);

[1] The test for condonation was set out in the authority of *Melane v Santam Insurance Co Ltd 1962* (4) SA 531 (A) at 532 C-F. The decision in *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) is also instructive, as is the summary of the applicable legal principle set out in paragraphs 24 to 29 in *Gaoshubelwe and Others v Pie Man's Pantry (Pty) Limited* (2009) 30 ILJ 347 (LC).

15.4 He had to retrieve previous correspondence and electronic mails in order to traverse the documentation required, presumably for the purpose of drafting the Statement of Case.

[16] The ninety day time period set out in Section 191(11)(a) of the LRA is measured in ordinary days and a failure to comply with that period is equally measured in ordinary days, unlike those periods set out in the Rules for the conduct of proceedings before the Labour Court which are measured in Court days.

[17] Standard Bank, in particular, also correctly argued that one cannot merely examine the 'post 90-day period' in assessing the explanation for a delay, but one must also examine the ninety day period as a whole, in order to determine whether, in the context of the overall period between the date that a Certificate of Outcome was issued and the ultimate delivery of the Statement of Case in the Labour Court, the explanation for the delay is reasonable and acceptable.

[18] In this regard, given the lack of particularity and detail for the overall period, I am constrained to find that the explanation for the ultimate late filing, by thirteen days, of Applicant's Statement of Case is porous, but not so unacceptable as to warrant the refusal of condonation on that basis alone, especially since the delay was short.

[19] Accordingly, it must be determined whether, in this application, Applicant has *prima facie* prospects of success against Standard Bank and/or EOH.

[20] Standard Bank denied that it was the employer of the Applicant and that Applicant was its employee, contending instead that Applicant was the employee of EOH and that EOH conducts business as a 'temporary employment service' as provided for by Section 198 of the LRA (hereafter referred to as a "TES"). Standard Bank was therefore the 'client' of the TES, EOH. Furthermore, Standard Bank contended that the Applicant resigned from employment with EOH on 12 November 2010 and that such resignation ends the matter insofar as it is concerned.

[21] EOH, on the other hand, readily sought to admit that it was the Applicant's employer in a TES arrangement with Standard Bank, but that Applicant refused their offer of assistance and placement elsewhere at an alternative 'client' of their TES business, following Standard Bank terminating the contract position in which Applicant was 'deployed'. Subsequently, the Applicant resigned and left the employment of EOH

voluntarily for greener pastures and his conduct does not, in the circumstances, meet the definition of a dismissal in Section 186(1) of the LRA.

[22] Practically speaking, and as a matter of law, Standard Bank and EOH effectively argued that between their two defences, that Applicant had no prospects of success in a claim against either Standard bank or EOH.

[23] The Applicant needs to show, given the factual matrix giving rise to this matter and the defences raised by Standard Bank and EOH, a *prima facie* case with prospects of success.

[24] It is trite that the respective defences of refuting an employer-employee relationship and refuting the existence of a dismissal are both good in law if they can be proven. Recently, the Labour Courts have had occasion to deal with a number of challenging scenarios relating to atypical employment.

[25] For present purposes, Section 213 of the LRA, defines an "employee" 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 business of an employer, and "employed" and "employment" have meanings corresponding to that of "employee",

And Section 186 (1) defines a dismissal as:

> 'an employer has terminated a contract of employment with or without notice'.

[26] Professor Paul Benjamin, in his article "An Accident of History: *Who is (and Who Should Be) an Employee under South African Labour Law*" (2004) 25 ILJ 787, suggests an approach which courts should adopt in interpreting the statutory definition of 'employee'. According to Benjamin, the presumption of employment as contained in Section 200A of the LRA (which in turn arises from the "Dominant Impression Test"), indicates that there are three primary criteria for indicating the presence of an 'employment relationship' namely:-

1. the employer' right of supervision and control;

2. the employee forming an integrated part of the organization of the employer; and

3. the employee's economic dependence upon the employer.

[27] The only exclusion to employment in terms of Section 213 is an independent contractor, which Benjamin points out is not defined and, as a result, has maintained its common-law meaning. Benjamin concludes his 2004 article by stating as follows:-

> 'An expansive interpretation of the statutory definition [Section 213] of an employee can be developed without doing any violence to the existing language of the definition. Such an interpretation is now required to comply with the constitutional directive to construe labour legislation purposively and in accordance with the primary objects of that legislation.'

[28] In *Dyokwe v De Kock NO and Others,*[2] the Labour Court was concerned with whether Dyokwe was employed by a TES, "Adecco", or Adecco's client, Mondi. In a CCMA arbitration, the commissioner found that Dyokwe was an employee of the TES, Adecco. In determining who Dyokwe's true employer was, the Labour Court held as follows at paragraph 37:-

> 'In the instant case it is common cause that the employee was being paid by the TES, Adecco, from July 2003; yet I must approach the true nature of the relationship, in circumstances where the workplace and the nature of the employee's employment remained the same for almost nine years, conscious of the obligation to combat disguised employment relationships and to examine the substance rather than the form of the relationship.'

[29] Steenkamp J went on to quote Professor Paul Benjamin's recent publication entitled: 'To regulate or to ban*?* Controversies over temporary employment agencies in South Africa and Namibia*'*, in Malherbe and Sloth-Neilsen (eds), Labour Law into the Future: Essays in Honour of D'Arcy du Toit (Juta 2012), which recognised that 'it is an entirely superficial construction (and one that gives rise to immense scope for abuse) to make an agency the employer of an employee

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[2] [2012 10 BLLR 1012 (LC); (2012) 33 ILJ 2401 (LC) at para.37

working on an on-going or indefinite basis for a 'client' merely because the employee's pay is routed through the agency.'

[30] In *Dyokwe,* the Labour Court held further that on interpretation of the provisions of Section 198 of the LRA in light of the right to fair labour practices as envisaged in Section 23 of the Constitution Republic of South Africa of 1996 that it was against public policy to enforce the contract of employment with Adecco as that contract of employment resulted in unfairness. According to the Labour Court, Adecco neither "procured" nor "provided" Dyokwe to Mondi as envisaged in Section 198 of the LRA. Rather, Mondi "provided" Dyokwe to Adecco and in a swift sleight of hand, Dyokwe returned to Mondi to continue his work as before.

[31] Other decisions of the Labour Courts have grappled with determining whether, on their particular facts, a worker is an employee for the purposes of the LRA despite the scheme of arrangement or contractual provisions indicating to the contrary, such as in *Denel (Pty) Ltd v Gerber,*[3] *Pam Golding Properties (Pty) Ltd v Erasmus and Others,*[4] *Workforce Group (Pty) Ltd v CCMA and Others,*[5] and *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others*[6] and in slightly different but analogous context, *Southgate v Blue IQ Investment Holdings.*[7] In all these cases, the scheme of arrangement utilised or contractual provisions were subservient to the reality of the situation.

[32] Based on the respective versions of the parties set out on affidavit, it is certainly not the case that the broad averment of the scheme of arrangement contended for by Standard Bank and EOH or the contractual provisions actually signed are dispositive of the issue; that is to say that it would be impossible to make a finding that an employer-employee relationship existed between Applicant and Standard Bank.

[33] On the factual matrix making up the circumstances of this case, the engagement of the Applicant, which culminated in him tendering service at the premises of Standard Bank for the period 1 October 2010 to 19 November 2010, was by no

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[3] (2005) 26 ILJ 1256 (LAC).
[4] (2010) 31 ILJ 1460 (LC).
[5] (2012) 33 ILJ 738 (LC).
[6] (2013) 34 ILJ 392 (LC).
[7] [2012] 8 BLLR 824 (LC).

means straight forward and instantly dismissible as nothing other than a TES arrangement.

[34] In my view, the Applicant does make out a *prima facie* case for his employment with Standard Bank, notwithstanding the written contracts signed between Applicant and EOH to engage Applicant as 'Contractor' or a fixed term employee, which scenario, in reality may have constituted EOH being a 'remuneration administrator'. On this state of affairs, the notice of termination communicated to Applicant by EOH on 22 October 2010 would constitute a dismissal. In this regard, *SA Post Office Limited v Mampeule*[8] is instructive in the broad category of conduct that will constitute a dismissal.

[35] In this scenario, Applicant's 'resignation' *ex post facto* amounts to an abbreviation, at Applicant's instance, of the period of notice given to him, but cannot alter the fact of a prior dismissal while serving out that notice. Much was made of Section 190(2) of the LRA, which qualifies the "date of dismissal" as the earlier of:-

35.1 the date on which the contract of employment terminated; or

35.2 the date on which the employee left the service of the employer.

If Standard Bank is established as the employer, the Applicant has made out a *prima facie* case that his resignation is not the *causa* for the termination of employment. I also do not believe that Section 190(2)(a) and the decision in *Ndlambe Municipality v CCMA and Others*[9] has application, since the matter did not involve a non-renewal in the face of a claimed legitimate expectation.

[36] As is plain from the joinder of EOH, the Applicant has pleaded his case in the alternative to the effect that if the Court should find that he was in fact employed by EOH, that, in any event, the Applicant's dismissal at the hands of EOH (which must logically, according to Applicant, be an operational requirements' dismissal) was unfair in that it failed to consult Applicant in terms of Section 189 of the LRA.

[37] If the Court on a trial of these issues were to find that EOH was the true employer and were to release Standard Bank, then the Applicant's case would still be reliant

[8] (2010) 31 ILJ 2051 (LAC).
[9] (2008) 29 ILJ 2263 (LC).

on the notice of termination dated 22 October 2010 communicated to Applicant by EOH as the 'act of dismissal'. The difficulty with this notion is that the employment contract between the Applicant and EOH is undoubtedly a one year fixed term contract and, moreover, the Applicant did not aver to the contrary either as against Standard Bank or EOH. The Court is therefore constrained to examine how, in relation to it as the employer, EOH dismissed the Applicant by virtue of its letter dated 22 October 2010 and whether a *prima facie* case of dismissal arises in this regard?

[38] In his affidavit in support of his condonation application, the Applicant prayed that the contents of his statement of case be specifically incorporated into his condonation application. In his statement of case, the Applicant, in the first instance, specifically disavows employment by EOH and avers that he was, properly construed, the employee of Standard Bank and specifically denies that he was dismissed based on the operational requirements of Standard Bank. Applicant further alleges that '[Standard Bank] is attempting to negate from its duties, obligations and responsibilities as conferred upon it by the Labour Relations Act in its attempts to have the [EOH] act as employer under the guise of Section 198 of the Labour Relations Act.' (Applicant repeats these averments in his affidavit in support of condonation.)

[39] Applicant further pleads that: 'If however, the Honourable Court holds that [EOH] was the Applicant's employer at all relevant times, then and in that event the Applicant requires confirmation from the above Honourable Court that [EOH's] letter, "NWD9" hereto [being, the dismissal notice of 22 October 2010], constitutes a dismissal.' Read in the light of a *lacuna* of supporting allegations to place the letter dated 22 October 2010 in context to be properly construed as a dismissal at the hands of EOH, the prospects of that letter serving as notice of Applicant's dismissal at the hands of EOH are quite slim. It appears, on the contrary, to be quite the opposite in that it confirms their on-going relationship.

[40] In my view, what then arises without further material allegations being made out, is a resignation by Applicant, on or about 12 November 2010, insofar as EOH is concerned. In my view, the Applicant enjoys only poor prospects of success against EOH. Poor prospects of success and a medicore explanation must be balanced against the short delay of thirteen days. The only remaining enquiry with regard to

EOH is whether the balance of prejudice favours EOH or the Applicant when considering the importance of the matter. When all criteria are assessed in this case, the minimal thirteen day delay is not so excessive as to warrant refusing condonation, more particularly as I would grant condonation in respect of the referral against Standard Bank.

[41] This raises a matter of convenience to the Court and the remaining litigants. Were I not to grant condonation in respect of the referral against EOH, an extremely dissatisfactory and anomalous situation has the potential to arise, in that, the full ventilation of the evidence may reveal better prospects against EOH and lesser prospects against Standard Bank, without EOH having been a party to the trial proceedings.

[42] The Applicant enjoys some prospects of success against Standard Bank, but the mediocre explanation for the delay equally applies to that referral. However, the thirteen day delay is insufficiently lengthy to warrant refusing condonation in respect of the referral against Standard Bank.

[43] It appears to me that in due course, the Applicant can only make out a successful case against either Standard Bank or EOH. This will, no doubt, entail vociferous argument between the parties concerning the costs of the trial action. To that vociferous debate should be added the issue of the costs of Applicant's condonation application, as the trial Court will be in a far superior position to properly apply the requirements of section 162 of the LRA in determining costs of this application with an overall view of the matter.

[44] In the premises, the following Order is made:-

1. The Applicant is granted condonation for the late delivery of his Statement of Case initiating these proceedings in the Labour Court as against the First and Second Respondents;

2. The costs of this application in relation to both the First and Second Respondents are reserved for determination by the trial court and insofar as it need be made clear, this is to include the costs consequent upon the employment of counsel.

Rocher, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr M. Hennig

Instructed by: Martin Hennig Attorneys

For the Respondents: Adv P.C Pio

Instructed by: Van der Merwe Attorneys