REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 798/12

In the matter between:

GALATIS PETER Applicant

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION First Respondent

BOYCE, MICHAEL N.O. Second Respondent

VAN GELMAN COLEEN Third Respondent

Delivered: 05 March 2014

JUDGMENT: LEAVE TO APPEAL

MASIPA AJ

Introduction

[1] On 1 November 2013, the Applicant applied for leave to appeal against my judgment delivered on 11 October 2013.

[2] The Applicant filed its written submissions in support of the application on 15 November 2013 and the Third Respondent filed its written submissions opposing the leave to appeal on 22 November 2013.

[3] The order in terms of the Judgment, was as follows:

> '1. The Applicant's review application is dismissed;
>
> 2. The Applicant is to pay the Third Respondent's costs.'

[4] The Applicant stated in its written submissions that it was appealing against the whole Judgment and order, including the cost order. The issue before the Commissioner was whether the Third Respondent was an employee. In her evidence before the Second, the Third Respondent testified that she was interviewed by the Applicant and his then partner Dr G van Niekerk. Further that following this meeting she was employed and was allowed to continue providing services to another dental practitioner.

[5] The Third Respondent saw herself as a professional Oral Hygienist. When Third Respondent was employed, there was no contract of employment. And she received remuneration based on the number of patients she saw.

[6] Following allegations of inappropriate conduct by a client of the Applicant, the Third Respondent was suspended and following some uncertainty arising from certain meetings, the Third Respondent referred a dispute to the First Respondent.

[7] Having considered several factors appearing in both the award and the Judgment, the Second Respondent found that the Third Respondent was an employee. These factors included the fact that she was subject to the supervision and control of the Applicant. In paying her salary, the Applicant deducted PAYE, SITE, and UIF. She was issued a payslip and IRP5, Made no contribution to rent utility bills and consumables, did not contribute towards staff salary and was obliged to submit to the Applicant's wishes in respect of time, date and venue of meetings among others. In the judgment, it was found that the Third Respondent was subject to the control and supervision of the Applicant in the performance of her work. Further that she had refused to sign

the contract setting out that she was a contractor when she was already an employee with PAYE, SITE and UIF being deducted from him. It was also found that she formed an integral part of the Applicant's organisation. Evidence before the Second Respondent proved that she was economically dependent on the Applicant.

[8] The Applicant contends that the Third Respondent performed dental hygiene services elsewhere on the days she did not do this for the Applicant. The Applicant's argument was that the fact that she offered her skills or services elsewhere was an indicator that she was not financially dependent and that providing service to a single client was an indicator of economic dependence. The Applicant relied on the article by Paul Benjamin 'An Accident of History: Who is (and who should Be) an Employee under South African Labour Law.'[1]After the relationship was terminated she continued to perform services for other dentists The Applicant argued that she had more than one client.

[9] The Applicant argued that the Third Respondent's evidence was that in terms of the South African Dental Association, Oral Hygienists required the control and supervision of a Dentist for the performance of their duties. The Applicant argued that this supervision requirement did not detract from the true nature of the relationship being that the Third Respondent was conducting her own trade at the Applicant's premises.

[10] The Applicant submitted that whether the Third Respondent was an employee of contractor was not determinable from the deduction of tax. In this regard, the Applicant relied on the judgment of *Total SA (Pty) Ltd v National Bargaining Council for the Chemical Industry& others*[2] where it was found that notwithstanding the employee being given an access card, employee number and the deduction of tax and UIF did not make this did not make him an employee. These deductions were immaterial to her actual status.

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[1] (2004) 25 ILJ 787 at 803

[2] (2013) 34 ILJ 1006 (LC)

[11] The Third Respondent submitted that the issue was whether the she was an employee and not an independent contractor. It was argued that the evidence led before the Second Respondent supported her version i.e. that she was an employee.

[12] The Third Respondent submitted that the Applicant conceded that she could not render her services independently. It was a requirement by the SA Dental Association that Dental Hygienist be under the control and supervision of a Dentist. In view of this, she could not be an independent contractor. It was argued by the Third Respondent that the suggestion by the Applicant that she did not exercise supervision over her meant that he was in violation of his ethical duties. Further that conducting performance reviews indicated an element of control and Supervision.

[13] The Third Respondent relies on the *SA Rugby Players Association and Others v SA Rugby (PTY) Ltd and Others*[3] which sets out the criteria of determining who is an employee and which was relied on in the main judgment. It was clear that the Third Respondent satisfied nine of the elements set out in the *SA Rugby* case.

[14] The Third Respondent argued that the fact that the Applicant was paid commission did not detract from the true nature of the relationship. Further, the Applicant was prepared to accept that the Third Respondent was an employee if that decision was made by someone other than the Second Respondent. The Applicant elected not to testify to be cross examined before the Second Respondent but sought to appeal his decision through the review process by providing new evidence.

[15] The Second Respondent conducted an in-depth analysis of the nature of the relationship between the parties. The Third Respondent argued that his analysis was based on the evidence before him and that no court would arrive at a different decision to that arrived at by the court in this matter.

[3] (2008) 29 ILJ 2218 (LAC)

[16] The Third Respondent argued finally that in terms of the *Toyota* judgment, receiving a payslip and the deduction of PAYE and UIF were factors which may point towards the employment relationship but that this did not constitute conclusive evidence of the true nature of the relationship. This was but one of the factors. The Third Respondent argued that there were no prospects for another court arriving at a different conclusion.

[17] In determining the review, the court can only rely on the evidence which was before the Second Respondent when the award was issued and not on fresh evidence introduced during the review application. The Second Respondent's issued a well reasoned award supported by the evidence before him. I am satisfied that on the material before the Second Respondent, there are no prospects of another court coming to a different conclusion.

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

The application for leave to appeal is refused with costs.

Masipa AJ

Acting Judge of the Labour Court of South Africa