



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 961/12

In the matter between:

LOYISO AND 28 OTHERS

First Applicant

MOTINGWA ANNA MOLAMU

Second Applicant

and

AMETHST (PTY) LTD

First Respondent

ETQUITON CORPORATION INVESTMENT

Second Respondent

EQUITON HEALTH SOLUTIONS

Third Respondent

BAOKI CONSORTIUM

Fourth Respondent

Heard: 26 November 2015

Delivered: 10 March 2016

Summary: Claim of dismissal based on breach of contract. Distinction between contractual relationship and employment relationship. Restating the principles for lifting the corporate veil.

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] The applicants, in this matter, claims that the first respondent breached their employment contract in allegedly dismissing them prior to the expiry of their five years fixed term employment contracts. The initial number of the applicants was 28 individuals but that has now been reduced to 11 applicants subsequent to the others accepting the settlement offer. The applicants claim compensation for the unexpired period of their written fixed term employment contracts which were terminated by the third respondent.
- [2] The first respondent has, in its statement of response to the applicants' statement of claim, raised several points *in limine*. All the other points were, however, except for the one on jurisdiction, abandoned.
- [3] At the commencement of the hearing on 23 November 2015, the parties agreed amongst other things that:
- '3. For the purpose of the points *in limine* raised by the First Respondent, the Applicants will have to show the existence of the contractual relationship.'
- [4] The respondent applied for the condonation of the late filing of its statement of opposition to the applicants' statement of case which was unopposed. Considering this and other relevant factors related to condonation application, the late filing of the statement of opposition of the first respondent was granted.
- [5] Furthermore, the parties agreed after the completion of the evidence in chief of the first witness of the applicants that there was no need to

present the case through oral evidence. They, in this respect, agreed to argue the case based on the papers before the court. It was also agreed that the oral evidence, thus far presented, should be ignored.

The parties

- [6] The first respondent, Amethyst (Pty) Ltd, the second respondent, Equiton Corporation Investment and the third respondents, Equiton Health Solutions are companies duly incorporated in terms of the company laws of the Republic of South Africa. The fourth respondent, Baoki Consortium, is an unincorporated entity comprising of the first and the second respondents. The fourth respondent was created in terms of the consortium agreement between the first and that second respondents which were separate legal entities. The third respondent, also a separate legal entity was formed by the second respondent.

Background facts

- [7] It is common cause that the first and second respondent formed a consortium for the purpose of rendering services to the Gauteng Department of Health (GDoH), known as Baoki Consortium (Baoki). In terms of this agreement, each of the parties (the first and second respondents) were to employ employees who were to be deployed to Baoki. The consortium agreement further provides, as pointed out in the pleadings that the first and second respondents are jointly liable for any claim relating to the premature termination of the contract of employment which employees may have or instituted against the fourth respondent. The second respondent outsourced its responsibility of deploying employees to the consortium to the third respondent.
- [8] On 3 November 2008, the GDoH awarded Baoki the tender for the provision of Hospital Information System and Electronic Health Record (the contract). It is apparent that after the conclusion of the contract the individual applicants and other employees concluded written five years fixed term employment contracts with the third respondent.

- [9] It would appear that the GDoH failed to honour its obligation in terms of the contract resulting in financial difficulties for the third respondent and the consequence of which was the termination of the employment contracts of a number of employees. The termination of the employment contract on the basis of retrenchment was effected by the third respondent. At that stage, the third respondent was in the process of liquidation.
- [10] According to the first respondent, it intervened and offered to ameliorate the consequences of the retrenchment by giving an undertaking to pay certain moneys to the affected employees. This resulted in the termination agreement of the employment contract by the third respondent, with some of the affected employees. It would appear that the applicants rejected that offer of settlement. Those who accepted the settlement offer undertook to indemnify the first respondent against any claim related to their dismissal and in particular in relation to the payment offered by the first respondent.

Was there a contractual relation between the first respondent and the applicants?

- [11] The first respondent contends that the proper analysis of the applicants' claim is based on breach of contract and, consequently, they have to show that there was a contractual relationship with the first respondent. In this regard, it was contended that the case of the applicants was based the provisions of s 77(3) of the Basic Condition of Employment Act 77 of 1997 (the BCEA).
- [12] Although in the statement of case reference is made to both the alleged unlawful and unfair termination of the employment contract of the applicants, it is apparent from the reading of the pleadings that the case of the appellants is based on the alleged breach of the contract. This was in fact clarified with the applicants' counsel during his submission where he stated that the case of the applicants was 'based purely on contract'.

- [13] The other suggestion which was made in the applicants' papers was that the contract between the applicants and the third respondent was for the benefit of the first respondent. It was, however, indicated on behalf of the applicants that that point was abandoned.
- [14] It is common cause that the written employment contract which the applicants rely on, in relation to their claim, was concluded with the third respondent.
- [15] As would appear later in this judgment, the other prayer raised by the applicants is to have this court lift the corporate veil of the third respondent and find that their real employer was the first respondent.
- [16] The third respondent contended that there was no basis to pierce the corporate veil of the third respondent.

Issues for determination

- [17] The two issues that requires determination are:
- a. was there a contractual relationship between the first respondent and the applicants,
 - b. have the applicants made out a case justifying the lifting of the corporate veil of the third respondent.

In essence, the first issue concerns whether this court has jurisdiction to entertain the applicants' claim of breach of contract.

The case of the applicants

- [18] The applicants contended that the first respondent together with others are jointly and severally liable for the unlawful termination of their employment contracts.
- [19] The legal basis for the case of the applicants as set out in the statement of case is that respondents were, at all material times, their employers and that they (the respondents) terminated their

employment contracts prior to the expiry period. Their alternative prayer is that:

‘47.6 the court should pierce the third respondent’s corporate veil and find the first and second respondent as the real employers.

47.7 the unlawful termination and breach of the applicant’s members’ is substantively and procedurally unfair and constituted unfair dismissal.

47.8 ...

47.9 As a result of the unlawful termination of the Contract applicant’s members suffered damages being the remainder of the contract terms.’

[20] The case which the applicants sought to make is that there is an employment relationship between the applicants and the first respondent. This, in my view, overlooks the fact that the existence of the employment relationship, which is governed by the Labour Relations Act 77 of 1995 (the LRA) is not predicated on the existence of a contract of employment. In this respect the court dealing with the definition of “employee,” in *Discovery Health Limited v CCMA and Others*,¹ had the following to say:

‘Taking into account the provisions of section 23(1) of the Constitution, the purpose, nature and extent of relevant international standards and the more recent interpretations of the definition of “employee” by this Court, I do not consider that the definition of “employee” in section 213 of the LRA is necessarily rooted in a contract of employment. It follows that a person who renders work on a basis other than that recognised as employment by the common law may be an “employee” for the purposes of the definition. Because a contract of employment is not the sole ticket for admission into the golden circle reserved for “employees”, the fact that Lanzetta’s contract was contractually invalid

¹ [2008] 7 BLLR 633 (LC) at paras 49-50.

only because Discovery Health had employed him in breach of section 38(1) of the Immigration Act did not automatically disqualify him from that status.

That, I think, is the short answer to the question that the commissioner had to answer. It was not necessary for the commissioner, as he did in his attempt to overcome the argument that Lanzetta's employment contract was invalid, to construct a conception of an "employment relationship" and to consider whether Lanzetta was a party to such a relationship. If, as I have suggested, the statutory definition of "employee" is not a sidecar to the motorcycle of the common law contract of employment, the commissioner had simply to ask, when applying the statutory definition of "employee", whether Lanzetta worked for Discovery Health and whether he received or was entitled to receive remuneration. The answer to both these questions is clearly yes. Therefore, for the purposes of determining the CCMA's jurisdiction to accept Lanzetta's referral of a dispute, Lanzetta was an employee and Discovery Health employed him.'

- [21] In *Kylie v CCMA and Others*,² the Labour Appeal Court in holding that it was not necessary to establish a valid contract of employment for the purposes of the protection of employment rights as envisaged in 23 of the Constitution had the following to say:

'Once it is accepted that the constitutional right to fair labour practices vests in "everyone" and, further that it includes not only parties to a contract of employment but those persons in an employment relationship, Mr Trengove's submission, to the effect that persons, who engage in services pursuant to an employment relationship such as the appellant, are covered by section 23, becomes particularly compelling.'

- [22] In my view, the averments made by the applicants in their statement of case do not establish the contractual nexus between them and the first respondent. The facts, as they stand, may well establish the existence of an employment relationship in terms of the LRA. The issue of the

² [2010] 7 BLLR 705 (LAC) at para 22.

employment relationship would have been relevant had the case of the applicants been based on the unfair dismissal concept. As indicated earlier, the case of the applicants was not based on the employment relationship but rather on the contractual relationship. In any case, even if the pleadings were to be interpreted as providing for the unfair dismissal, that would not have assisted the applicants as there is no evidence that such a dispute was ever referred to the CCMA for conciliation and, also, that if that was the case, then the court would not have jurisdiction, as that would have been a matter that falls within the CCMA jurisdiction.

[23] In my view, the facts as they stand do not establish the contractual nexus between the third respondent and the applicants. In other words, the facts placed before this court do not support the applicants' contention that they had employment contracts with the first respondent.

[24] In light of the above, I find that the applicants have failed to show the existence of contractual relationship with the first respondent. Accordingly, the *in limine point* raised by the first respondent, in this regard, stands to succeed.

Piercing of the corporate veil.

[25] It is trite that there is no general discretion for the court to disregard the separate juristic personality of a legal entity. It is generally accepted that the piercing of the corporate veil is 'an exceptional procedure'.³ In *The Shipping Cooperation of India Ltd v Evdoman Corporation and Another*,⁴ the court, after indicating that it did not find it necessary to attempt to define the circumstances in which the Court would pierce the corporate veil, held that those circumstances will include where there is 'fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs'.

³ See *Airport Cold Storage [Pty] Ltd v Ebrahim and Others* 2008 (2) SA 303 [C].

⁴ 1994 (1) SA 550 [A] at 566C-F.

[26] In *Bargaining Council for the Furniture Manufacturing Industry, Kwazulu- Natal v UKD Marketing CC and Others*,⁵ the Labour Appeal Court in dealing with the issue at hand had the following to say:

[21] It is now possible to examine appellant's argument about lifting the corporate veil. In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*, Smalberger JA noted that: '[o]ver the years it has come to be accepted that fraud, dishonesty or improper conduct could provide grounds for piercing the corporate veil.' At 803 G He warned that 'it is undoubtedly a salutary principle that our Courts should not likely disregard a company's separate personality but should strive to give effect to and uphold it. To do otherwise would negate and undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attached to it.' At 803 H The learned judge of appeal then went on to say that, where fraud dishonesty or other improper conduct was to be found, then further considerations would influence the overall assessment as to whether the corporate veil should be pierced. In this connection, the court would proceed to examine the substance rather than the form of the adopted structure in order to determine whether there has been a misuse of corporate personality which would justify it being disregarded. Smalberger JA then noted that fraud or improper conduct was not the only basis by which the corporate veil could be lifted. Citing Gower (The Principles of Modern Company Law (5ed at 133)) at 804 C 'it also seems clear that a company can be a facade even though it was not originally incorporated with any deceptive intentions; what counts is whether it has been used as a facade at the time of the relevant transactions.'

[27] In the present matter, all what the applicants say, in their statement of case, is that this court must simply 'pierce the third respondent's corporate veil and find the first and second respondent are the real employers' of the applicants. There is no averment that the outsourcing

⁵ [2013] 2 BLLR 119 (LAC); (2013) 34 ILJ 96 (LAC) at para 21.

of the employment of the applicants by the second respondent was intended to mislead the applicants as to who their true employer was. There is also no evidence connecting the first respondent to the outsourcing of the employment of the applicants by the second respondent to the third respondent.

[28] In my view, the party whose corporate veil ought to be lifted, if at all, on the papers of the applicants, is that of the second respondent who is not only the sole shareholder of the third respondent but also was responsible for arranging to have the third respondent take the responsibility of employing the applicants. However, even then, the pleadings do not point to any wrong doing on the part of the second respondent or the third respondent for that matter. There is, in this regard, no evidence pointing to the first respondent playing any part in the arrangement between the second respondent and the third respondent to have the applicant appointed as employee and signing for a fixed term employment contract.

[29] In the circumstances, I find that the applicants have failed to make out a case for lifting the corporate veil of the third respondent. In any event, the situation would not be different for the applicants even if the corporate veil of the third respondent was to be lifted because that would not automatically make the first respondent a party to the contract concluded between the third respondent and the applicants. This would be the case because there is no evidence that the two parties at the time of concluding the contract had intended the first respondent to be a party to their contract neither is there evidence that the first respondent intended the same. This approach is well illustrated by the English case of *VTB PLC v Ludteck International and Others*,⁶ which the first respondent's counsel provided to the court during his submission. In that case, whose principles I find to be applicable to our jurisprudence, the court in dealing with a situation similar to the present held that:

⁶ [2013] 1 All ER 1296.

'In any event, it will be wrong to hold that Mr Malofeev should be treated as if he was party to an agreement in circumstances where (i) at the time the agreement was entered into, none of the actual parties to the agreement intended to contract with him, and he did not intend to contract with them and (ii) thereafter, Mr Malofeev never conduct himself as if, or led any other party to belief, he was liable under the agreement. That that is the right approach seems to me to follow from one of the most fundamental principles on which contractual liabilities and rights are based, namely what objective reasonable observer would believe was the effect of what the parties to the contract, or alleged contract, communicated to each other by words and actions, as assessed in their context.'

Conclusion

[30] The applicants have failed to show that there is a contractual relationship between them and the first respondent. Accordingly, this court lacks jurisdiction to entertain the applicants' claim.

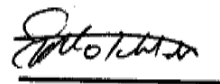
[31] The applicants have also failed to establish a basis for lifting the corporate veil of the third respondent. In any case, even if the corporate veil of the third respondent was lifted, that would not have assisted their case as all what that would do is to show that the applicants were, on the facts as they stand before this court, employed by the third respondent.

[32] Turning to the issue of costs, on the facts and the circumstances of this case, I see no reason why cost should not, in both law and fairness, follow the results.

Order

[33] In the circumstances, the following order is made:

1. The point *in limine* raised by the first respondent is upheld.
2. The applicants' application is dismissed for lack of jurisdiction.
3. The applicants are to pay the costs of the first respondent.



Molahlehi, j

Judge of the Labour Court

Appearances:

For the Applicant: Adv T Munchu

Instructed by: Thaanyane Attorneys

For the Respondent: Mr M Khoza of Edward Nathan Sonnenbergs Inc