



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR2186/11

In the matter between:

QUBE SYSTEMS (PTY) LTD

First Applicant

QUBE MANUFACTURE (PTY) LTD

Second Applicant

QUBE TECHNICAL SERVICES (PTY) LTD

Third Applicant

QUBE PROPERTY HOLDINGS (PTY) LTD

Fourth Applicant

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

KATLHOLO WABILE N.O.

Second Respondent

HENK MOEN

Third Respondent

Delivered: 15 December, 2015

Matter decided in chambers

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL

BRASSEY, AJ:

- [1] In this matter, the third respondent ('Moen') applies for leave to appeal against the whole of my judgment handed down on 16 September 2015. In motivating the application, Moen has filed comprehensive representations and the companies that are the applicants in the review proceedings have filed representations in opposition.
- [2] I have studied the papers and I am not persuaded that there are reasonable prospects of success in the appeal.
- [3] The first ground of appeal, substantively speaking, is that I erred in rejecting the claims against the second, third and fourth applicants.
- [4] One of the grounds of rejecting the claims was that they were never submitted for consideration in the process of mediation contemplated in the statute.
- [5] Moen admits that there had been no formal referral of the claims against the three companies in question but says that there was no need to make the referral in the circumstances and to insist upon this procedural step would be an exercise of formalism producing palpable prejudice for him.
- [6] Considerations of this sort are, however, collateral to the real issue to be decided.
- [7] Under the Act, matters must be referred for conciliation not just in order to produce a settlement acceptable to the parties but in order that the Commissioner should endeavour, by means of mediation, to limit the burden that an excessive proliferation of disputes places on the dispute-resolution system. In the present case, the Commissioner did not have the opportunity to exercise that statutory function.
- [8] In the circumstances, no claim could lie against the second, third and fourth applicants in the review proceedings. I am satisfied that, on the basis of prevailing authority, no court on appeal could reasonably be expected to disturb my finding on this score.

- [9] In my judgment, I granted relief against the first applicant in the review proceedings. I did so solely on the basis of an admission by counsel who represented the first applicant that it was indeed Moen's employer.
- [10] The case mounted by Moen suggested that the first applicant was not exclusively his employer but that he was 'jointly' employed by all four applicants; but, unless an agreement between persons is proved regulating the mode in which control over the employee is to be exercised, employment law can countenance no notion of 'joint employment' for the simple reason that there must ultimately be a single controlling mind that directs the work of the employee. The stance taken by Moen in these proceedings, therefore, was one that was wholly subversive of his case and it is surprising that he seeks to prosecute it on appeal.
- [11] Be that as it may, there is no basis upon which relief can be granted against all four companies. The best that Moen can expect is to rely on the admission by counsel for the first applicant that it is indeed the employer. It was on the basis of that admission that I granted relief against the first applicant and I see no grounds upon which a court on appeal might reasonably disturb the finding in question.
- [12] That leaves me with my finding that the termination of employment was not substantively unfair. The challenge to my finding on this score is more tenable than on the other two but, ultimately, I do not believe a court on appeal could reasonably come to a different conclusion.
- [13] The common cause facts revealed by Moen's conduct show a surprising, perhaps even shocking, want of judgment on this part. He was the joint managing director of the first applicant and yet took it upon himself, without authorisation from anyone else, to change the basis upon which banking transactions were conducted in a manner that inevitably provided him with scope for malfeasance. No person in a position of authority could possibly believe that he was entitled to do this without informing other interested parties and allowing them independently to exercise a discretion as to

whether his proposed conduct would be appropriate. I cannot believe that a court on appeal would reasonably come to a different conclusion.

[14] In the circumstances, I dismiss the application for leave to appeal with costs.

Brassey, AJ

Acting Judge of the Labour Court of South Africa