



**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

Not Reportable

CASE NO: JR228/16

In the matter between:

DOMESTECH

Applicant

and

JOAS MALATJI

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION (PRETORIA)**

Second Respondent

Heard: 11 January 2017

Delivered: 8 February 2017

JUDGMENT

BECKENSTRATER AJ

- [1] The Applicant has approached the Court seeking to review and set aside an Arbitration Award emanating from the Second Respondent (CCMA) in relation to a dispute between the Applicant and First Respondent.
- [2] At the CCMA the Applicant was represented by an attorney whilst the First Respondent represented himself. The First Respondent had referred a dispute to the CCMA relating to his alleged unfair dismissal for misconduct. At the CCMA, as before the Court, the Applicant only raised two issues. The first was that the First Respondent was not an employee, but an independent contractor and accordingly that the CCMA lacked jurisdiction to entertain the matter. The second is that, in any event, the First Respondent had not been dismissed by the Applicant and, again, consequently the CCMA lacked jurisdiction.
- [3] After hearing the evidence of the First Applicant and Mr Streicher, the Sole Proprietor of the Applicant, the Commissioner found that it was probable that the First Respondent was an employee of the Applicant and also probable that he was dismissed "*when he was told to stop coming to work*".
- [4] Having dealt with those issues, the Commissioner held that the First Respondent's dismissal had been substantively and procedurally unfair and, because the First Respondent only sought compensation, and awarded him five months' remuneration as compensation.
- [5] The Applicant now seeks to review the Award on the grounds that the Commissioner erred in both of her findings that the First Respondent was an employee and that there had been a dismissal. Insofar as these challenges relate to the jurisdiction of the CCMA to entertain the matter, the question I am required to consider is whether the Commissioner's findings on those aspects were correct (see: *SA Rugby Players Association and Others v SA Rugby (Pty) Limited and Others*¹

¹ [2008] 9 BLLR 845 (LA) at paras 39 to 41).

- [6] At the CCMA it was common cause that the First Respondent had first worked for the Applicant as a tiler for two weeks in December 2014 and thereafter from January 2015 until 23 November 2015, the date of his alleged dismissal. During 2015 the First Respondent has regularly worked Mondays to Fridays as a tiler, painter, plasterer, driver and supervisor on various projects of the Applicant. There was some dispute whether he was to be remunerated at R200.00 a day plus bonuses or R250.00 a day, but it appeared to be common cause that, although the First Respondent was paid weekly, he was paid R5 000.00 per month.
- [7] The Applicant's contention before the CCMA and this Court is that it does building maintenance, small handyman and building projects as well as gas installations. It engaged the First Respondent as a sub-contractor for these purposes. In this regard, the Applicant argued that the First Respondent was free to come and go as he pleased, was not paid for the days when he was not at work and that the First Respondent brought with him some of his own tools of the trade.
- [8] The First Respondent asserted that he was an employee, being subject to the instructions of the Applicant and noting that he had never been referred to as a sub-contractor until the matter came to the CCMA.
- [9] There is also a dispute between the parties about whether the First Respondent was dismissed if he ever was an employee. While the transcript of the evidence is not clear in this respect, it suggests, and the Award records, that on Tuesday 10 November 2015, the Tuesday before the incident relevant at the CCMA, the First Respondent had been absent from work and then either dismissed or told to leave. He had apologised and asked for forgiveness and this had been accepted by the Applicant. It was then common cause that on the subsequent Friday, 13 November 2015, the First Respondent had been absent from work. He contended he was sick. On the same day the Applicant had sent him an SMS message to say there was no more work for him. The Applicant contends that the

SMS either conveyed or was meant to convey that there was no work for him the following week, but there may have been work available for him thereafter.

- [10] The First Respondent then went to the Applicant's premises on the following Monday 16 November 2015 when he was told that there was no work available for him.
- [11] The dispute is that the Applicant contends that he was shouted at and simply told that there was no longer work for him. The Applicant, however, contends that there was insufficient work available and thus he had to distribute work that was available between the five people whose services he was using. Thus there was no work available for the First Respondent during that week. According to the Applicant this was communicated to the First Respondent who, however, opportunistically took this as being a termination of his services.
- [12] At the CCMA neither party produced proof of the SMS exchanges which would have been helpful in resolving this dispute. The Applicant's testimony was not clear whether the first SMS had indicated that the lack of work for the First Respondent was only for a limited duration. Obviously that would have been a material part of the communication if it had not been intended to terminate the First Respondent's services.
- [13] The Commissioner first considered whether the First Respondent was an employee. She, as I must, took cognisance of the presumption contained in Section 200A(1) of the Labour Relations Act² (LRA). As set out above, it was common cause that the First Respondent had his hours of work controlled by the Applicant, worked for the Applicant generally more than forty hours a month and during the eleven months of his engagement rendered services only to the Applicant. The triggering events of Sections 200A(b), (d) and (g) were then met. One must thus assume the First Respondent was an employee until the contrary was proved. The Commissioner then reasoned as follows:

² Act 66 of 1995.

"[25] In this matter it was not disputed that the Applicant discharged functions that were determined by the Respondent i.e general work, supervisor and driver. This functions performed were necessary for the usual trade or business of the Respondent. Clearly the manner in which the Applicant worked was controlled by the Respondent. An independent contractor usually performs a single task or project for another person.

[26] It was also not disputed that the Applicant worked five days a week and was paid a daily wage of R250.00 per day. This indicates that the Applicant's hours of work were controlled by the Respondent. It was also not disputed that the applicant worked for a period of about eleven months without being stopped. Normally an independent contractor will be paid after a completion of a task or project after submitting an invoice".

[14] I agree with this reasoning.

[15] Furthermore, while the Applicant contended the First Respondent was a sub-contractor, the following exchange during the Arbitration, when the present First Respondent was the Applicant and the present Applicant the Respondent, is informative:

"RESPONDENT'S ATTORNEY – You did the job as and when it was needed?

APPLICANT – We were getting instructions from the boss where to go and what kind of work to do.

RESPONDENT'S ATTORNEY – But that worked changed from day to day?

APPLICANT – Yes. Because there are the small jobs of the housing.

RESPONDENT'S ATTORNEY – And he was acting as a tiler or painter depending if there needed to be tiling or painting done is that correct?

APPLICANT – The kind of work that we were doing was continuously going on because if we started working from 7 o'clock until 5 o'clock they will be moved to another place".

- [16] This exchange demonstrates to me a fairly typical informal employment relationship.
- [17] While the Applicant contended that its business “*is a totally sub-contract base business*” the Applicant supported this statement at the CCMA by testifying: “*I don’t have employees I use sub-contractors and casual labourers*”. This reveals the erroneous mind set of the Applicant. The Applicant appears to assume that if someone is employed on a casual (or more accurately part-time/ as and when) basis such person is not an employee. This is not correct. A casual labourer engaged for a short project or a number of short projects is still an employee. During working hours they remain at the beck and call of the master. The very fact that during the Arbitration there was no demure to the First Respondent’s reference to the Applicant as the “*boss*” further supports the view that the First Respondent was, indeed, an employee.
- [18] During argument Mr Coetzee who appeared on behalf of the Applicant contended that the undisputed fact that the First Respondent had provided his own tools of the trade was a factor that one could not get past as demonstrating that the First Respondent was an independent contractor. I disagree. Firstly, the First Respondent had not provided all of his tools of the trade but, according to him, had only provided such tools because “*my employer was providing us cheap tools*”. Secondly, when facts are considered in determining whether there is an employment relationship, no single factor is determinative. This is of the essence of the so-called “*dominant impression*” test. As items 27 and 52 of the Code of Good Practise: Who is an Employee records: “*There is no single factor that decisively indicates the presence or absence of an employment relationship ... that there is no single decisive criterion that determines the presence or absence of an employment relationship does not mean that all factors should be given the same weighting ... Courts, tribunals and officials must determine whether a person is an employee or independent contractor based on the dominant impression gained from considering all relevant factors that emerge from an*

examination of the realities of the parties' relationship". The overall impression I have of the situation is that the First Respondent was an employee of the Applicant albeit an informal employment relationship.

- [19] On the issue of whether the Applicant dismissed the First Respondent I, like the Commissioner, find it more probable that what took place on Monday 16 November 2015 was a dismissal rather than the First Respondent being advised that there was no work available for him for that week and abandoning his work. Had the First Respondent only been told that there was no work available for him that week (and that there would be work available to him the following week) then there would have been no need for Mr Schneider to have raised his voice during the conversation. Moreover, the First Respondent's immediate understanding that he had been dismissed and reporting it to the CCMA would have been strange.
- [20] The Applicant did not contend at the CCMA that the First Respondent had misunderstood what had been explained. Mr Schneider testified that he had *"told [the First Respondent] in front of all the other labourers we all were together and said guys we are going to have to share work. Some guys will work on the one day and the other guys on the other days. I said to him that he will have to go home and he will have to wait until some work comes in within the next few days. I couldn't let 6 guys sit alone doing nothing at my house"*. It was put to the First Respondent during cross-examination that: *"Actually what you are interested in is money and not work"*. So it was the Applicant's case that the First Respondent had not misunderstood what had been told to him, but had rather opportunistically attempted to claim dismissal when he had not been dismissed. I find this improbable in circumstances. The First Respondent had previously apologised and asked for forgiveness to get his job back. He alleged that he had to come to work on the Monday, notwithstanding the SMS notification that there was not work for him on Friday 13 November 2015, because he needed the work.

[21] In the above circumstances, there is no reason to disturb the findings of the Commissioner.

[22] Moreover, it must be noted that the Commissioner has neither been cited nor joined as a party. The joinder of the Commissioner from whom the relevant Award emanates is a material obligation in a Review Application (see: *Member of the Executive Council, Department of Education, Eastern Cape v Gqebe*³). Such joinder is generally necessary not just an issue of convenience or prejudice. Those cases that hold that when faced with a material non-joinder the court may exercise a discretion not to join such a party suggest that it is only done in exceptional circumstances and where it is clear that the party that has not been joined would not be prejudiced (see *Wholesale Provision Supplies CC v Exim International CC and Another*⁴). To my mind there are no exceptional circumstances in this matter. To the contrary the Court file does not reveal that any statement has been filed by the CCMA or the Commissioner in response to the Review Application in which a view is expressed whether or not those parties simply abide by the decision of Court and whether or not the Commissioner desired to supplement his reasons. This is an additional reason why the application falls to be dismissed.

[23] Insofar as the application was unopposed, there should be no order as to costs.

Order

[24] Wherefore I make the following order:

1. The application is dismissed.

Beckenstrater AJ

Acting Judge of the Labour Court of South Africa

³ (2009) 30 ILJ 2388 (LAC) at paragraph 33 and the authorities collected there

⁴ 1995 (1) SA 150 (T) at 157H-158I

Appearances:

For the Applicant: Advocate Mark Coetsee

Instructed by: Raymond Hauptfleisch

LABOUR COURT