IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No. JR895/16

In the matter between:

PROCTOR AND GAMBLE	
MANUFACTURING SA (PTY) LTD	**First Applicant**
WORKFORCE GROUP (PTY) LTD	**Second Applicant**
and	
AARON MOKADI AND 40 OTHERS	**First Respondents**
SODEXO SOUTHERN AFRICA (PTY) LTD	**Second Respondent**
COMMISSION FOR CONCILIATION	
MEDIATION AND ARBITRATION	**Third Respondent**
DUMISANI NGWENYA *N.O*	**Fourth Respondent**

Heard: 13 July 2017

Delivered: 02 March 2018

JUDGMENT

JULY. AJ

Introduction

[1] This application is brought in terms of sections 145 and 158 of the Labour Relations Act[1] (LRA), to have an award dated 4 April 2016 made by the fourth respondent under case number: GAEK 4688-15 the auspices of the third respondent, reviewed and set aside.

[2] The fourth respondent made the following award:

> "28 In the result I make the following determination:
>
> 29 The respondent (Sodexo and Workforce) are the joint or
>
> co-employees of the applicant's within the meaning of Section 200B.
>
> 30 The applicants are deemed to be employees of P&G within the meaning of S198A by virtue of the fact that P&G is determined to be the client of its co-employee Sodexo."

[3] The nature of the dispute that was referred by the first respondents is clearly set out in item 3 of referral form 7.11 as being a dispute in terms of section 198A.

[4] The outcome required by the first respondents as per item 4 of the Request for Arbitration form is –

> "Applicants are to be deemed permanent employees of Proctor & Gamble Manufacturing SA (Pty) Ltd in terms of Section 198A (3)(b)."

[1] Act 66 of 1995 as amended.

[5] The dispute remained unresolved as at 9 July 2015. Subsequently, the dispute was referred to arbitration on or about 10 July 2015.

Factual Background

[6] The first applicant operates a diaper manufacturing plant. The first applicant and the second respondent entered into a global service level agreement titled "*EOL and Warehouse Services*" (SLA) for a period of 2 years with annual escalation inflation plus 2%. In terms of the SLA the second respondent's scope of service is to provide online packaging and warehouse services, and are stipulated on pages 1 to 3 of the SLA as follows:

1. Receiving: Emptying of goods from delivery trucks and vehicles and storage of these goods into designated areas on the premises as per P&G specifications:

- Receiving of about 100 container trucks and 20 local trucks (pack material) per month.
- 7 day, 24h operations.
- Offloading of CHEP pallets from delivery truck (about 500 pallets/day average).

2. Line Supply: Delivery of goods to the production areas as per P&G request:

- Line supply, supply of about 200 to 220 unit loads from warehouse to the line per day (including returns to the warehouse)
- 7 day, 24h operations.
- Pick up RM upon order of the line, move to the line, partially drop them into a cart, scanning

3. Line Take Away: Collection of Goods from end of line as per P&G request:

- Line take away, movement of about 500 FP pallets from the line to the warehouse per day.
- 7 day, 24h operation.
- Scope: Pick up pallets at the line, compare pallet label with log book, move to the warehouse, store in racks, scanning.

4. Shipping: Picking of Goods and Loading of trucks and vehicles as per P&G specifications:

- Shipping of finished product, about 160 – 200 trucks per month, 60 pallets each.
- 5 day operation, 24h operation.
- Scope: remove pallets from racks, stack them to piles of 2, move them from a strapping area into a truck, scanning.

General scope included in all of the above:

i) FLT inspection before use, changing of batteries, checking and maintaining water level of batteries.

ii) Pallet Jack scope

- preparing FP pallets for shipment: Strapping FP pallets with belts
- moving CHEP pallets from offloading area into storage area
- "Owning" a section of WH for standards
- Doing inspection while on shift, Check BIN labels
- Maintaining RTCIS labels in good condition within own section
- Attach printed labels per description to the BINS/racks, printing through P&G."

[7] The agreement sets out the following further requirements

7.1 EOL teams will primarily be at the end of the production line and WH teams will be in areas which RPM and FP are located in the warehouse areas.

7.2 The second respondent will have full ownership of the designated areas as per the layout.

7.3 The second respondent is required to train its own employees until they achieve a desired skill level.

7.4 In relation to health and safety, the second respondent is required to comply with the first applicant's local regulatory laws, regulations and laws of South African Department of Labour.

7.5 The second respondent is required to provide, its own and maintain all necessary Personal Protective Equipment. This equipment must be in compliance with the safety requirements of the first applicant. It must further ensure that all its workers have all appropriate safety equipment.

7.6 All employees of the second respondent that operate motorized vehicles must have the relevant licenses and/or certificates and where necessary the first applicant will provide the initial training.

7.7 The second respondent will have the full responsibility to maintain a training programme.

7.8 The second respondent would be required to provide branded products and services of superior quality and must be adequately staffed.

7.9 The second respondent is to be paid upon presentation of an invoice.

[8] In a questionnaire appearing in paragraph 1 on page 93 of the paginated bundle, the second respondent states that it has 355 000 employees and 30 600 clients in 80 countries, is recognized as a top performing company with high quality products and service offering, and its objective is to be able to work with a manufacturer for each strategic product or category/ies of a product.

[9] The second respondent in turn entered into a sub-contractor agreement with the second applicant. In terms of the sub-contractor agreement, the second applicant was obliged to provide services for the first applicant in terms of the Tender CONLAB 002-2010 incorporating annexures "B" and "C". Annexure "B" is a facility management outsourcing services agreement between the first applicant and second respondent.

[10] The second applicant's core business, as stipulated in the tender document, is the provision of staffing solutions to all industry sectors. It has permanent and temporary placement labour broking and industrial staffing. In terms of operations, the second applicant was required to provide all miscellaneous equipment and technology required to provide the service and to ensure contract continuity, contract execution and to maintain good communication between all parties involved.

[11] Four dedicated supervisors were assigned to the second respondent's site, at the premises of the first applicant, the fourth respondent seems to be persuaded that this establishes a client and temporary employment service relationship between the first applicant and the second applicant. This simply cannot be true as the first respondents' presence at the premises of the first applicant is due to the simple fact that the services of the second respondent are required on site.

<u>Grounds for review</u>

[12] The grounds for review are set out in paragraph 47 of the first and second applicants' founding affidavit as follows:

> "47.1 The fourth respondent failed to identify, appreciate and determine the true issue that he was called upon to determine and apply his mind accordingly.
>
> 47.2 The fourth respondent made findings that are not rational nor reasonable in relation to the reasons given by him and/or the facts properly before him.
>
> 47.3 The fourth respondent further failed to consider relevant evidence and decided the matter which was not brought before him, and in that exceeded his powers.
>
> 47.4 The fourth respondent's failure to apply his mind to the facts and the case before him reaching a decision that a reasonable decision maker could not have come to.

47.5 The fourth respondent committed gross misconduct by committing a gross error of law.

47.6 There is a reasonable prospect of success in that this Honourable Court would likely reach a different decision to that of the fourth respondent based on the facts of the matter."

[13] The applicant, therefore, requires this Court to make an order as follows:–

"1. Reviewing and setting aside the award handed down by the fourth respondent on or about 4 April 2016, under case number GAEK4688/15, in respect of the determination that:

1.1 the second applicant and the second respondent are co-employers of the first respondents in terms of section 200B of the Labour Relations Act 66 of 1995 ("LRA"); and

1.2 the first applicant is the deemed employer of the first respondents within the meaning of section 198A of the LRA.

2. substituting the decision of the fourth respondent with a decision of this Honourable Court, namely that-

2.1 the second respondent is not the co-employer of the first respondents; and

2.2 the first applicant is not the deemed employer of the deemed employer of the first respondents.

3. directing such respondents who oppose this application to pay the costs of this application to pay the costs of this application, either singularly or jointly and severally."

The Test for Review

[14] Review applications are regulated by Section 145 of the LRA, and it is settled law that the test to be applied in applications brought in terms of this section is the test for reasonableness or rationality. Simply put, the reasons for the decision must be rational failing which the outcome will be irrational. In other words, illogical reasoning will lead to an irrational outcome.[2]

[2] See: *Sidumo and Another v Rustenburg Platinum Mines and Others* (2007) 28 ILJ 2405 (CC) ; *Heroldt v Nedbank Limited* (2013) 34 ILJ 2795 (SCA).

Section 198 of the LRA

[15] In terms of Section 198A, a temporary service is defined to mean work for a client by an employee –

> "(a) for a period not exceeding three months;
>
> (b) as a substitute for an employee of the client who is temporarily absent; or
>
> (c) in a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8)."

[16] In terms of section 198A (3) an employee performing a temporary service is the employee of the temporary employment services provider. However, an employee not performing such temporary service for the client is deemed to be an employee of the client, and the client is deemed to be his employer. Such an employee is subject to the provisions of section 198B, employed on an indefinite basis by the client.

[17] In order for an arbitrator to determine whether the temporary service employees are to be deemed employees (in terms of section 198A(3)) , the relationship between the parties must be one of a client and temporary employment service provider. In this case the first applicant has to be the client of the second applicant, and not that of the second respondent. I therefore find that there is no client and temporary employment service relationship between the first applicant and the second applicant, nor does such a relationship exist between the first applicant and the second respondent. Therefore, the deeming provision in section 198A does not find application in the present circumstances. Consequently, the fourth respondent's award must be set aside.

Analysis of the pleadings

[18] In paragraphs 22 and 23 of the first and second applicants' affidavit it is stated that:

> "22 It is common cause between the parties that the second applicant is a temporary employment service provider and that the employees concerned are temporary employees as contemplated by S198 read with 198A of the LRA.
>
> 23 In providing these EOL services, the second respondent has chosen, at its own behest, to contract with a recognized temporary service provider, namely second applicant, for the provision of resources in the shape of workers that are placed at P&G's plant."

[19] According to the first respondents' answering affidavit, paragraphs 22 and 23 of the first and second applicant's founding affidavit are admitted, however, the first respondents deny that the second respondent is the client.

[20] The first respondents allege that the second respondent is the client of the second applicant. The first applicant's response to this allegation is that –

> "81 The employees of the second applicant work for the first applicant as has been demonstrated above, and were procured to work at the first applicant by the second respondent via second applicant."

[21] This response does not deal with the relationship between the first applicant and the second respondent. It is not sensible that the second respondent procures work from the second applicant on behalf of the first applicant.

[22] The first respondents admitted the allegation contained in paragraph 17 of the first and second applicants' founding affidavit that the second respondent entered into a global commercial agreement with the first applicant as a service provider.

[23] In paragraph 9 of the Commission for Conciliation, Mediation and Arbitration (CCMA) arbitration award, the fourth respondent states the issue to be decided as-

> "9. whether, in the circumstances, the applicants are deemed to be the employees of Sodexo and/or PG for purposes of section 198A(5) of the Act."

[24] For section 198A(5) to apply, there must be a client and employment service provider relationship between the first applicant and second applicant. In the absence of such a relationship between the two, section 198A does not apply. In light of the service level agreement between the first applicant and the second respondent, on the one hand, and the subcontracting agreement between the second applicant and the second respondent, it is difficult to understand how the first applicant and the second respondent are said to be co-employers of the first respondents.

[25] The first applicants' contention at the CCMA arbitration and before this Court has been consistently that there is no such a relationship between it and the second applicant and therefore section 198A does not apply in so far as it relates to it. Having read the outsourcing agreement between the second applicant and the second respondent, I am convinced that the relationship between the two parties is not one that is intended to be subjected to regulation by section 198A. In other words, there is no client and temporary employment service relationship between the parties.

<u>Section 200B of the LRA</u>

[26] Instead of determining the issue before him, the fourth respondent finds that the second applicant and the second respondent are co-employers in terms of section 200B of the LRA. It is crucial to cite the provisions of section 200B which provides:

> "(1) For the purpose of this Act and any other employment law, 'employer' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent of doing so is or has been to directly or indirectly defeat the purpose of this Act or any other employment law.
>
> (2) If more than one person is held to be the employer of an employee in terms of section (1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of this Act or any other employment law."

<u>Findings</u>

[27] It is not clear how the issue of liability comes into play in this matter. The fourth respondent provides no basis as to why the Subsidiary Agreement between the second applicant and second respondent falls foul of the provisions of section 200B.

[28] Having determined that the relationship between the second applicant and the second respondent is that of co-employers, it is not clear how such a relationship translates to the application of section 198A. In his reasoning, once the first applicant and the second respondent became co-employers, section 198A became applicable. I do not agree with this reasoning.

[29] In determining the real issue before him, the fourth respondent, in paragraph 26 of the CCMA arbitration award states that:

> "26. Having determined that Sodexo is also an employer of the applicants, what is left to be determined is the nature of the relationship between the Sodexo and P&G. The Main Agreement, as already established from the basis of the relationship between the entities. It is an established fact that the purpose of the Main Agreement was to source labour to work at the P&G plant. This activity falls squarely with the definition of a relationship of a Client and a TES within the meaning of sec198. P&G was thus the client of Sodexo."

[30] There is absolutely no factual basis for the fourth respondent to conclude that the main agreement was intended to procure labour. The main agreement between the first applicant and the second respondent was for the procurement of services. The reliance on section 200B is misplaced and a misconstruction on the part of the fourth respondent. The fourth respondent's findings undermine the outsourcing arrangement between the first applicant and the second respondent.

[31] There was also no basis for the fourth respondent to refer to the second respondent as a temporary employment service provider and the first applicant as the client, nor does the fourth respondent explain how section 198 applies to co-employers. It appears that the fourth respondent failed to

apply his mind to the issues and facts before him, and therefore his reasoning is irrational.

[32] In analyzing the evidence, the fourth respondent states that it is common cause that the second respondent was required to provide labour to render the services of the first applicant. This is inaccurate and is not supported by the evidence before him. Had the fourth respondent taken enough time to interrogate the documents before him, I am convinced that he would have come to a different conclusion. There is no indication in the affidavit that the documentary evidence was considered, and even if it was, I am not convinced that a thorough interrogation of the documents was done. The evidence is very clear, beyond any doubt, that the relationship between the first applicant and the second applicant was an outsourcing of services which is permitted in terms of the LRA.

[33] I therefore make the following order:

Order

1. The award under case number GAEK4688-15 dated 4 April 2016 made by the fourth respondent under the auspices of the third respondent is reviewed and set aside.

2. That the first applicant is not the employer and/or deemed employer of the first respondents

3. The matter is referred back to the third respondent for a hearing *de novo* to be heard by a commissioner other than the fourth respondent.

4. There is no order as to costs.

S. July

Acting Judge of the Labour Court of South Africa

<u>Appearances</u>

For the First Applicant:	Mr F Malan/ Mr J Norval
Instructed by	ENS
For the Second Applicant:	Advocate Louwrens Malan
Instructed by	Hunts (Incorporating Borkums) Attorneys
For the First Respondent:	Advocate T Bruinders SC with Advocate E Richards
Instructed by	Lawyers for Human Rights