IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

Reportable

CASE NO:C688/99 in the matter between:

OAKFIELDS THOROUGHBRED & LEISURE INDUSTRIES LIMITED **Applicant**

and

First Respondent

Second Respondent

Third Respondent

JUDGMENT

GAMBLE A.J:

INTRODUCTION

1.The Applicant , a listed public company , seeks to set aside an award of John McGahey ("McGahey") , a Commissioner of the Third Respondent , of 11 November 1999 in favour of the Second Respondent , Nick Walker Webb("Walker Webb"). It is alleged that this award is reviewable under sections 145(2)(a)(ii)and (iii) of the Labour Relations Act 66 of 1995 ("the LRA")

2.Walker Webb complained that he had been unfairly dismissed by the Applicant on 22 March 1999. McGahey found in his favour and awarded him compensation equal to 8 months remuneration for both substantive and procedural unfairness .

3.At the commencement of the arbitration proceedings before McGahey on 9 November 1999 , Walker Webb's employment status was placed in issue by the Applicant . McGahey was therefore required to decide , initially , whether Walker Webb was an employee of the Applicant and , if so , whether he had been fairly dismissed .

4.Initially Walker Webb opposed this application and filed an answering affidavit . He withdrew his opposition on 17 April 2001 . McGahey and Third Respondent have not opposed the relief sought herein .

THE MATERIAL FACTS

5.The applicant is the holding company of various subsidiaries involved in the horse racing industry in South Africa . This involvement includes breeding , racing and dealing in racehorses throughout South Africa . At all times material hereto it was represented by one Emmanuel ("Cambouris") its managing director .

6.Walker Webb is apparently qualified as a trainer of racehorses . He was interviewed by Cambouris and his wife in January 1999 and thereafter appointed initially as an assistant trainer at the Applicant's Milnerton Yard . It is the nature of this appointment which was the first issue to be determined by McGahey .

7.Various of the Applicant's (and its subsidiaries) activities are governed by the Rules of the Jockey Club of South Africa . So too is Walker Webb .

8.The racing industry and the Jockey Club make use of certain quaint colloquialisms , certain of which will be dealt with as this judgement runs its course .

9.In January 1999 the Applicant availed itself of the services of a certain Dr Koos Neuman ("Neuman") as its trainer in Cape Town . Persuant to the Rules of the Jockey Club (with whom Neuman was registered) , the

Applicant did not employ Neuman , who operated on an a so-called "open licence" issued to him by the Club . The use of this phrase is intended to convey that Neuland can train for any number of racehorse owners and is not restricted to the services of one particular owner . Such a trainer is , in all senses of the term , an independent contractor .

10.An entity recognised by the Jockey Club as being permitted to race its horses under the Club's aegis is referred to as "a patron" . Each patron races its horses under its distinctive livery called "colours" or 'silks". In the present case it seems as if the Applicant's subsidiary , Swynford Paddocks (Pty) Ltd , was the racing entity which "had the silks" .

11.The Jockey Club Rules permit a patron to directly employ a trainer only in certain defined circumstances . To do so the patron would require the permission of the Jockey Club . In terms of Rule 10.1 such a person is referred to as a "private trainer" . In racing parlance it is said that a patron may not race "under the lap". This means that a patron cannot employ a trainer with an open licence to work for it on a private and exclusive basis .

12.Besides a "private trainer" , Rule 10.1 of the Jockey Club recognises the following categories of persons who are permitted to train horses to run at race meetings :

12.1 a "trainer" ; (as described in paragraph 9 above)

12.2 an "owner/trainer" (who is permitted to train only his/her own horses in very limited and defined circumstances);

12.3 an "assistant trainer" ;

12.4 a "stable employee" (who has been given permission by a stipendiary steward to act due to the absence or illness of a trainer who employs him/her)

13.An "assistant trainer" may fall into either of 2 categories :

13.1 a person in terms of Rule 10.1.4. “who.....has obtained the permission of a stipendiary steward to act during the absence or illness of a trainer who employs him”(my underlining) ;

13.2 a person in terms of Rule 10.1.5 who controls a “racing stable” on behalf of his employer who shall be a trainer , and who shall have obtained permission in terms of rule 11.2.5” (my underlining)

14.The ambit of the prescribed permission required under Rule 11.2.5 is not material to this matter save that it is significant to note that :

14.1 Rule 11.2.5 relates to circumstances “where an assistant trainer in his [i.e. a trainer ‘s] employ is left in charge of a racing stable in terms of Rule 10.1.5" ,

14.2 Rule 11.2.5.2 establishes a degree of vicarious liability in terms whereof “ the trainer and the assistant trainer shall be jointly and severally liable for all actions of the assistant trainer running the stable on behalf of the trainer”.

15.Rule 10.2 directs that “no one may act as a trainer , assistant trainer or private trainer unless and until such individual has been granted a licence by the licencing board”.

16.An “assistant trainer” cannot operate outside the ambit of the Rules of the Jockey Club. The effect of this prohibition (when read in conjunction with the constitution of the Club) is that no person is able to participate in horse racing in South Africa , otherwise that in accordance with such Rules . Of course a party such as an assistant trainer is contractually bound by the Rules and regulations of the Jockey Club through his / her membership of that voluntary association .(**Turner v Jockey Club of South Africa 1974 (3) SA 633 (A) at 645 B-C).**

17.From the aforegoing it is clear to me that a person who wishes to train horses for race meetings under the rubric of “assistant trainer” cannot be employed by a patron , can only be employed by a trainer and may attract vicarious liability on the part of the trainer for his / her actions .

THE CCMA PROCEEDINGS

18.An arbitration was convened by the Third Respondent on 9 November 1999 . Present at those proceedings were Cambouris , Walker Webb and McGahey.

19.In the founding affidavit filed in this application and in argument at the hearing thereof, the Applicant referred to certain facts which he contended were suggestive of bias on the part McGahey in favour of Walker Webb . While there may be something to be said about this , I do not think it necessary to deal therewith in any great detail given the plethora of other reviewable irregularities which tainted the proceedings . It is curious , to say the least , that McGahey apparently sought out Cambouris at the ground floor entrance to the CCMA offices in Cape Town and escorted him upstairs to the arbitration locale.

20.At the commencement of the arbitration Cambouris indicated that the Applicant would like to be legally represented . McGahey brushed this request aside by telling Cambouris that this would not be necessary "as this was an informal meeting which would only take a short time". This was the first irregularity **(Scholtz v Commissioner Maseko NO & Others (2000)21 ILJ 1854 (LC) at p 1858)**. This irregularity is exacerbated by the fact that it was obvious to all concerned that Walker Webb was being assisted outside the arbitration proceedings by a person whom Cambouris thought had the appearance of a labour lawyer (it is not quite clear what the distinguishing features were in this regard other than being a person "dressed formally in a jacket and tie").

21. In reply to an initial enquiry by Cambouris about whether there was "any appeal on this process" , McGahey demonstrated his complete ignorance of the basic structure of the LRA by replying :

"Yes . An appeal can be made to the Labour Appeal Court . The Labour Appeal Court looks at the process which was followed and provision does exist in the Act for you to appeal and note any grounds for appeal which you may like to make".

22.After the parties' brief opening statements , McGahey apparently quickly understood the issues . Cambouris then gave evidence under oath during which McGahey seemed to hurry the witness somewhat . There was no cross-examination of Cambouris initially .

23.Walker Webb then gave evidence under oath where after McGahey offered the parties an opportunity to negotiate a settlement in his absence . This was declined by Cambouris. McGahey had no right to do this since he was not conciliating the matter .

24.Cambouris was then cross-examined by Walker Webb . When the latter was finished he was cross-examined by Cambouris . Thereafter the parties delivered their closing arguments during which Walker Webb was permitted to give certain further evidence , albeit not under oath .

25.While an arbitrator has a discretion under section 138 of the LRA as to how the proceedings should be run , there should still be a semblance of procedural order reminiscent of a trial and , in particular , regard should be had to the issue of onus prescribed by section 192 of the LRA . **(Naraindath v CCMA and others (2000)21 ILJ 1151 (LC))** .

26.While the unusual procedure adopted by McGahey may not have constituted an irregularity *per se,* the effect of certain of his rulings did . He apparently decided to try and determine the employment relationship issue as a matter of priority .

27.In an attempt to establish the absence of such relationship , Cambouris produced a letter written by the Applicant to the Jockey Club on 2 March 1999 setting the circumstances of Walker Webb's appointment . The opening paragraph of that letter reads as follows: *"This letter serves to confirm that the Oakfields Group, of which Swynford Paddocks (Pty) Ltd is a wholly owned subsidiary , has*

recently appointed Mr Nick Walker Webb as a trainer of a number of the Group's racehorses . This appointment is on a trainer / patron basis , and Mr Walker Webb has not been employed as a salaried employee of Oakfields . Mr Walker Webb will be paid a monthly training fee of R5 500.00" .

28.After dealing with the payment of various disbursements the letter concludes with the following

"*As a trainer Mr Walker Webb shall be entitled to stable and train other persons' horses. Please note that Oakfields reserves the right to remove the horses at any time on the immediate payment of all outstanding trainer's fees" .*

The letter was copied to Walker Webb .

29.In his evidence Cambouris also pointed out to McGahey that the appointment as trainer was subsequent to Walker Webb's initial appointment as an assistant trainer to Neuman:

"He reported to Dr Neuman , he had to by rules of the Jockey Club , report to Dr Neuman".

After the Applicant had terminated its relationship with Neuman it evidently engaged Walker Webb as its trainer.

30.In cross -examination by Cambouris , Walker Webb admitted that

30.1 he was not a private trainer for the Applicant ;

30.2 Neuman had an open licence and was not a private trainer for the Applicant;

30.3 the Applicant had about 8 or 9 trainers countrywide;

30.4 all of those trainers operated on an open licence and none were private trainers;

30.5 none of the other trainers were employees of the Applicant .

31.The evidence of Walker Webb under cross-examination turned to the circumstances under which the Jockey Club would have renewed his licence if it was known that he was earning a salary from the Applicant . It

appeared as if the matter was capable of clarification by way of a letter from the Club .

32.Cambouris then said the following to McGahey :

"All right , I am going to get a letter from the Jockey Club on that particular issue, provide you with a letter to show ...."

The arbitrator interrupted him with following brusque retort :

"It will be long gone . Evidence is presented here . I make the ruling on what I see here" .

33.The following exchange then occurred between Cambouris and McGahey :

: Okay , no problem ....I will provide all the information you need. I have nothing to hide ..... Dr Neuland as the trainer , your trainer had to also receive a training fee from us and he can provide all the proof for that . He was not our employee.

Commissioner : Have you got any of that here ?

: Yes , sorry , I haven't brought his file but I can.....

: It is too late".

34.After the completion of the evidence and immediately prior to the final argument, McGahey enquired of Cambouris whether Neuman was present at the CCMA offices . The reply was : "No , he is in Mozambique . But he is always in contact with me". From that question it is clear that McGahey appreciated the materiality of Neuman's evidence.

35.In my opinion the aforementioned extracts from the evidence demonstrate the following further reviewable irregularities in the proceedings :

35.1 A failure on the part of arbitrator to advise the Applicant of its rights to adduce further evidence and of its right to call witnesses in support of its case ;

35.2 A failure to permit the Applicant to place appropriate documentation before the arbitration or to advise the

Applicant of its right to do so where it was manifestly necessary to do so .

35.3 An unnecessarily crude application of arbitrator's discretion under section 138 of the LRA to determine the appropriate procedure , which precluded the Applicant from properly advancing its case or knowing what adverse inferences the Arbitrator may make from its failure to place evidential material before him.

(See: Naraindath v CCMA *Supra* , Pick 'n Pay Supermarkets , Northern Transvaal v CCMA & Others (2000) 21 ILJ 234 (LC) at p 240 , Scholtz v Commissioner Maseko NO & Others *supra* at p 1862 , East Cape Agricultural Cooperative v Du Plessis & Others (2000) 21 ILJ 1335 (LC) at p 1338 ; 1341 .)

36.What makes the procedural irregularities more startling is McGahey's reliance thereon in his award . After postulating the various tests to be applied in distinguishing between an employee and an independent contractor , the Arbitrator states the following : "The above may be specific to the relationship with Webb and may or may not exist in the company's relationship with its other trainers . Neuman was not here to testify and neither was Dr Podlas [Cambouris' wife] . Had they been present a different perspective may have been given.....

Evidence was not presented to clarify (the) relationship (between Neuland and the Applicant) other than to say he had an open license (sic) and could not therefore be an employee."

37.In conclusion , I should say that the alacrity with which the arbitrator disposed of the hearing and the fact that he issued his award only 2 days later lends some credence to the suspicions of bias alluded to in paragraph 19 above .

38.In any event , I am of the opinion that the arbitrator's award is singularily lacking in rationality and justifiability in the light of the totality of the evidence before him (limited as it was by the irregularities) and for this reason , too, is reviewable **(see: Shoprite Checkers (Pty)Ltd v Ramdaw NO & Others , unreported**

Labour Appeal Court judgment of 29 June 2001 in case No. DA 12 /2000).

39.In all the circumstances , I find the proceedings before McGahey and his subsequent award to have constituted an utter travesty of justice and I have no hesitation in setting the award aside .

THE APPROPRIATE ORDER

40.The various extracts from the Rules of the Jockey Club to which I have referred above were not placed before McGahey by virtue of the way in which he conducted the matter. However , in the founding affidavit filed in this application Cambouris dealt extensively with the Rules and , *inter alia* , the nature of the relationship between a patron , a trainer and an assistant trainer .

41.In his answering affidavit filed in opposition of the application Walker Webb purported to deny various of the material allegations made by Cambouris . These denials are mendacious in the light of Walker Webb's evidence at the arbitration as well as the extracts from the Jockey Club Rules annexed to the founding affidavit . In event , as pointed out above , Walker Webb has withdrawn his opposition and there is accordingly no real dispute of fact before me .

42.I am able to determine the case on the evidence before me and there would therefore be no purpose in remitting the matter for a hearing *de novo* .

43.The facts which I have set out above demonstrate that the Rules of the Jockey Club (by which the parties are contractually bound) precluded the employment of Walker Webb by the applicant either as a trainer or assistant trainer .

44.Of course that does not mean that the parties may not have elected to breach their respective contractual

obligations towards the Jockey Club and to enter into a contact of employment . However, it is most unlikely that the Applicant , as a prominent patron in the racing fraternity , wold have risked the sanction which follows such conduct . The enforceability of such a contract of employment may also be subject to challenge in accordance with the dictates of contractual *bona fides* and public policy **(see:Eerste Nationale Bank van Suidelike Afrika Bpk v Saayman N.O 1999 (4) SA 302 (SCA) at 318-330)** . In any event the evidence shows that Cambouris took pity on Walker Webb (who had fallen on hard times) and offered him an appointment in the Applicant's stables which would provide him with some sort of income . This was hardly a case of the Applicant wanting to secure the services of a successful trainer at all costs , to the extent that it would consider breaching the Rules of the Jockey Club .

45. Walker Webb argued at the arbitration that the employment relationship was apparent from the fact that he had received a cheque from the Applicant marked "salary" . In fact the cheque was drawn on the account of "E. Cambouris Bloodstock (Pty) Ltd" (apparently a subsidiary of the Applicant). Not only is this an entirely separate corporate entity , but it was explained that the cheque was marked "salary" to effect speedy clearance by the bank .

46. The documents show too that Walker Webb was paid at the month's end in response to an invoice submitted by him to the Applicant . This invoice referred to "training fees" and not salary . In addition there was no deduction by the Applicant from such monthly payment of any employee's tax .

47. Finally the fact that the instruction to terminate Walker Webb's appointment eminated from Cambouris and his wife do not necessarily imply the type of control to be found in situations where an employee is fired . The Applicant was quite entitled to terminate the appointment of an independent contractor rendering services to it , in much the same way as a litigation client is permitted to terminate the services of an advocate by giving the relevant instruction to the attorney to withdraw the brief .

48.I am satisfied that on the evidence adduced at the arbitration and in these proceedings, the Applicant (who bears no *onus* in that regard) has demonstrated that Walker Webb was not employed by it .

COSTS

49.During argument , Mr Willis , for the Applicant , suggested that Walker Webb should be ordered to pay the costs of the application because he had opposed the matter thereby bringing himself within the ambit of prayer 3 in the Notice of Motion . Suprisingly , the Applicant sought no costs order against McGahey .

50.If the Arbitrator had properly exercised its discretion in making his award he may well have found , under section 138(10) of the LRA that Walker Webb had litigated in a frivoulous or vexatious manner and that he should have been mulcted in costs . The Applicant did not seek its costs order herein on that basis and it would accordingly not be appropriate for me to consider such an order in the absence of Walker Webb having been heard on the point .

51.I consider that Walker Webb was correctly advised to withdraw his opposition . It does not seem as if the Applicant was put to any great expense by Walker Webb's short- lived opposition and it does not appear reasonable in those circumstances to order him to pay the costs of the application .

CONCLUSION

52.In the circumstance I make the following order :

51.1 The arbitration award of the first Respondent dated 11 November 1999 is hereby reviewed and set aside ;

51.2 The unfair dismissal dispute lodged by the 3rd Respondent under case number WE21317 is determined in the Applicant's favour in that the 2nd Respondent was not an employee of the Applicant ;

51.3 There shall be no order as to costs .

P.A.L GAMBLE

Acting Judge

APPEARANCES

ant: Adv Willis instructed by Rapeport Inc of Johannesburg .

No appearance for the Respondents

g : 29 June 2001

Date of Judgement: 11 July 2001