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IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

BRAAMFONTEIN

CASE NO: J2175/98

2002-03-15

In the matter between

J F E GERBER

Applicant

and

DENEL (PTY) LTD

Respondent

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J U D G M E N T

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REVELAS J:

1. The applicant commenced employment as a personnel manager with Atlas Aircraft of South Africa (Pty) Ltd on 1 March 1990 and thereafter she performed the same functions for its successor in title, the respondent. The applicant contends that she was an employee of the respondent in terms of Section 213 of the Labour Relations Act 66 of 1999, ("the Act"), where

an employee is defined as:

- “(a) Any person, excluding an independent contractor, who works for another person or for the State and who receives or is entitled to receive any remuneration, and**
- (b) Any other person who in any manner assists in carrying or conducting the business of the employer.”**

2. The respondent contends that the applicant is not an employee but a sub-contractor.
3. The applicant's case in the pleadings and her testimony is that she performed her functions at the respondent in terms of three agreements between three corporate entities, in which she was involved, and the respondent and its predecessors in title.
4. The first agreement was concluded between Atlas Aircraft Corporation of South Africa (Pty) Ltd (Atlas) and Ultimate Holdings (Pty) Ltd (“Ultimate”). Mr Langner signed on behalf of the respondent, and Mr Gerber, the applicant's husband, signed on behalf of Ultimate. The agreement was operative for the period March 1990 until April 1993.
5. On 3 April a second agreement was reached between Denel (Pty) Ltd and Datacare CC. The applicant signed the agreement in her capacity as a member of Datacare CC, a close corporation. At this stage Atlas had become Denel (Pty) Ltd.

6. The third agreement was concluded between Denel (Pty) Ltd trading as Denel Aviation, and Multicare Holdings (Pty) Ltd. The applicant signed this agreement on behalf of Multicare Holdings (Pty) Ltd ("Multicare") as a director of that company on 29 September 1997.
7. As from 1 October 1997 the applicant acted as the Executive Manager Human Resources, for the respondent. She applied for this position when it was advertised in September 1997.
1. 8. The respondent had also in the interim embarked on a retrenchment exercise on which a moratorium was placed on 18 March 1998.
9. This moratorium was extended on 7 May 1998 and was lifted on 29 May 1998.
10. On 24 February 1998 the applicant was advised that the respondent had decided on an acceleration of affirmative action in all human resources departments of the respondent.
11. On 18 April 1998 the applicant's services were terminated by the respondent, and to quote the words in the applicant's statement of case, the respondent 'purported' to terminate her fixed term contract. She did not accept the termination.
12. The Group Executive-Director confirmed this termination on 4 May 1998 and on 15 May 1998 the applicant was

informed that the reason for the termination of her employment was that the respondent had to implement a drastic cost cutting exercise and that in turn led to a drastic reconstruction of the corporate structure and that her position had become redundant. She was given the option to take up another post at less the remuneration than she was earning or a package in terms of which she was to receive a severance package of two weeks' remuneration per completed year of service. The two options were rejected by the applicant.

1. 13. On 4 June 1998 a meeting was held where she was informed of the respondent's stance. I do not wish to deal with those facts at this stage save to mention that the respondent treated the applicant as if it had retrenched her.
14. *In limine*, the respondent raised the point that the applicant was not an employee, and this is the question that I now have to decide upon. The questions of fairness and so forth are not relevant at this stage.
15. The applicant argues that on the undisputed facts led by her in evidence and confirmed by Mr Langner (of the respondent) who was subpoenaed to give evidence, she was an employee. It was argued in the alternative that in the event of my finding that the applicant was not an employee, the respondent was essentially stopped

from denying it, based on the representations made to the applicant by respondent which caused her to act to her detriment.

16. The applicant was remunerated and taxed through the two companies and the close corporation (Ultimate, Datecare and Multicare") throughout her working relationship with the respondent and its two predecessors in title (Atlas and Denel Aviation). As far as the South African Revenue Services was concerned, she was an employee of the aforesaid three entities for the period relevant to the dispute which is now come before the Labour Court.

17. The respondent referred to the last contract between Multicare and Denel Aviation and made the following points:

Multicare provided the services of a personnel management consultant to Denel Aviation.

The agreement could be terminated by either party giving 30 days' notice of such termination.

The agreement was for a fixed period which commenced on 1 October 1997 and ceased on 31 March 2000.

Multicare was paid an inclusive rate of R200,72 per hour excluding VAT, in relation to the services provided by Multicare.

All taxes applicable to the remuneration paid to Multicare were to be borne by Multicare.

In the event of Multicare lodging with Denel Aviation, a directive issued by the Department of the Commission Inland Revenue, exempting Multicare from the requirement for P.A.Y.E. and SITE to be deducted, Denel Aviation could not make deductions from the remuneration payable to Multicare.

Payment to Multicare was to be made within seven days, after receipt of an invoice of Multicare.

The prevailing conditions applicable to Denel Aviation's full-time employees were not applicable.

The services to be provided in terms of the agreement did not have to be provided or performed on Denel Aviation's premises.

18. It is common cause that the applicant carried out Multicare's obligations in terms of the agreement. In terms of clause 3.3 of the agreement the applicant

provided Denel Aviation with directives from the South African Revenue Services stating that as Multicare and Datacare CC, through which the applicant previously contracted her services to Denel Aviation, carried on an independent trade, payments made by clients did not represent remuneration and were consequently exempt from the deduction P.A.Y.E. In the circumstances no P.A.Y.E. was deducted from the remuneration paid to Multicare. Multicare submitted monthly invoices to Denel Aviation in respect of services provided by the applicant and Multicare charged Denel Aviation VAT in relation to the services provided by her.

19. According to the respondent it had terminated its contract with Multicare on or about 19 April 1998.

20. The respondent argued that as the terms of the agreement with Multicare are clear and unequivocal the document should accordingly be accepted as the sole evidence of the terms that the parties had decided to agree upon. In support of its case the respondent relied on the Parol Evidence Rule as set out in *Johnston v Leal* 1980 (3) SA 927 AD at 943B as follows:

1. **"It is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict and/or to modify the writing by reference to**

extrinsic evidence and in that way to redefine the terms of the contract."

21. The respondent argued further that the only manner in which a party to such a contract can by way of evidence state that the written terms do not truly reflect the real intention of the parties is through either misinterpretation, fraud, duress, undue influence or illegality. The applicant obviously has not done this, the respondent argues, and she has not pleaded the aforesaid and accordingly the point *in limine* should succeed.
22. The facts relied upon by the applicant are however relevant to the inquiry in this matter, specifically as *estoppel* was raised. When the applicant was in effect retrenched by Atlas and received a retrenchment package, she structured her employment relations with the respondent by performing functions for it through a company, because the pension fund benefits at that time were very unfavourable to women. This evidence was corroborated by Mr Langner. Furthermore the applicant was part and parcel of the respondent's organisation, infrastructure and hierarchy.
1. 23. The applicant worked there exclusively and full-time and was subject to the control and discipline of

the respondent who instructed her when, where and how to work and the sequence of work she filled acting positions with the respondent. This evidence was corroborated by Mr Langner and presented by him as such. The applicant was not only operational but also participated in the strategic management of the respondent. She had delegated authority, controlled budgets, represented the respondent in various contractual arrangements, acted in a very senior position for an extensive period of time and was presented by the respondent as an employee both nationally and internationally. The documentation demonstrated that the respondent paid for the applicant's business and travelling, entertainment and cellular telephone expenses.

24. It was argued that the respondent made a significant investment in the applicant personally. That is not the case with independent contractors or for consultants as was the case in the matter of *CMS Support Services (Pty) Ltd v Briggs* (1998) 19 ILJ 271, (LAC). In that matter the tax position and the remuneration position of the consultant (Briggs) were similar to the applicant's in this matter. However, Briggs was employed as a consultant. Factually the applicant was no sub-contractor. The applicant was even required to

evaluate other employees. Clearly her duties were in consistent with those of a sub-contractor.

25. In the *CMS Support Services* judgment (supra), Myburgh JP referred with approval to the remarks of Bulbulia DP in a similar case of *Cullinan v Tee Kee Borehole Casings Ltd & Another* (1992) 13 ILJ 1544 IC at 1550D-E and quoted the following:

1. **"The Court accepts that the applicant formed his close corporation in a *bona fide* belief that it will assist him with easing his tax burden. It does not appear that it was his express intention to defraud the fiscal authorities. Having said that, I must also point out that the applicant cannot have his proverbial cake and eat it. He cannot say that he was not the respondent's employee as a machinist for a purpose of taxation (all for wishing to avoid the pension scheme of the Industrial Council) but simultaneously be regarded as an employee for the purpose of the Labour Relations Act."**

26. In the first instance I must mention that the case I just referred to was decided when the Labour Relations Act 28 of 1956 still had application and the definition of an employee in that Act is different from the definition contained in Section 213 of the current Act. Furthermore I have already indicated that the facts of the two matters are different in terms of the duties of the applicants concerned.

1. 27. Insofar as the respondent is concerned, it can also not have its cake and eat it. For purposes which did not only suit the applicant, but suited the respondent as well - there was a moratorium at some stage on new appointments - the applicant had to perform her duties as an employee. Yet at the same time, the respondent did not have to incur the responsibilities imposed on an employer by Labour Legislation. The applicant should not be criticised for wanting to structure her salary in a way she deemed fit. She also stated, and this was not disputed by any witness on behalf of the respondent, that the contracts in question were entered into each time, when the respondent underwent structural changes and it was the respondent's wish to have the contracts and the payments structured as it was in this matter.
28. Mr Langner also gave evidence that the applicant did not fall foul of the provisions relating to the South African Revenue Services since a tax directive was given which permitted the financial arrangements between the parties. He testified that the individuals who are permanent employees, as this was also in the case of the applicant, obtain tax directives from the Revenue Services so that no tax can be deducted.
29. The applicant's attorneys argued that in determining

the true nature of the relationship between the parties the issue of tax is accordingly mutual. The fact that the respondent did not deduct P.A.Y.E. from the remuneration paid to the companies and the CC in question, was because of tax directives issued by the SARS based on the Income Tax Act and their own policies and procedures.

30. I would not in this judgment wish to make any pronouncements upon the applicant's relationship with the Receiver of Revenue. I believe that it would perhaps be prudent to send a copy of this judgment to the South African Revenue Services.

31. On the facts and the dominant impression gained by all the facts which are common cause, the applicant is an employee and not a sub-contractor.

1. 32. I do not believe that I should make a costs order in this matter, therefore the question of costs should be reserved.

33. I make the following order:

1. The point *in limine* raised by the respondent is dismissed.

2. Costs are reserved.

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E. Revelas