IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JR 850/01

In the matter between:

WYETH SA (PTY) LIMITED Applicant

and

MANQELE, T First Respondent

MOLETSANE, R N.O. Second Respondent

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Third Respondent

SECURITY, RETAIL, TRANSPORT AND ALLIED WORKERS UNION OF SOUTH AFRICA Fourth Respondent

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JUDGMENT

CORAM : A VAN NIEKERK AJ

[1] This is an application brought in terms of section 158(1)(g) of the Labour Relations Act, 66 of 1995 ("the LRA") in which the Applicant seeks to review and set aside the ruling made by the Second Respondent, a Commissioner of the Commission for Conciliation, Mediation and

Arbitration ("the CCMA"), on 2 March 2001.

[2] The Applicant has raised two grounds for review. The first is that the Commissioner committed a gross irregularity in handing down a ruling in circumstances where another Commissioner had heard oral submissions from the parties' respective representatives concerning the merits of the matter. Secondly, it is contended that the Commissioner committed a material error of law, alternatively, that he arrived at an unjustifiable conclusion in ruling that the First Respondent was an "employee" of the Applicant as defined by section 213 of the LRA.

[3] The facts giving rise to this application are largely common cause. The First Respondent was offered a position by the Applicant as a sales representative. They concluded a written contract of employment on 15 March 2000 in terms of which the First Respondent was to commence employment on 1 April 2000.

[4] Prior to the First Respondent commencing employment, the First Respondent was advised that the Applicant was no longer prepared to employ him.

[5] The Applicant's decision not to employ the First Respondent was directly related to the allocation of a motor vehicle to the First Respondent. In terms of the contract of employment, the First Respondent was entitled, as part of his remuneration package, to be provided with a company vehicle for company business and reasonable use for private purposes. The Applicant avers that the First Respondent was advised that he could purchase a new motor vehicle in pursuance of this term of his contract,

subject to a maximum purchase price of R124 000. The Applicant avers further that the First Respondent was advised that he was to acquire a new motor vehicle, since the leasing company that financed vehicles for and on behalf of the Applicant would not finance a second hand vehicle. The Applicant selected a BMW 316 motor vehicle, which after inspection by the leasing company, transpired to be a used vehicle. The First Respondent thereafter identified an Opal Astra motor vehicle as the vehicle to be purchased on his behalf. After signature of the contract of employment, the Applicant was contacted by the leasing company and advised that the vehicle selected by the First Respondent was no longer in production and could not be a new vehicle. The Applicant viewed what it considered to be a misrepresentation by the First Respondent of the status of the vehicle in a serious light, and advised him that there was no contract of employment between them since the parties had been unable to reach consensus as to the condition of the motor vehicle stipulated in the letter of employment.

[6] The Fourth Respondent, on behalf of the First Respondent, thereafter referred a dispute concerning an alleged unfair dismissal to the CCMA. The Applicant took the point that the First Respondent was not an employee as defined in section 213 of the LRA. The Presiding Commissioner, Commissioner Nagdee, is alleged to have heard oral

submissions from the parties' representatives. On 25 August 2000, an agreement was reached between the parties in terms of which the point in limine would be addressed by the filing of affidavits by both sides and once these had been exchanged, the parties further agreed to furnish the CCMA with "written submissions/arguments". The parties agreed that the Commissioner would thereafter make a ruling, and that they were in agreement that it would not be necessary to schedule a hearing for arguments and that the "ruling will be made on the affidavits and submissions."

[7] On 6 October 2000, the Fourth Respondent addressed a letter to the Senior Convening Commissioner recording that it intended to request Commissioner Nagdee's recusal on the basis that he was alleged to have suggested at the conciliation proceedings that the CCMA would not have jurisdiction and that the dispute ought to be dealt with by the civil courts. Without any recourse to the Applicant, the matter was thereafter allocated to another Commissioner, the Second Respondent in these proceedings, Commissioner Moletsane. The Second Respondent ruled that the First Respondent became an employee "the moment he accepted an offer of employment" and dismissed the point in limine.

[8] In so far as the first ground of review is concerned, the Applicant's primary

complaint is that Commissioner Nagdee had been seized of the matter and that it was irregular for Commissioner Moletsane to make a ruling, I am not persuaded that it can be said that Commissioner Nagdee had been seized of the matter in the sense that any submissions addressed to him were of such a nature or extent so as to preclude another Commissioner from making a ruling on the point in limine.

[9] The tentative nature of any proceedings before Commissioner Nagdee is apparent from the terms of the agreement the parties themselves concluded as to how the point in limine would be determined. The agreement contemplated the filing of a founding affidavit, an answering affidavit and a replying affidavit, as well as arguments to be submitted in writing by both parties. It is also clear that the parties contemplated that the ruling would be made on the basis of the affidavits and submissions filed in terms of the agreement. There is nothing in the agreement between them to indicate that anything that may have been submitted to Commissioner Nagdee was to be of any consequence in the determination of the point in limine.

[10] The letter addressed to the CCMA by the Fourth Respondent on 6 October 2000 was not an application for Commissioner Nagdee's recusal. The letter clearly states that the Fourth Respondent intended to request his recusal, not that it was doing so. What actions the Senior Convening Commissioner took consequent on the delivery of the Fourth Respondent's letter are not disclosed on the papers but it is clear that at some point, Commissioner Nagdee withdrew from the proceedings. There is nothing to preclude a commissioner from withdrawing from proceedings without a formal application for recusal being brought. The

Fourth Respondent had raised a concern based on a view that Commissioner Nagdee had allegedly expressed and it may well have been for this reason that Commissioner Nagdee and/or the Senior Convening Commissioner agreed that the point in limine would be determined by Commissioner Moletsane without a formal application for Commissioner Nagdee's recusal.

[11] I do not agree with the Applicant's submission that the Fourth Respondent's actions amounted to "Commissioner shopping" and that to condone its actions would encourage abuse of the statutory dispute resolution process. It remained open for the Senior Convening Commissioner and/or Commissioner Nagdee to disagree with the view expressed by the Fourth Respondent in its letter, and to insist that Commissioner Nagdee determine the point in limine or that a formal application for recusal be brought. Given the nature of the agreement between the parties, and their clear instruction that the point in limine was to be determined by what followed the agreement rather than what preceded it, there was no prejudice in this instance to the Applicant by having Commissioner Moletsane determine the matter in accordance with the terms of their agreement.

[12] The first ground for review must therefore fail.

[13] In so far as it is alleged that Commissioner Moletsane misconducted himself by finding that the First Respondent was an employee of the Applicant by virtue of their having concluded a contract of employment, this Court has previously held that a person who is a party to a contract of employment but who has not yet commenced employment is not an employee for the purposes of the LRA. In *Whitehead v Woolworths (Pty)*

Ltd (1999) 20 ILJ 2133 (LC), Wagley AJ, as he then was, held that even if on the facts of that case he were to find that a contract of employment had been concluded, Ms Whitehead was not an employee because she did not work for nor was she entitled to receive remuneration from the respondent in that matter.

[14] Section 213 of the LRA defines "employee" to mean:

> *"(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 on or conducting the business of an employer,*
>
> *and "employed" and "employment" have meanings corresponding to that of "employee".*

[15] In this regard, Wagley AJ stated the following:

> "[7] In terms of the definition a person is only an employee when such person actually works for another person. The employee must therefore have rendered a service to another which services are not that of an independent contractor. In addition to

> working for another the employee must also 'receive' or be 'entitled to receive' remuneration. The remuneration referred to must correspondingly mean remuneration for work done or tendered to be done. In the circumstances where an offer of *employment is made to another and the offer is accepted a contract of employment may come into existence but the parties to that contract do not enjoy the protection of the Act until such time as the offeree actually commences her performance or at least tenders performance in terms of the contract."*

(See *Whitehead v Woolworths (Pty) Ltd* at p 2137 A-C)

[16] Reference was made in a submission on behalf of the First Respondent in these proceedings to an obiter by Zondo JP in the Labour Appeal Court proceedings in the same matter, reported as *Woolworths (Pty) Ltd v Whitehead* [2000] 6 BLLR 640 (LAC). In that case, Zondo JP stated that:

> *"In that event the question that arises is whether, between the date of the interview and the date of the taking of the final decision by the employer on which of the candidates he gives the job to, an employer is not entitled to change his mind about which candidate he thinks is the best for the job. Clearly, an employer is entitled to change his mind between those two*

events provided he has not yet made an offer to anyone of the candidates. In my judgment it is irrelevant whether the change of mind is due to his own reconsideration of issues or whether he has spoken to a colleague or an adviser. The fact of the matter is that the period between the interview and the taking of the final decision is for the employer to consider all the candidates – their strengths and weaknesses as well as what his/her business requirements are before he makes the final decision to give the job to one of the candidates or, indeed, not to give the job to anyone of the candidates."

[17] The proviso in this passage relating to the making of an offer to a prospective employee is principally the basis on which Commissioner Moletsane came to the conclusion he did. It also forms the rationale of a judgment in this Court by Pillay J in *Jack v Director General : Department of Environmental Affairs* (Labour Court) case number P734/02, 11 November 2002.

[18] It should be recalled that while Wagley AJ found that Ms Whitehead was not an employee for the purpose of her claim of unfair dismissal, there was no dispute that she was an applicant for employment for the purposes of her claim of unfair discrimination. The LRA at that time conferred locus

standi for the purposes of an equality claim on persons who were applicants for employment. The *Whitehead* case was decided on that basis, and the judgment of the Labour Appeal Court in which the obiter by Zondo JP appears was a judgment given in the context of a claim for unfair discrimination rather than unfair dismissal. It is not clear whether the obiter extends to a statutory claim for unfair dismissal by an aggrieved party to an unfulfilled employment contract or whether the observation by Zondo JP concerned a possible remedy for breach of contract.

[19] Be that as it may, I am not persuaded that the view expressed by Wagley AJ on the meaning of "work" is necessarily correct. To require that the statutory reference to "work" is necessarily confined to work actually performed for another person is a limitation that is not justified either by the wording of the definition or the protection extended by the LRA to rights of work security. Section 186 defines "dismissal" to mean *inter alia* that "an employer has terminated a contract of employment with or without notice" (see section 186(1)(a)). That provision makes no reference to an employee, and simply requires the existence of a valid contract of employment and a termination of that contract, summarily or on notice, by an employer. The section is not qualified, as one might expect were the *Whitehead v Woolworths (Pty) Ltd* approach to be correct, by any reference to a contract of employment entered into by an employee.

[20] The interpretation of the definition of “employee” adopted in *Whitehead v Woolworths (Pty) Ltd* necessarily consigns a person such as the First Respondent, who is an employee party to a valid contract of employment to become effective on a later date, to a jurisprudential limbo unless and until that party physically renders services in terms of that contract. Persons in these circumstances may well have resigned from their existing employment and put themselves at considerable financial risk in the expectation of commencing work in terms of an agreement that is binding on both parties at common law. To deny the statutory protection of the security of employment conferred by the LRA in the interregnum between the conclusion of a valid contract of employment and the physical commencement of work seems to me to be contrary to a purposive interpretation of the definition of ”employee”.

[21] A less literal approach to the statutory definition of employee is further justified by the extent of the constitutional protection of employment rights. Section 23 (1) of the Constitution provides that *“Everyone* has the right to fair labour practices”. The choice of the word “everyone” was deliberate; other constitutional labour rights extend to a “worker”.

[22] A person who is an employee party to a binding contract of employment is

obliged to commence work, and entitled to receive remuneration on the date that the parties agree that these respective rights and obligations will commence. In my view, the term "employee" as defined in section 213 of the LRA and the requirement that a person 'work' for another to be an employee extends to a person who is contracted to work.

[23] It follows that the Applicant's second ground for review must also fail. Whether the First Respondent was dismissed and the fairness of any dismissal is a matter to be determined by the CCMA. I find only that as a party to a valid and binding contract of employment, she is an "employee" for the purposes of a claim under Chapter VIII of the LRA.

[24] I accordingly make the following order:

The application is dismissed with costs.

ANDRE VAN NIEKERK,
Acting Judge of the Labour

Date of hearing: 23 May 2003

Date of judgment: 26 May 2003

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