REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JA 3/2014

In the matter between:

PHAKA AND 19 OTHERS **Appellants**

and

COMMISSIONER RONNIE BRACKS **First Respondent**

THE NATIONAL BARGAINING COUNCIL FOR THE

ROAD FREIGHT INDUSTRY **Second Respondent**

UTI SOUTH AFRICA (PTY) LTD

(MOUNTIES DIVISION) **Third Respondent**

Heard: **27 November 2014**

Delivered: **18 December 2014**

Summary: Review of jurisdictional ruling –former employees entering into owner-drivers scheme with employer as independent contractors – former employees referring unfair dismissal and unfair labour practice to bargaining council – arbitrator ruling that it lacks jurisdiction because no employment relationship existed between parties. Evidence showing that former employees now independent contractors- distinction between employee and independent contractor restated- former employees contractors operating in close corporation, employing employees to render courier services to company – no

application of the reasonableness test of review to jurisdictional ruling- Award and Labour Court's judgment upheld- Appeal dismissed with costs.

Coram: Waglay JP, Murphy and Setiloane AJJA

JUDGMENT

MURPHY AJA

[1] The appellants appeal against the decision of the Labour Court (Bleazard AJ) handed down on 29 May 2013 in which he dismissed their application to review and set aside the award of the first respondent ("the arbitrator') under the auspices of the second respondent, the National Bargaining Council for the Road Freight Industry ("the bargaining council").The arbitrator dismissed the claims of the appellants alleging that they had been wrongfully or unfairly dismissed and subjected to unfair labour practices by the third respondent ("the company"). In his award, dated 25 March 2011, the arbitrator held that the appellants were not employees of the company but were in fact independent contractors. Only an employee has the right to refer an unfair dismissal or unfair labour practice dispute to a bargaining council in terms of section 191 of the LRA, and hence the arbitrator held that he lacked jurisdiction to deal with the referrals.

[2] The appellants brought their review application in terms section 145 and/or section 158 of the Labour Relations Act[1] ("the LRA") on the basis that the decision was unreasonable, irrational, and not supported by evidence and facts before the arbitrator. The correct inquiry, as I will discuss later, is whether the arbitrator was correct in finding that he lacked jurisdiction because the appellants were not employees.

[3] Two referrals to arbitration were made by the Retail and Allied Workers Union ("RAWU") on behalf of the 19 individual complainants. The first referral on behalf of five of the appellants alleged that there had been a termination of

[1] Act 66 of 1995.

contract or unfair dismissal and sought the reinstatement of those five appellants. The second referral, which named as applicants all but one of the appellants, alleged an unfair labour practice. The disputes relate to what has been described as an empowerment initiative initiated by the company in which it set up a scheme of employing owner-drivers to render client services on its behalf. The initiative has a long-established track record realised over a number of years within the road freight industry, and enjoys the unqualified approval and support of the bargaining council. The appellants' challenge arose out of their unhappiness with the empowerment initiative. Their referrals and this appeal are thus a test of the integrity of the empowerment initiative and its acceptability as an industry practice. The appellants are aggrieved about the relationships of *locatio conductio operis* established under and in terms of that empowerment initiative. They contend that a contract of employment (*locatio conductio operarum*) subsisted notwithstanding the apparent existence of a relationship of independent contractor established in the explicit terms of the contract between each individual appellant and the company.

[4] There is some uncertainty about the exact nature of the claims of each appellant and the relief to which they might be entitled on the basis of the referrals made on their behalf. But there is no need to resolve these issues if the arbitrator's conclusion that he lacked jurisdiction is upheld. The crisp issue for determination on appeal is whether the appellants were employees or not.

[5] The court *a quo* formulated the question in issue accurately and succinctly as follows:

> 'At the centre of the dispute is whether a written contract that each of the applicants concluded with the third respondent constituted a contract of an independent contractor or an employee. Allied to this is whether, notwithstanding the express provisions of the contract, the applicant were nevertheless employees by virtue of the presumption included in section 200A of the Labour Relations Act.'

[6] The definition of "employee" in section 213 of the LRA reads as follows:

'**employee**' means-

(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.

[7] Section 200A of the LRA enacts a presumption as to who is an employee for the purposes of the LRA. It is common cause that it is applicable in this case. Section 200A(1) provides:

> 'Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an *employee*, if any one or more of the following factors are present:
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> (*a*) the manner in which the person works is subject to the control or direction of another person;
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> (*b*) the person's hours of work are subject to the control or direction of another person;
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> (*c*) in the case of a person who works for an organisation, the person forms part of that organisation;
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> (*d*) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
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> (*e*) the person is economically dependent on the other person for whom he or she works or renders services;
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> (*f*) the person is provided with tools of trade or work equipment by the other person; or
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> (*g*) the person only works for or renders services to one person.

[8] The company operates as a courier company on a fixed route basis, with regular and recurring collection times, primarily for financial houses. At the arbitration hearing, it led the evidence of three witnesses: Mr d'Almeida, a

senior employee; the managing director Mr Wagner; and an erstwhile employee, Mr Moeng, who now successfully operates his own independent business having resigned as an employee to take up a contract as an owner-driver in terms of the empowerment initiative. Their evidence was largely unchallenged.

[9] The company introduced the scheme in the 1980's in the interests of productivity, empowerment and efficiency. After a consultation process with the company's employees, agreement was reached in terms of which existing employees were offered the opportunity to participate in the owner-driver programme. The programme was piloted in Cape Town and was later extended to other areas of the country. There was no objection to the scheme by either the unions or the regulatory authorities prior to the present dispute. The model was viewed favourably and its implementation encouraged by the bargaining council and the relevant government department. The success of the programme, according to Mr Wagner, is evident from the number of drivers who have contracted as such throughout South Africa, many of them providing more than one route, and some earning more than R100 000 per month. Mr Moeng, for example, ran six routes on behalf of the company, his business having grown over the years from one single route. He operates through a close corporation which employs its own employees who are not employees of the company.

[10] The owner-driver model that has been developed entails the contracting of individual drivers (mostly former employees with their own vehicles acquired with the financial and related support of the company) to perform courier services on behalf of the company. These contracts have been developed over the years and take the form of a standard contract. Participation in the scheme has always been voluntary. Those owner-drivers who were previously employed by the company were required to resign from the company, thereby terminating their employment relationship. Thereafter the owner-driver ceased to receive any benefits associated with employment. After resignation, the relationship between an owner-driver and the company would be governed by the standard written contract concluded between the company and the owner-

driver or a separate juristic person, usually a close corporation, if the owner-driver chose to operate through such. The company has not and never has had any financial or other relationship in any close corporations owned by owner-drivers or with whom the company has contracted as part of the owner-driver scheme. The company does, however, offer assistance to owner-drivers so as to enable them to set up their businesses and continue to run them successfully.

[11] The vehicle used in the execution of duties under the contract is owned and operated by the owner-driver, not by the company, though it was often acquired with the assistance of the company. However, the company enjoys no rights of or incidental to ownership over the vehicles of owner-drivers. With the development of their businesses, some owner-drivers have been able to acquire more than one vehicle, employ drivers to perform the services they had contracted to provide under the contract, and in some cases cease to perform the services themselves.

[12] Mr Wagner, the managing director, testified that the company is primarily geared towards servicing the major banks by providing daily for cheque, bills of exchange, credit card and internal documentation collection and distribution. The documents moved can have a very high value and are also time-sensitive commodities and constitute a high security risk. The relationships between the company and the banks are strictly governed by service level agreements and if the stipulated service levels are not met then there are financial consequences, including penalties, for the company. The times within which documents must be collected and/or distributed are determined by the banks with whom the company contracts. The driver must adhere to a scheduled collection and delivery programme, with stipulated stops at set times. These stipulated routes are incorporated into the agreements concluded between the company and owner-drivers.

[13] A failure to adhere to the stipulated times or service level agreements will result in penalties being imposed as against the company. In circumstances where the failure is attributable to the owner-driver then, under the contract concluded between the owner-driver and the company, penalties can also be

imposed on the owner-driver. Repeated breaches by the company of the service level agreements—including breaches committed by owner-drivers whilst performing services under their own contracts—may result in the cancellation of the agreements between the company and its clients. The standard form contracts concluded between the company and owner-drivers reflect this reciprocity between what is expected of the company from its clients and what the company in turn requires from owner-drivers. Persistent or material failures by owner-drivers amounting to a breach of the agreement between the owner-driver and the company may also result in the cancellation of the owner-driver contract.

[14] The agreements and the nature of the services provided to the company's clients also necessitate the wearing of identity cards, uniforms, vehicle safety precautions, security clearance checks, trip-sheets, record-keeping and drivers to have cell-phones.

[15] The vehicle is an essential component of the courier services provided and, for that reason, vehicle roadworthiness, safety and reliability is a contractually stipulated requirement. As the vehicle is perceived by clients to be representative of the company, there are also requirements that the vehicles be presentable and portray the company brand appropriately. The drivers of vehicles must all be licensed. The vehicles themselves must be properly licensed and fitted with tracking devices and insurance. The safety and security of the cargo also restricts the use to which a vehicle can be put whilst it is being used for purposes of collecting and delivering documents. There are no restrictions on the uses to which the owner of a vehicle can put the vehicle outside of working hours.

[16] The scheme and the elements of it have been recognised in the Code of Good Practice on Broad Based Black Economic Empowerment for the Transport Sector as a worthy initiative providing real and meaningful opportunities for the development of business ownership and the economic empowerment of individuals.[2] The requirements of wearing uniforms and identification to reflect association with the company, vehicle maintenance

[2] GN 1162 of 2009 in *Government Gazette* 32511 of 21 August 2009.

standards, routes, training, resignation as an employee, penalties, etc. are all expressly recognised in the Code as being necessary elements of the owner-driver scheme.

[17] The nature of the arrangement and its recognition and acceptance in the industry coalesce, according to the company, to show that the programme is not in fact employment under another guise. This, it submitted, is most evident in the terms of the contract itself.

[18] As mentioned earlier, a standard form contract has been used and developed over time to implement the owner-driver programme. This contract has become an industry-wide example and is promoted on the website of the bargaining council. In accordance with general principle and doctrine, the contract falls to be interpreted by having regard to its plain and unambiguous language understood contextually and purposively.[3]

[19] The contract repetitively and in clear language records that the relationship between the parties is not one of employment. Thus, clause 2.1 of the contract provides that the company "hereby engages the services of the Contractor who shall effect the collection and delivery of goods on behalf of (the company) according to the route structures detailed in Annexure A". The company maintains that this clause expressly reflects an intention that the appointment effected under the contract is one of an independent contractor for the purpose of providing services in the form of the collection and delivery of goods according to the specified routes. Its contention is supported by clauses 2.4 and 2.5 which are even more explicit. Clause 2.4 provides that the company "hereby appoints the contractor which accepts the appointment as an *independent Contractor* for the purposes of providing (the company) with the service". Clause 2.5 in turn reads as follows: "It is recorded that nothing in this agreement, whether expressed or implied, shall be construed as creating the relationship of either employer and employee or franchisor and franchisee between the parties". The agreement thus expressly excludes any intention to

[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18; *Bothma Batho Transport v S Bothma & Seun Transport* 2014 (2) SA 494 (SCA) at paras 10 – 12; and *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA) at para 16.

constitute an employer/employee relationship. And, lastly, Clause 11 expressly records that the contractor and his employees are not employees of the company and that nothing in the contract renders them to be such. And hence it provides further that they are not entitled to recover any benefits or emoluments that would normally accrue to employees of the company. Clause 13 records that the contractor acknowledges and agrees that the relationship is not one of employment, that the nature of the agreement was explained to the contractor and that the rights applicable to employees on retrenchment are not of application to the relationship.

[20] In addition, clauses 3 and 7 of the contract oblige the contractor to provide the vehicle that is a *sine qua non* for the execution of the services under the contract and a cell phone. This obligation extends to the hiring of replacement vehicles and ensuring that the vehicles are properly licensed and roadworthy. Such clauses are not usually found in employment contracts. Likewise, the consideration amount payable under the contract is not calculated *qua* salary but is *inter alia* a reimbursement of costs and include, where applicable, the levying of VAT on the services rendered (clause 5).

[21] Clause 10.2 contains another distinguishing feature in that the contractor "shall not have the authority in the conduct or administration of its business to incur any debt or obtain any credit facilities either in the name of or on behalf of (the company)". Clause 10.3 further constrains the relationship. It imposes a positive obligation on the contractor to disclose its independent status to outside stakeholders by requiring it to "timeously advise its suppliers, creditors, their financial institutions and all other parties affected by this agreement that it does business with, that it does not constitute any part of (the company)". The contract also expressly countenances the contractor having employees of its own that would provide the services on behalf of the contractor and excludes any contractual relationship arising as between these employees and the company (clause 15). The fact that the contract permits the contractor to employ others to provide the services is, according to the company, inimical of any suggestion that this could be an employer/employee relationship.

[22] The company accordingly submitted that on a proper interpretation of the contract, it does not and cannot give rise to a relationship of employment between the contracting parties.

[23] Of the possible 20 appellants who sought relief of one kind or another, nine gave evidence before the arbitrator. It is unnecessary to discuss their evidence in any detail. It is sufficient to focus on their collective submissions pertaining to the nature of their legal relationship with the company. There are however a few features of their evidence that must be highlighted. Firstly, some of the appellants operated as owner-drivers through close corporations; secondly, some were still engaged in on-going contracts while the contracts of others had been terminated through the effluxion of time or on grounds of breach of contract arising from poor or non-performance; thirdly, some of those individuals who employed employees had registered as employer contributors to UIF, SDL and COIDA; fourthly, the company had assisted some of the individuals to set up their businesses and acquire cars; fifthly, the individuals were paid after submitting invoices with some being registered for VAT, none of them were paid a salary, but were paid a contractually agreed amount determined with reference to the number of routes they were contracted to service and the distance of those routes; and sixthly they admitted to having resigned from employment with the company before taking up the owner-driver contract.

[24] It was submitted on behalf of the appellants that despite their participation in the empowerment initiative, they remained employees on a par with other drivers employed by the company. Their reasons for taking that view is that the contract subjected them to significant control by the company and their activities were integrated into the company in such a way as to constitute an employment relationship. They point to the following in support of their claim. Firstly, the contract required them to report for duty six days per week for specified hours and they were subject to instructions from the same persons who had been their superiors before the initiative. This proposition is not strictly speaking correct. The contractor is free under the contract to have others perform the duties, as many did after forming close corporations and

employing their own employees. Secondly, the contract imposes restrictions upon the freedom of the contractor to employ employees of their choice, to wear their preferred clothing, to use their cars as they wish during working hours, to acquire vehicles from the dealership of their choice and permitted the company to deduct PAYE and other financial penalties. These arrangements and restrictions, they argued, gave rise to the presumption that they were employees in terms of section 200A of the LRA, in that they were subject to significant direction and control by the company, worked almost exclusively for it, were economically dependent on and derived their income mainly if not exclusively from it; and the company had failed in its evidence to rebut the statutory presumption.

[25] The arbitrator, as stated, held that the appellants were not employees. He commenced his analysis with reference to the definition of an "employee" in section 213 of the LRA and said:

> 'The first part of the definition under section 213 reflects the common law concept of an employee. Under the common law, an employee is someone who works under a contract of service (*locatio conductio operarum*) as opposed to a contract for services (*locatio conductio operis*). The definition explicitly excludes independent contractors. The second part of the definition is much wider than the first and, but for the express exclusion, would cover independent contractors and even partners and brokers. The Courts distinguish between people 'assisting in the carrying on or conducting of a business' who would be employees and those persons 'performing work or services which have the effect of providing such assistance' who, as independent contractors fall outside the scope of the definition of employees.'

[26] The arbitrator proceeded then to consider the implications of section 200A of the LRA and correctly stated the legal position as follows:

> 'Section 200A of the LRA seeks to assist vulnerable individuals in establishing employee status. Although section 200A leaves the definition of 'employee' unchanged, it creates a rebuttable presumption that a person who renders services to any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of a list of seven factors are present. Thus even if the contract of work purports to be that of independent

> contractor, if any one of the listed factors is present, that person is presumed to be an employee:
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> . . .
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> The general principle in law is that if a person alleges a state of affairs, that person must prove it. Section 200A shifts that burden of proof to the employer party to show that the person is not an employee if any one of the seven factors is present. The factors [listed in section 200A(1)(a) to (g)] are drawn from jurisprudence in our civil Courts.'

[27] The arbitrator thereafter considered the tests that have been developed in our jurisprudence which inform the factors underpinning section 200A(1) of the LRA. This included a consideration of the control test, the integration or organisation test, the dominant impression (or multiple) test and the public policy test. He had regard to the applicable case law and decided that the appellants were independent contractors not employees and that the statutory presumption had been rebutted by the evidence in this instance.

[28] The arbitrator concluded as follows:

> 'Turning to the evidence presented at the hearing it is clear that the majority of the Applicants were employees of the Respondent before and that they had been invited to be part of this empowerment scheme. None of the Applicants was forced in any way to participate in the scheme. They did so voluntarily. This was further established by the fact that despite all of them stating that they did not understand the terms and conditions of the contract they renewed these contracts without seeking any advice on them.'

He thus recognised that there was a difference between the position of the appellants prior to their resignation as employees and their appointment as owner-drivers and their position afterwards. He later added:

> 'In light of the above it is clear that when the Applicants were invited to embark on the owner/driver concept they were well aware that they would no longer be employees as they would have to resign. A number of the Applicants benefited from the program renewing the exact same contract which they are now alleging they never understood. In addition despite having

copies they never sought advice as the contracts remained the same. One can therefore safely conclude that as long as the Applicants benefited from the agreement they had no problem. The problems in my view started when they were being penalised for non-performance of the contract. It is further my candid view that the issues raised by the Applicants were mere red herrings and that they knew that there was a benefit in entering into contracts with the Respondent as they were empowered thereby since they obtained assets which they would otherwise not have had. Furthermore the success of the program can only be measured by the endorsement it received from various authorities.'

[29] The appellants sought review of the award of the arbitrator on the basis that the conclusion reached by him was not a decision that a reasonable decision-maker or arbitrator in that position could have reached. This is an incorrect approach. When the jurisdiction of the arbitrator is in question the issue is whether he objectively had jurisdiction in law and fact. The arbitrator's finding was that as the appellants were not employees he had no jurisdiction to determine their referrals of unfair dismissal and unfair labour practice disputes to the bargaining council. The court on review in such an instance is required to determine whether that finding was correct. The arbitrator either had jurisdiction or he did not. A finding that he had jurisdiction because he might reasonably have assumed as much is wholly untenable in principle. No legal power may be exercised without authority. The standard of review enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[4] that in order to succeed in a review, the applicant must establish that the award was one that could not have been made by a reasonable decision-maker, applies only to the review of determinations of the fairness of a dismissal or labour practice. It has no application to the determination of jurisdiction.

[30] The appellants did not persist before this Court with the contention that they did not understand the terms of the contract.

[31] The court *a quo* determined the application before it correctly by deciding *de novo* the question of whether the appellants were employees. If they were not

[4] 2008 (2) SA 24 (CC).

employees, then the bargaining council had no jurisdiction to entertain their claims.[5] The learned judge proceeded from the premise that the legal relationship between the parties must be gathered primarily from a construction of the contract which they concluded. In this regard, he referred to *SA Broadcasting Corporation v McKenzie*[6] in which this Court held that in seeking to discover the true relationship between the parties, the court must have regard to the realities of the relationship and not regard itself bound by what they have chosen to call it. He went on to examine those realities and concluded that the statutory presumption had been rebutted. There was accordingly no employment relationship and that the arbitrator was correct in his finding that he lacked jurisdiction.

[32] In my view, the arbitrator and the court *a quo* reached the right conclusion for the right reasons. The repetitive references in the contract to the nature of the relationship, and the painstaking effort to define it, leave no doubt that the intention of the parties was to establish relationships overtly on a different footing to the previously existing employment relationships. This is confirmed not only by the express wording of the contract and the purport of its terms, but also by the fact that the appellants resigned their employment before embarking on the scheme. Add to these the facts that the appellants mostly conducted their dealings with the company (for a period of many years) through close corporations of which they were the principal member, and employed their own employees to render the contractual services, and the proposition that we have here to do with a *locatio conductio operis* is frankly unassailable.

[33] The levels of control and direction reserved to the company by the contract in relation to the routes, hours of performance, vehicle maintenance, branding etc. are all essential requirements of the contract intrinsic to the nature of the services to be performed by the company to its clients. The company transports sensitive financial information and does so in accordance with the needs of its clients. It is obliged to delegate those requirements to its sub-contractors. By virtue of its character, the business of couriering financial

[5] *Denel (Pty) Ltd v Gerber* [2005] 9 BLLR 849 (LAC).
[6] (1999) 20 ILJ 585 (LAC) at para 10.

documents must be done efficiently during business hours on conditions that cannot be left to the discretion of the sub-contractors. These constraints do not in the operational circumstances of these peculiar contracts alter the relationship to one of employment, especially so in those instances where the contractor is a close corporation employing subordinate employees with no prior or existing relationship with the company. Insofar as the company deducts PAYE from the amounts payable to the owner-driver, it did so in pursuance of a responsibility imposed upon it by the income tax legislation in relation to the taxation of independent contractors[7].

[34] Accordingly, in all of the circumstances, the appellants' relationship with the company as owner-drivers did not amount to a relationship of employment and the arbitrator as confirmed by the court *a quo* was correct to hold that he lacked jurisdiction.

[35] Whilst the company opposed the review application on the grounds that it was quite evidently lacking in merit, it appreciated that the application presented it with an opportunity to vindicate the scheme which it had developed over many decades and which the appellants sought to undermine. The review application thus had significant implications for both the company and the industry as a whole. To this extent, the review application was a test of the integrity of the empowerment initiative and the company did not seek its costs in the court and tribunal below. The vindication it sought was achieved in the court a *quo* in a judgment which lucidly upheld the scheme. However, it now takes the view that the predictable lack of prospects of success on appeal justify dismissing the appeal with costs. I agree with that submission and see no reason why the costs should not follow the result.

[36] The appeal is accordingly dismissed with costs.

[7] The Fourth Schedule to the Income Tax Act 58 of 1962

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JR Murphy AJA

I agree

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Waglay JP

I agree

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Setiloane AJA

APPEARANCES:

FOR THE APPELLANTS: Mr W Khoza

Instructed by RAWU

FOR THE THIRD RESPONDENT: Adv B E Leech SC

Instructed by Rose-Innes Inc