REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: JR798/12

In the matter between:

GALATIS PETER **Applicant**

and

THE COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

BOYCE MICHAEL N.O. **Second Respondent**

VAN GELMAN, COLLEEN **Third Respondent**

Heard: **10 July 2013**

Delivered:

Summary:

JUDGMENT

MASIPA, AJ

Introduction

[1] [2] This is an application for the review of the Second Respondent's (the commissioner) arbitration award under case number GA22454-11 dated 21 February 2012. In its notice of motion, the Applicant also sought an order for the stay of further proceedings until finalisation of the review application; suspension of the execution of the award of the Second Respondent until the conclusion of the review proceedings and an order for costs against any party opposing the application.

[3] The award was issued under the auspices of the Commission for Conciliation, Mediation to Arbitration, the First Respondent in this matter. The issue before the Second Respondent was whether the Third Respondent was an employee and if so, whether she was dismissed by the Applicant and whether the dismissal of the Third Respondent was substantively and procedurally unfair. The Second Respondent after considering the evidence before him, found that the Third Respondent discharged the onus to prove that she was an employee; he found further that her dismissal was substantively and procedurally unfair and ordered the Applicant to compensate her in the amount of R141 000.00.

[4] The Applicant contends that the Second Respondent's award is unreasonable and susceptible to review. The Applicant undertook to elaborate on his grounds for review after considering the record but elected to file a notice standing by his initial affidavit on receipt of the record. In his founding affidavit, the Applicant averred that the Second Respondent misdirected himself and came to conclusions which were unjustifiable, illogical and unreasonable. The application is opposed by the Third Respondent.

Background

[5] During the arbitration hearing, there were only two witnesses. Both the employer and the employee had legal representation. The Third Respondent testified in person and the Eugenie Richardson testified for the Applicant. The Third Respondent's contention was that she was an employee while the

Applicant's contention was that she was an independent contractor. The onus therefore rested with the Applicant to prove that she was an employee.

[6] In his founding affidavit, the Applicant averred that there could not have been any dismissal as he was awaiting the outcome of the suspension proceedings which were initiated by the Third Respondent's Attorneys. The Applicant did not deal with the issue of dismissal in his heads of argument and recorded in court that the issue of the fairness or otherwise of the dismissal was no longer an issue to be determined by the Court. The only issue was, therefore, whether the decision of the Second Respondent in finding that the Third Respondent was an employee and not an independent contractor was that of a reasonable decision maker.

[7] It is important, at this stage, to mention that the Applicant deposed to the founding affidavit in this matter. He had, however, elected not to give evidence at the arbitration hearing and relied on the evidence of his advisor, Richardson.

The arbitration award

[8] The Third Respondent testified that she is a Dental Hygienist and met the Applicant while working for Dr Fulko. In May 2008, he was contacted by the Applicant's receptionist about a position they had for a dental hygienist and invited her to an interview. She went to the interview and was interviewed by the Applicant and his partner at the time Dr Galatis. (Both Doctors are Dentists). She was hired at the interview. She advised that she wanted to continue working for Dr Fulko for one day a week and was given permission by the Applicant.

[9] Her evidence was that it was agreed that she worked for the Applicant four days a week some months Saturday and/or Sunday. She was paid 50% commission of whatever she brought in. She was not given a contract of employment and performed work at the Applicant's premises. She received a payslip monthly and had an employee number. The Applicant deducted SITE tax, PAYE and UIF from her monthly salary. She was not doing the

accounting or taking money. Her salary was worked out by Dina who did salaries for all staff.

[10] She did not pay rent and used equipments supplied by the Third Respondent which were used by the previous hygienist. She had to order the products she used through Lynn and the order had to be approved by the Applicant who paid for them and for everything she needed. Payment of patients was made to the Applicant's receptionist. She was ordered when to take leave i.e. in accordance with the Applicant's closing periods. She was stopped from using her preferred method of tooth whitening and had to follow the one preferred by the Applicant. The Applicant's friends and associates did not pay for the services she performed on them.

[11] When the receptionist refused to do the call outs, she had to recall patients because the Applicant told her to do it for both of them. At least two performance review meetings were conducted. Her usage of the telephone was restricted by the Applicant.

[12] Richardson's evidence testified that she provides Human Resources advice to the Applicant since 2008. He met the Third Respondent for the first time in May 2008. She drafted the contract between the Applicant and Third Respondent. The Applicant signed the contract on 15 August 2008, it was however not signed by the Third Respondent.The contract was prepared on 29 July 2008 and the Third Respondent was hesitant to sign as she valued her flexibility. The Applicant was working for another dentist at the time.

[13] The contract stated that she was a contractor and would not qualify for leave pay or sick leave and she had to give timeous notice of her absence. She was to be paid 50% commission and was not entitled to bonuses. She was not in a position to explain why SITE, PAYE and UIF were deducted from her income. She confirmed that there were performance reviews.

[14] In the award, Second Respondent extensively analysed the issue whether the Third Respondent was an employee. The Second Respondent considered the definition of employee in terms of section 213 of the LRA. He found that in terms of section 213(a), for the Applicant to be classified as an employee,

three factors must be shown being that the Third Respondent worked for the Applicant, she received or was entitled to receive remuneration from the Applicant and was not an independent contractor.

[15] The second Respondent considered the provisions of Section 200A of the LRA and correctly found that the presumptions did not apply to the Third Respondent as she earned above the Minister's determination in terms of Section 6(3) of the Basic Conditions of Employment Act which was R149 739.00.

[16] He found that he could not place much reliance on the unsigned contract produced by the Applicant as it could not be said to be reflecting the meeting of the minds of the two parties.

[17] The Second Respondent also took into account the provisions of item three of the Code of Good Practice on who is an employee. He found that in terms of the code, any person interpreting or applying one of the following Acts must take this Code into account for the purpose of determining whether a particular person is an employee. The Second Respondent had regard to the dominant impression test and took into account six factors set out by the Appellate Division to distinguish a contract of employment from a contract of service.

[18] The Second Respondent analysed the evidence before him in respect of the agreement between the Applicant and Third Respondent as follows:

18.1 That she was obliged to submit to the control and supervision of the Respondent in terms of regulations governing the relationship between an Oral Hygienist and Registered Dentist and was not permitted to practice for her own account without such control and supervision;

18.2 She was not paid a fixed salary but an agreed amount based on fees raised by her, less certain deductions, including PAYE, SITE, UIF and VAT;

18.3 She was provided with a monthly payslip;

18.4 She was provided with an IRP5 certificate by the Respondent;

18.5 She did not share in the fees generated by the Applicant;

18.6 She made no direct contribution towards rent, utility bills and consumables;

18.7 She did not purchase her own consumables but required the consent of the Applicant to purchase any consumables which she required for her practice;

18.8 She made no direct contribution towards salaries of the Applicant's employees but utilised their services;

18.9 She was not authorised to utilise the Applicant's telephone system unless it was for the purpose of generating fees for the practice;

18.10 She was obliged to telephone clients of the practice to generate business for both the Applicant and herself;

18.11 She did not partake in the administration of the Applicant's practice save for the calculation of amounts due to her;

18.12 She was not granted any paid leave or sick leave;

18.13 She was not allowed to take leave without the Respondent's consent (on her version) and without consultation (on the Applicant's version); and

18.14 She was obliged to submit to the Applicant's wishes in respect of time, date and venue of meetings called by the Applicant.

[19] Based on the above, the Second Respondent found that the evidence before him illustrated the actual agreement and the dominant impression created to be that the Third Respondent was an employee and not an independent contractor. He found that it was never the intention of the parties to put in place a commercial arrangement but that the true nature of their relationship was an agreement of employment.

[20] The Second Respondent found that the Third Respondent had discharged the onus to prove that she was an employee.

The review and the legal framework

[21] In terms of the issues raised by the parties in court, I had to review the Second Respondent's decision that the Third Respondent was an employee. This issue limits the review to whether the First Respondent had jurisdiction to determine the matter before the Second Respondent. The test applicable in the present matter is that formulated in *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*[1] where Tlaletsi AJA, as he then was, mentioned that:

> 'The question before the court a quo was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the contrary.'

[22] This approach was followed in *Workforce Group (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*[2] where the court stated the following:

> 'The question is not whether the commissioner's finding was reasonable but whether on the facts the applicant was an employee. The basis of this approach is that a ruling on jurisdiction made by the CCMA is made for convenience - the CCMA is a creature of statute and cannot decide its own jurisdiction. Whether the CCMA has jurisdiction is a matter for this court to decide. In other words, the issue before the court is whether, objectively speaking, there existed facts which would give the CCMA the jurisdiction to entertain the dispute i.e. that established that the third respondent (Malkin) was an employee as defined by s 213 of the LRA.'

[23] In *ASARA Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others,*[3] where Steenkamp J found that the test to be followed in jurisdictional matters was

[1] (2008) 29 ILJ 2218 (LAC) at para 41.
[2] (2012) 33 ILJ 738 (LC) at para 2.

that set out in the *SA Player's Association* decision. The issue was whether the Second Respondent correctly found that the Third Respondent was an employee in terms of Section 213.

[24] Section 145 provides as follows:

> '145 Review of arbitration awards
>
> (1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission for Conciliation, Mediation and Arbitration may apply to the Labour Court for an order setting aside the arbitration award...'

[25] In *Carephone (Pty) Ltd v Marcus NO and Others,*[4] the court held that the only section that can be invoked by a party seeking the review of an arbitration award made in proceedings under the auspices of the Commission for Conciliation, Mediation and Arbitration (the CCMA) is section 145.

[26] In *Mtshali v Commission for Conciliation, Mediation and Arbitration and Others*[5] the court stated that:

> 'Even if it were open to [a] court of review to consider evidence not placed before a commissioner, it would have to be accompanied by a satisfactory explanation as to why the evidence was not tendered in the first place. It is conceivable that a court of review may have the power to receive fresh evidence by reason of its inherent powers and equitable jurisdiction. Were this possible, it would at least have to satisfy the long-established requirements for receiving evidence on appeal'.

[27] In *National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others*,[6] Nugent JA stated that it is trite that an appeal does not lie against the award of an arbitrator. Even if the reviewing court believes the award to be wrong, there are limited grounds upon which it is entitled to interfere.

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[3] (2012) 33 ILJ 363 (LC) at para 22.
[4] (1998) 19 ILJ 1425 (LAC).
[5] (1999) 20 ILJ 2400 (LC) at para 23.
[6] (2011) 32 ILJ 1618 (SCA) at para 5.

[28] Advocate Lennox correctly submitted that there is no right of appeal to a Commissioner's award and that it is merely a review. It is only in exceptional circumstances that this court sitting as a court of review can hear new evidence which was not placed before the arbitrator. The Applicants has not set out any reasons why it sought to introduce new evidence in its founding affidavit. There is, therefore, no case made out to suggest the existence of any exceptional circumstance for the admission and/or consideration of such evidence. I will therefore not take the evidence into account.

[29] The Applicant initially set out the grounds for the review as being that it was bizarre that the Second Respondent came to the conclusion that the dominant impression created was that the Third Respondent was his employee. The Applicant submitted that the dominant impression indicated exactly the opposite. He submitted that the fact that the Second Respondent came to this illogical conclusion was reinforced by the fact that he, somewhat inexplicably found that the evidence of Richardson was nothing but a clear litany of lies.

[30] The evidence of Richardson related mainly to whether the Third Respondent was dismissed or not. As a result, the Applicant did not pursue its challenge to the Second Respondent's award in so far as it related to a finding that Richardson's evidence was a litany of lies. I will therefore not deal with this aspect in the judgment.

[31] The fundamental issue which the Second Respondent had to determine was whether the Second Respondent was an employee as set out in Section 213 of the LRA. This was a discussed in the *Workforce Group* matter where Van Niekerk J applied the principles set out in *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[7] *and Denel (Pty) Ltd v Gerber,*[8] where the LAC set out the primary criteria for determining an employment relationship as relating to:

1. the employer's right of supervision and control;

[7] (2008) 29 ILJ 2234 (LAC) at para 12.
[8] (2005) 26 ILJ 1256 (LAC).

2. whether the employee forms an integral part of the organisation with the employer; and

3. the extent to which the employee was economically dependent upon the employee.

[32] He submitted that it H Paul Benjamin in 'An Accident of History*: who is (and who should be) an employee under South African Labour Law'*[9] wrote the following:

> 'The presumption of employment indicates that there are three primary criteria for indicating the presence of an employment relationship - the employer's right of supervision and control; the employee forming an integrated part of the organization of the employer; and the employee's economic dependence upon the employer.'

[33] Advocate Hutchinson submitted that the Third Respondent applied her own trade. It was a legislative requirement that she be supervised by a Dentist. It did not follow from this that she was an employee. Throughout her period with the Applicant, she sought to promote herself as a specialist. She testified that Oral Hygienists should be independent and have their own practice numbers and that supervision was not necessary. In her evidence, she did not explain how she was supervised the actual carrying out of her duties.

[34] He submitted further that the issue of PAYE deductions had no bearing as it was deductible even with independent contractors. He submitted that the deduction of UIF did not determine the nature of the relationship. However, he conceded that the deduction of PAYE, UIF and SITE tax meant that the Third Respondent was short changed if she was not an employee. He disputed that there was fraud perpetuated against the South African Revenue services.

[35] The Third Respondent could practice elsewhere and in her evidence kept referring to her practice. He argued that the recalls done by the Third Respondent were towards growing her own practice. He compared the relationship between the parties to that of the CCMA and its Part-Time

[9] (2004) 25 ILJ 787 at (804.

Commissioners and submitted that it was all about the money. According to him, CCMA Commissioners followed the money and would go to Bargaining Councils as they paid better than CCMA. He argued that the organisation test could not apply with the Third Respondent and that it was dependant on where she was sitting on any particular day.

[36] Advocate Lennox submitted that the Applicant interfered with the Third Respondent's fee analysis. In addition to the tax deductions, she was issued with an IRP5 certificate and issued with payslips which had an employee number. She had two performance appraisals. He argued that the fact that Oral Hygienists were aspiring to be independent did not suggest they were independent contractors. He made an example of a law practice where associates are expected to grow the practice that did not mean they were not employees.

[37] As regards the issue of being part of the organisation, he submitted that the bookings and payments by patients were done with the Applicant's receptionist. She was issued payslips and was issued payslips together with other employees. She closed when the business closed for December holidays. She had to seek permission to take leave. She obtained permission to work elsewhere as she was working four days a week with the Applicant.

[38] On a consideration of the criteria set out in the *SA Rugby* matter, the following is apparent on the issue of the employer's right of supervision and control:

1. It is a legal requirement that Oral Hygienists be supervised by Dentists;

2. The Third Respondent could not apply her own skills in whitening/bleaching teeth as the Applicant instructed her not to do so;

3. She could not take leave when she pleased and had to seek permission from the Applicant;

4. She was instructed not to use the phone except for work related purposes;

5. She paid no rent;

6. The purchase of her supplies/consumables was done and approved by the Applicant;

7. She performed her services on the Applicant's friends with no payment;

8. She was obliged to submit to the Applicant's wishes in respect of time, date and venue for the meeting

9. She was obliged to phone clients of the practice to generate business for the Applicant and herself.

[39] In view of the above, it is unclear why Advocate Hutchinson argued that she did not testify as to why she alleged she was supervised when there was clear evidence in this regard.

[40] On the issue of whether the employee formed an integral part of the organisation with the employer, her evidence was as follows:

1. She received a payslip with an employee number;

2. PAYE, UIF and SITE tax were deducted from her salary and she was issued with an IRP5 certificate;

3. She was not allowed to take leave without the Applicant's consent and without consultation.

4. She did not pay rent or directly contribute towards her supplies/consumables;

5. She made no contributions towards salaries of the Applicant's employees but utilised their services.

6. She did not work on the December holidays when the practice was closed.

[41] It cannot be said that because she worked for another dentist for one day, then she did not form part of the Applicant's organisation since her evidence that this was after obtaining consent from the Applicant was unchallenged.

Further, as Advocate Lennox argued, there is no law prohibiting an employee to be employed by more than one employer.

[42] The last point relates to the extent to which the employee was economically dependent upon the employer. The evidence of the Third Respondent was that:

1. She was paid 50% commission from the work she performed. She worked four days for the Applicant;

2. The Applicant was responsible for purchasing her supplies/consumables;

3. She did not directly contribute towards rent;

4. She did not directly contribute towards salaries of the Applicant's employees but utilised their services.

[43] I find that the Second Respondent, in analysing the evidence before him, found that the Third Respondent was subject to the supervision and control of the Applicant, formed part of the organisation and was economically dependent on the Applicant. On a consideration of all facts which were before the Second Respondent, it is clear that the real relationship which was between the Applicant and the Third Respondent was an employment relationship. The Second Respondent's award should therefore stand.

[44] As regards the issue of costs, the Applicant asked that any of the Respondent's opposing the review application be ordered to pay the costs. I am of the view that, having found against the Applicant, costs should follow the result.

[45] In the premises, I make the following order:

1. The Applicant's review application is dismissed;

2. The Applicant is to pay the Third Respondent's costs.

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Masipa, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Advocate W Hutchinson

Instructed by: Fluxmans Inc

For the Third Respondent: Advocate M A Lennox

Instructed by: Mahons Attorneys