THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C818/2016

In the matter between:

FRED WASSWA KIYEGA **Applicant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

C WEST **Second Respondent**

SAWIC CNPO **Third Respondent**

Heard: **25 August 2017**

Delivered: **29 September 2017**

Summary: A review application that is not supported by a compliant affidavit is fatally defective. A party should set out legal grounds upon which a party seeks to rely in order to correct or set aside a decision. Determining whether an employer and employee relationship existed behoves a party claiming to be an employee to present evidence in support of any of the factors set out in Section 200A of the Labour Relations Act 66 of 1995 as amended. An employee is one who works for another and is entitled to receive or receives remuneration. Payment in

kind ought to be proven and shown by a person claiming to be an employee. Existence of employer and employee relationship is not determined by what happens and is said by one party at the end of the relationship but by what factually happened during the relationship. A person who is offered a place to stay in exchange of maintaining and looking after the place cannot claim to be an employee of the Landlord simply on the basis that he or she is staying for "free" and maintains the place. Such a person is a tenant who instead of paying for rent in cash, pays it in kind-maintaining and looking after the property. The test for determining whether one is an employee considered and confirmed. The review test is one of wrongfulness or rightness of the decision taking into account the objective facts presented before the arbitrator. Held (1) the application is fatally defective. Held (2) the facts objectively viewed do not create an employer and employee relationship. Held (3) the review application is dismissed. Held (4) No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an unopposed application to review and set aside a jurisdictional ruling issued by the second respondent on 31 October 2016, in terms of which, it was ruled that the applicant was never employed by the third respondent therefore there was no dismissal.

Background facts

[2] The facts of this matter are gathered from various documents. Unfortunately, the applicant was not legally assisted at the time of filling the review papers. The only facts relayed by the applicant commence on 16 September 2016. The transcript is also not too helpful in narrating the facts in a rather logical and comprehensible manner.

[3] Perusal of the transcript, the award and the founding affidavit reveals that apparently around 2012, the applicant, who at the time was employed at Table Bay or Bayside Mall as a car guard, met up with one Ntsikie, who was then the Chairperson of the third respondent. According to the applicant he was asked if he had a place to stay, because the third respondent was looking for someone who can look after the property. That person will not be charged rental.

[4] He was told that the person the third respondent was looking for would be someone to look after the house, clean the garden and keep the house clean. He was told that they know he is working as a car guard but could he look after their premises so that it would not be vandalized. The applicant expected to be paid R4000.00 as per the sectorial determination. However, he was never paid a cent for a period of four years. According to him he was working for *free*. According to the third respondent, the applicant was offered a place to stay without paying rental in order to look after the property.

[5] The property at which the applicant was offered a place to stay belonged to a government department. At some point the department informed the third respondent that it no longer needed tenants at the property. A meeting was then held with the applicant where he was told of the department's position. He was asked to leave as he no longer attended to the garden as initially agreed and he did not contribute towards the electricity bill. In the said meeting he agreed to contribute R500, towards the electricity bill, as he was not earning much.

[6] On 16 September 2016, the applicant received a letter which read thus:

> "Sawic landlords hereby give (sic) Fredie thirty (30) days notice to vacate the Savic Office 31 Orange Street Cape Town.
>
> The reason for the <u>eviction</u>:
>
> - You are no longer in partnership with SAWIC
> - No longer the Security for the building

- You are no longer doing your duties that you were appointed to do.

If you remain in the dwelling on the date specified for the owner might seek to enforce the termination only by bringing judicial action at which time you may present a defence. If you request a meeting the owner/ landlord or its agent will discuss the proposed termination with you. You are hereby advised of your right to defend this action in court. Your failure to object to the termination notice shall not constitute a waiver of your rights to thereafter content (sic) the owner's action in any court proceeding."

[7] The third respondent's officials as landlords signed the letter. The applicant was aggrieved as he had bought a car and had not vandalized the property nor was he given the tools of trade. He approached the Commission for Conciliation, Mediation an Arbitrtion (CCMA) and reported "matters and what's going on". On 21 October 2016, the CCMA enrolled the dispute for con/arb. The third respondent then objected to the jurisdiction of the CCMA on the basis that the applicant was never employed by it. This objection was upheld hence the present application.

Grounds of Review

[8] This application is in fact defective in that no specific grounds have been spelled out in the founding affidavit.[1] The applicant's affidavit does not set out the legal grounds upon which the jurisdictional ruling ought to be corrected. The Court does appreciate that the applicant is a layperson and drafted his papers without legal assistance. Upon obtaining *pro bono* assistance, the papers were not supplemented to set out legal grounds. Therefore, there are no legal grounds upon which this ruling could be attacked. This defect is actually fatal to the applicant's review application. On this basis alone, the application is bound to fail.

Evaluation

[1] Rule 7A (2) (c) provides that the notice of motion must be supported by an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside.

[9] The test for review in matters of this nature is whether the arbitrator was right or wrong[2] in making the decision that there was no employer employee relationship. Although the defect is fatal the Court considers the application in the interest of justice to determine whether the decision was right or wrong. Bodies like the CCMA make jurisdictional rulings for convenience and such rulings do not bind this Court.

[10] This matter exhibits important legal issues regard being had to the interesting factual matrix it presents. Mr Naidoo appeared *pro bono* on behalf of the applicant. He filed good heads of argument[3] which actually brought to the fore the test of determining whether an employer and employee relationship exists. In his submission the applicant was an employee within the contemplation of section 213 of the Labour Relations Act[4] (LRA) read with section 1 of the Basic Conditions of Employment Act[5] (BCEA), defining remuneration. He submitted that the free rental was in effect a payment in kind. The fact that the applicant cleaned and looked after the property meant that he worked for the third respondent, which in turn paid the applicant by providing him with *free* accommodation.

[11] He further submitted that as contemplated in section 200A of the LRA, the applicant is presumed to be an employee. He suggested that the applicant fits the definition of a domestic worker in section 1 of the BCEA.

[12] The second respondent concluded that the applicant does not fit the definition of an employee in section 213 of the LRA. She could not ignore the fact that the applicant never received a salary for four years. The letter of 16 September was nothing but an eviction letter. To these conclusions, Naidoo argued that the second respondent focused her attention to a cash salary and ignored the fact that the applicant was paid in kind-being provided free accommodation. Also the second respondent

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[2] *Madondo v SSSBC and others* [2015] JOL 32795 (LC) at para 48.

[3] The court expresses its gratitude towards Mr Naidoo for the sterling work done.

[4] Act 66 of 1995 as amended.

[5] Act 75 of 1997.

found that there was no evidence that the applicant was subject to the respondent's control. To this Naidoo submitted that indeed there was no evidence but the second respondent should have engaged in an inquisitorial approach to extract such evidence. He also submitted that applying the principle of *res ipsa loquitur*, the second respondent could have easily concluded that there was control.

Was the applicant an employee?

[13] Section 213 of the LRA defines what an employee is. The third respondent disputed that the applicant worked for it. Such to my mind behooved the applicant to present evidence that demonstrated that he indeed worked for the third respondent. The principle of he who alleges must prove applies in this regard. There is no evidence as to what work the applicant was performing and under whose supervision. Before the second respondent, his evidence is recorded as follows:

> "MR F.W KIYEGGA: My case-I was working there as a security, I've got the Certificate. I've got everything and then, because South African Government, he said, we are not going-I was working in (07:17) as a Security and then they said "NO this year we must have a certificate" and then I started working as a Car Guard until now. Working as a car guard, one of the members, he came and said, "Please come and watch our property".

[14] On his own version as recorded above, it is clear that he worked elsewhere as a car guard. All the member said to him was that he must come and watch the property. No other details were given to him as to whether watching the property will be compensated for and how. Employment agreements like any other agreement ought to be preceded by meeting of minds. He led no evidence as to how he watched the property if at all he considered this to be his work. The record reflects that he was never given anything to sign and was never provided with the tools to clean the compound. On his own version the applicant never worked for the third respondent. From the definition in section 213 the person must be remunerated or be entitled to be remunerated for the

work done. At one stage the applicant testified that he was being paid R4000.00. As he was unable to produce proof thereof, he testified thus:

> "COMMISSIONER: So you worked for free, basically, for 4 years?
>
> MR F.W KIYEGA: Like I was working for free.
>
> COMMISSIONER: OK"

[15] Contrary to the submission by Naidoo, the applicant did no testify that he was paid in kind (free accommodation). So one of the crucial elements of being an employee is lacking. Nowhere in his evidence did the applicant unequivocally testify that his remuneration was in kind as later submitted in this Court. On the contrary, the applicant attempted to claim a salary in cash and upon being quizzed; he testified that he never received any payment. This alleged payment in kind only emerged in argument. Again any employee who alleges any payment in kind must submit evidence to support the allegation. Payment in kind may be made for an exchange of goods or services for work performed. The value of the goods or services is considered an equal exchange for the work performed.

[16] Ordinarily a tenant must pay for his or her tenancy. In a situation where a tenant is not required to pay in cash but in kind (providing some services) such does not give rise to an employment relationship. A tail cannot wag the dog. In other words, one must perform work first and thereafter be paid, be it by cash or in kind. However, the applicant working as a car guard was fortunate to have accommodation that does not require rental in cash but in kind.

[17] In order for the section 200A presumption to kick in, evidence must be adduced by an employee. The section requires certain factors to be present. The only way to demonstrate that any of the factors is present, evidence must be led. In this matter it is common cause that the applicant led no evidence that he was subject to the control of the third respondent. The applicant led no evidence as to his working hours. He led no evidence as to the directions that were given to him by the third respondent. I cannot agree with Naidoo that the second respondent was

compelled to extract such evidence. It is not the duty of an arbitrator to assist any of the parties appearing before him or her no matter how lay the party may be[6]. Further I cannot agree that the principle of *res ipsa locutur* applies in this matter.

[18] The letter of 16 September is not proof of an employment relationship. The letter was written and signed by the officials of the third respondent as landlords. The fact that the letter makes reference to a partnership does not point to the fact that the applicant was an employee. The fact that reference is made to no longer doing your duties that you were appointed to do does not suggest an employment relationship. When determining whether there was an employer and employee relationship one has to consider what factually happened during the tenure of the alleged relationship? There is no evidence that the applicant was appointed to do duties. On the contrary, the applicant was allowed to stay in the property for as long as he does gardening and cleaning. As pointed out earlier the evidence does not demonstrate that the applicant will clean and in return be accommodated *(payment in kind* as it is now contended).

[19] It was not disputed that the applicant worked elsewhere whilst staying at the place he was accommodated. Clearly the applicant was not economically dependent on the third respondent. The applicant testified that he was using his own money to maintain the room he was accommodated in. He bought the door and the rates for the windows. He testified as follows:

> "When they break, and then I go in the Parking and then I got money and then I fix the stuff, because I don't want to sleep outside…"

[20] The test to determine whether an employer and employee relationship exists was somewhat perfected by the LAC in *State Information*

[6] The *helping hand* principle has been doubted in subsequent cases.

Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others.[7] The Court per Davis JA held thus:

> "[12] For this reason, when a court determines the question of an employment relationship, it must work with three primary criteria:
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> 1 an employer's right to supervision and control;
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> 2 whether the employee forms an integral part of the organization with the employer; and
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> 3 the extent to which the employee was economically dependent upon the employer."[8]

[21] Further, in the case *Colonial Mutual Life Assurance v MacDonald*[9] it was said

> *"….* one thing appears to me to be beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract; in other words, unless the master not only has the right to prescribe to the workman what work has to be done, but also the manner in which such work has to be done…"

[22] Applying the criteria to the facts of this case depicts that the applicant was not an employee of the third respondent. The third respondent did not stake any right to supervise and or control the applicant. The right to supervise and control does not necessarily mean the exercise of that right. For an example a pilot employed by a particular airline flies the plane unsupervised but yet under the control of the airline in terms of when to fly the plane and to where. Of importance is the right to do so. If it is brought to the attention of the airline that a pilot in flying the plane does not observe certain rules, it is the prerogative of the airline to supervise his or her flying. In the matter before me there is no *iota* of evidence that such a right was available to the third respondent.

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[7] (2008) 29 ILJ 2234 (LAC) para 12

[8] Page 2238 para 12 I

[9] 1931 AD 412 at 434.

[23] On the evidence, it is clear that the applicant did not form an integral part of the organization. On the applicant's own version, the third respondent kept on changing Chairpersons without him knowing. They come for meetings and say nothing to him for months on end. If he was part of the organization, he would have known of the meetings even if not forming part of those meetings. On the objective facts the applicant does not meet the criteria.

[24] In *Dempsey v Home and Property*[10] the Court considered that the lack of integral factors regarding employment relationships would lead to a conclusion that the contract was not one of employment. The following factors should be taken into consideration:

> "…The contract between the parties made no reference to leave, sick leave or any other terms or conditions customarily forming part of a contract of service. The appellant was not even required to tender a medical certificate in respect of periods of absence due to illness or incapacity. …'

[25] When taking all the above factors into account, the dominant impression created is that the applicant stayed at the accommodation for free in return for maintaining and securing the property.

[26] The third criterion simply implies that the applicant must depend on the third respondent for survival. Naidoo submitted that the fact that the applicant was offered accommodation means that the applicant was economically dependent on the third respondent. I cannot agree. In this regard, Benjamin[11] aptly observed thus:

> "A starting point is to distinguish personal dependence from economic dependence. A genuinely self-employed person is not economically dependent on their employer because he or she retains the capacity to contract with others. Economic dependence therefore relates to the entrepreneurial position of the person in the marketplace. An important

[10] (1995) 16 *ILJ* 378 (LAC) at 384F-G.

[11] An accident of History: Who is (and Who Should Be) an Employee under South African Labour Law [2004] 25 ILJ 787

> indicator that a person is not dependent economically is that he or she is entitled to offer his skills or services to persons other than his or her employer. The fact that a person is required by contract to only provide services for a single 'client' is a very strong indication of economic dependence. Likewise depending upon an employer for the supply of work is a significant indicator of economic dependence.[12] (Own emphasis)

[27] In *casu* the applicant offered his services to other people as a car guard without any reference to and or permission from the third respondent. The third respondent knew that he worked elsewhere and only stayed at the premises. A true employer will not allow or permit his employee to work for somebody else without its permission or consent.

[28] The applicant earned income from being a car guard and actually used part of the income to maintain the place where he stays with the blessings of the third respondent. There was no shred of evidence to suggest that the applicant was supplied with work by the third respondent. Accordingly, the applicant failed to meet this test too.

[29] It is worth emphasizing that it is incumbent on a person staking the claim of being an employee to demonstrate through credible evidence any of these criteria. Even in a situation of presumptions within the contemplation of section 200A of the LRA, it is still incumbent on the person staking the claim to present evidence which shows the existence of any of the factors. Once that is done the rebuttable presumption kicks in. Therefore, if an applicant fails to establish the presence of any of the factors, there is no onus to rebut on the part of an employer. The applicant in this matter failed to invite the presumption by not adducing evidence which demonstrates presence of any of the factors.

Conclusions

[30] The definition in section 213 of the LRA helps only to determine who an employee is. On a matter like this what is important are the criteria to

[12] Page 803.

determine what an employee is. Often times a person may attempt to fit oneself within the definition of an employee. If the criteria is not applied even an independent contractor may fit the definition. On application of the criteria the Court is satisfied that the applicant failed to meet any of the criteria. Even on application of the presumption in section 200A, the applicant failed to show presence of any of the factors which will allow a rebuttable presumption to kick in. What the presumption does is to presume that a person is an employee. It does not presume the existence of the factors. On the contrary, existence of the factors illuminates the presumption. To think otherwise is to put the cart before the horses. On proper analysis of the facts of this case, the applicant is a tenant. Protection of his rights lies in the Rental Housing Act[13] Accordingly, I am of a firm view that the ruling is not reviewable. It is in fact correct regard being had to the objective facts.

[31] In the results, I make the following order:

Order

1. The application for review is dismissed.

2. There is no order as to costs.

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GN Moshoana

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr V Naidoo of Hayes Incorporated (Acting *pro bono*), Cape Town

For the Respondents: No Appearance.

[13] Act 50 of 1999