

REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C 548/2009

In the matter between:

**MONDI PACKAGING SOUTH AFRICA (PTY) LTD**

Applicant

and

**SUZANNA HARVEY**

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION**

**AND ARBITRATION**

Second Respondent

**KHULULEKILE DYOKHWE**

Third respondent

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**JUDGMENT**

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**DE SWARDT, A J:**

The applicant ('Mondi') has applied for the review of an arbitration award made by the first respondent ('the Commissioner') in terms whereof Mondi was found to have

been the employer of the third respondent and was ordered to reinstate the latter retrospectively to the date of his dismissal.

Mondi had employed the third respondent as a general worker in 2000. During 2003 Mondi decided to make use of labour brokers to provide staff and concluded a contract with, inter alia, Adecco Recruitment Services (Pty) Limited ('Adecco'). In terms of such contract, Adecco would provide staff to Mondi in one of three ways: Mondi would recruit staff members and transfer them to the books of Adecco (styled as a contract managed service), alternatively Adecco would recruit temporary staff members (thereby providing what was termed a temporary recruitment service) or, further alternatively, Adecco would recruit permanent position employees for Mondi (referred to as a permanent placement service). The third respondent, having previously been employed by Mondi, clearly fell into the category of workers who would form part of the 'contract managed service'.

The contract defined 'Contract Managed Service' as 'Any staff member that has been recruited by Mondipak for a temporary assignment and placed onto Adecco's books.'

The service itself was described as follows:

'Adecco runs the administration of the staff member (Receiving of approved Time sheets, working out salary and taxes, UIF, WC, RSC, SDL and all legal costs, physical payment of the salary through bank transfer and payment of all legal costs, annual declarations, IRP 5 and wage slips).

In return for performing the aforesaid administrative duties, Adecco would receive an administrative fee of 20% 'on top of cost of wage'.

General workers at Mondi were informed of the agreement that was entered into with Adecco and the third respondent took himself off to the offices of Adecco where he signed a document bearing the Adecco logo with the heading 'Contract of Employment Defined by Time'. The document was in a standardised format with blank spaces provided for insertion of, inter alia, the personal details of the employee, the job title, period and place of employment as well as the wage that would be payable to the employee. The relevant portion of the document, after completion, reads as follows (handwritten words and figures are reflected in bold letters):

'Adecco South Africa, herein after (sic) referred to as the Employer, hereby agrees to employ K Dyokhwe (Name) 5309165546086 (ID No) hereinafter referred to as the Assignee on a Fixed Term Contract Defined by Time as Asst (job title) with effect from 07.07.03 (Date) to .....-..... (Date), based on the following terms and conditions:

1. PRIMARY DUTIES

- 1.1 You will be employed primarily in the capacity of Asst Reporting to L Williams employed at Mondipak.
- 1.2 Your job title does not define or restrict your duties and you may be required to undertake other work within your abilities at the request of the Client, and any refusal to comply with such request constitutes a breach of your contract of employment.
- 1.3 You shall, unless prevented by ill-health or accident and except during holidays permitted in terms of your contract of employment with Adecco South Africa, devote your usual working hours, attention and abilities to the proper, loyal and efficient conduct, improvement, extension, development, promotion, protection, preservation, reputation and goodwill of the Client's business of the (sic) and not do anything which is harmful to it.
- 1.4 You may be required to tender your services at any other Client designated by Adecco South Africa upon reasonable notice, and any refusal to comply with such request constitutes a breach of your contract of employment.

2. REMUNERATION ...

3. HOURS OF WORK ...

4. TERMINATION OF CONTRACT

As this contract is for a fixed period, you will not be entitled to any discharge or severance benefits upon termination of such contract. It is specifically recorded that

there will be no expectation that your contract of employment will be renewed or prolonged beyond the date of completion as aforesaid. The termination of this contract as provided for in this agreement shall not be construed as being a retrenchment but shall be completion of the contract.

...  
Yours sincerely

Signed  
BRANCH CONSULTANT

I have received a copy of this letter. I confirm that the contents thereof have been explained to me and that I understand and accept the terms and conditions of employment contained herein.

SIGNED: K dyokhwe

DATE: .....

It is immediately apparent from the above that the document, although it was styled as a fixed term contract, in fact constituted nothing of the sort. The commencement date of the contract was provided, but the date of termination was not. Indeed, a line was drawn in the space provided for the termination date, indicating that the contract was open ended.

Subsequent to the aforesaid document being signed, third respondent continued to render his services to Mondi for a further period of approximately 5½ years, until December 2008, when he went on leave. On his return from leave in January 2009, he was informed that there was no longer a position for him.

Mondi, at some stage, gave notice to Adecco that with effect from 24 January 2009 it would no longer require the services of a number of 'contractors', inclusive of the third respondent. A copy of the written communication in this regard, formed part of the record of the proceedings before the CCMA. It was undated and unsigned,

although reference was made at the foot of the letter to it having been written by Mr S C Lange ('Lange'), Mondi's HR Manager. The letter was not addressed to Adecco, nor did it reflect Adecco's address. It was merely marked 'Attention: Danielle Cronje', whomever she may be.

The 'contractors' employed by Adecco were advised to apply for permanent positions at Mondi and the third respondent so applied. In the event, however, the third respondent's application for permanent employment with Mondi was not successful and somebody else was permanently appointed to the position which he had previously held.

The third respondent initially commenced unfair dismissal proceedings against Mondi in the CCMA. He was advised that the CCMA did not have jurisdiction, inasmuch as the dispute with Mondi had to be adjudicated upon by the Statutory Council for the Printing, Newspaper & Packaging Industries ('the Bargaining Council'). Third respondent duly referred the dispute to the Bargaining Council, whereupon Lange, on behalf of Mondi, asked that the matter be dismissed by reason of the fact that the third respondent was not in its employ, but was employed by Adecco.

The Bargaining Council issued a certificate that the dispute remained unresolved. The certificate contained a note that read 'NB EMPLOYER IS A LABOUR BROKER: ADECCO RECRUITMENT SERVICES (PTY) LTD; TECHNO SQUARE 42 MORNINGSIDE ROAD NDABENI 7405 ...'. The Bargaining Council did not have jurisdiction over the

dispute with Adecco and the matter was accordingly taken up in the CCMA once more.

On 21 April 2009 arbitration proceedings between the third respondent (as the applicant) and Adecco (as the respondent) commenced before the Commissioner. The third respondent testified as to his employment with Mondi and his alleged dismissal. He was cross-examined by Mr Gary Howard ('Howard') who represented Adecco. In response to questions put by the Commissioner, the third respondent stated that it had not been explained to him that Adecco was a labour broker who could move him to any site at any time, nor was he told that he was entering into a temporary contract that would only last a short time. He also stated that the contract he had signed with Adecco had not been translated into isiXhosa, that he was not able to read and interpret it and did not know what it contained.

Howard elected not to call any witnesses on behalf of Adecco. After hearing argument, the matter was adjourned. On 1 May 2009 the Commissioner made an order in terms whereof Mondi was joined to the proceedings and the matter was set down for further hearing on 1 June 2009.

On 25 May 2009 Howard applied for a postponement of the hearing which was set down for 1 June 2009, because Mondi's material witness, Lange, would not be available inasmuch as he would be engaged in national wage negotiations on that date. The application for postponement was adjudicated upon by the Commissioner

on 1 June 2009. On that date, Howard continued to represent Adecco and the third respondent appeared on his own behalf. There was no appearance on behalf of Mondipak.

Howard, however, applied for the postponement 'sort of 50 per cent on behalf of Mondipak' (transcript p 3 lines 18 - 19) . He argued that Lange was a material witness for Mondipak and that the hearing had to be postponed due to his unavailability. It was specifically stated that Lange's evidence would relate to the events at the Bargaining Council and that a ruling had been made by the latter to the effect that Mondipak was not the third respondent's employer. On these grounds it was alleged that the Commissioner would be precluded from investigating whether or not Mondipak was the true employer of the third respondent. In the event, the Commissioner granted the application for postponement and the hearing eventually continued on 26 June 2009.

On 26 June 2009, the third respondent, Howard and Lange were present, the latter representing Mondipak. At the commencement of the proceedings, Howard indicated that he wanted to raise two jurisdictional issues or in limine objections. The first of these related to the identity of the employer. Howard argued that Adecco had been substituted as the third respondent's employer during the proceedings before the Bargaining Council, that a certificate to that effect had been issued by the arbitrator who presided over those proceedings and that the issue as to who the employer was, had accordingly already been determined. Consequently, he submitted that the

Commissioner was bound by the 'ruling' made at the Bargaining Council and did not have the power to determine who the employer was. The second issue raised by Howard was based on Mondi's cancellation of its service level agreement with Adecco. The argument was that if the third respondent was found to have been dismissed, his dismissal could only have been due to operational requirements as a consequence of the aforesaid cancellation of the contract between Mondi and Adecco and that the provisions of section 191(12) of the Labour Relations Act, No 66 of 1995 ('the LRA') precluded the CCMA from arbitrating the dispute.

The Commissioner dismissed the first of the objections to jurisdiction on the basis that the certificate issued by the Bargaining Council certified that the dispute had not been resolved and did not constitute a binding ruling as to who the employer was. She further ruled that she was empowered to join Mondi, because the CCMA Rules made it clear that joinder did not affect steps which had already been taken. It appears that she intended to deal with the objection based on operational requirements if and when that should arise in the course of the evidence.

After confirming that the witnesses for Mondi were available, the Commissioner decided to continue the proceedings on the following basis:

'So the process is going to be that I am going to call them, I am going to swear them in. I am going to ask them the questions that I need to know and then I am going to give each of you an opportunity to address me.' (Transcript p 18 lines 20 -24)

There was no objection by any of the parties to the aforesaid procedure being



followed. Lange was sworn in and the Commissioner asked him, *inter alia*, to explain how it came about that the third respondent, who had been employed by Mondi in 2000, ended up concluding a contract with Adecco and how it came about that the third respondent lost his employment. Once Lange had answered the Commissioner's questions, the third respondent and Howard were each afforded an opportunity to cross-examine Lange. On completion of Lange's testimony, Manuel was called to testify. A similar procedure was followed whereby the arbitrator asked certain questions, whereafter the third respondent and Howard cross-examined the witness.

On conclusion of the aforesaid evidence, Howard and the third respondent were each afforded an opportunity to address argument to the Commissioner, whereafter the arbitration was adjourned for the Commissioner's decision.

There is no formal application before this Court for the review of the Ruling which the Commissioner made that Mondi be joined to the proceedings. I am, in any event, satisfied that it was appropriate for the Commissioner to join Mondi inasmuch as the evidence tendered by the third respondent tended to establish that Mondi was his employer. Mondi clearly had a direct and substantial interest in the proceedings before the Commissioner.

As is apparent from the foregoing synopsis of the events at the arbitration, Mondi was not a party to the proceedings when the third respondent testified and was not

present when he did so. Moreover, although the Commissioner had joined Mondi as a party to the proceedings, there is no indication on the record of the proceedings before her that it was afforded the rights which a party to the dispute was entitled to. It is not apparent from the record that Mondi was apprised of the evidence which the third respondent had given, that it was afforded an opportunity to cross-examine the third respondent, or that it was informed of the consequences attendant upon a failure to cross-examine the third respondent. Mondi was not offered an opportunity of leading its own witnesses and was not asked which witnesses, if any, it wanted to call. There is also no indication that it was afforded an opportunity to present any argument to the Commissioner as to why it ought not to be found to have been the employer of the third respondent. The fact that Mondi was effectively denied these rights clearly constitutes an irregularity in the proceedings before the Commissioner.

Mr Kahanovitz, who appeared on behalf of the third respondent, submitted that not every regularity gives rise to a review ground. If a procedural irregularity occurred, the applicant for review must provide proof of prejudice suffered as a result, failing which the application for review must be dismissed. Mr Kahanovitz relied on the decisions in *Jockey Club of South Africa & Others V Feldman* 1942 A D 340 at 359, *National Union of Textile Workers v Textile Workers Industrial Union (SA) & Others* 1988 (1) SA 925 (A) at 940B and *S v Van Molendorf* 1987 (1) SA 135 (T) at 151 as authority for this proposition. In the Feldman- case, Tindall JA held as follows:

'I am not prepared to accept, as a rule applicable to all cases of irregularity in the proceedings of private tribunals, the proposition that an irregularity which is calculated to prejudice a party entitles him to have the proceedings set aside. No doubt such irregularity prima facie gives him such right, but if it is clear that in the particular case the irregularity caused such party no prejudice, in my judgment he is not so entitled.'

Mr Kahanovitz submitted that Mondi and Adecco were invited, in the third respondent's answering affidavit, to explain the actual prejudice which it allegedly suffered and that they had not done so, nor did they explain why neither of them asked for the applicant to be returned to the witness stand so that he could be cross-examined. Mondi's response on the papers was that it was not up to the parties to request that a witness be cross-examined, but that the function rested squarely with the Commissioner to ensure that each of the parties was given a fair opportunity to present evidence, as well as to cross-examine an opposing party's witness.

In my view, the irregularity in the instant case, albeit procedural, was of a serious nature and had serious consequences for Mondi. Indeed, the irregularity denied Mondi a fair hearing of its dispute. It became a party to the proceedings due to its joinder, but it was not treated as such, nor was it afforded the rights which a party to litigation normally has. Mondi was evidently not apprised of the evidence tendered by the third respondent and was denied the opportunity of eliciting evidence in its favour through cross-examination of the third respondent. On completion of the testimony of Lange and Manuel, Mondi was not asked whether it wished to call any other witnesses, nor was it given an opportunity to present argument in regard to the merits of the case in general, or in regard to the finding as to who the employer was, in particular. The prejudice to Mondi is readily apparent

- it was denied a fair hearing of its case.

Mr Kahanovitz submitted that Howard was 'a seasoned and aggressive representative', that Lange was the HR Manager of a large company which is listed on the JSE and that 'it cannot be seriously suggested that they were not aware of their right to ask for the third respondent to return to the witness stand should they have felt that there was some advantage to be gained by him being called to testify once again'.

However experienced a party's representative may be and irrespective of whether a party is legally represented, it remains the responsibility of the presiding officer to ensure that all of the parties before him/her receive a fair hearing of their dispute. In circumstances where parties are not legally represented, such as in the instant case, the presiding officer ought to take particular care to ensure that each of the litigants receives a fair trial.

It is clear from what has been stated above that Mondi was indeed prejudiced by the irregularity which occurred and that it has accordingly made out a case for the review and for the setting aside of the proceedings before the Commissioner.

The further issue that must be determined is whether or not the application for review must be granted, given that Adecco has not been joined to the application. Adecco clearly ought to have been joined to the application before this Court

inasmuch as Mondi contends that it was the employer of the third respondent. I am, however, satisfied that undue delay would occur if the matter had to be postponed at this stage in order to join Adecco to the application. Moreover, given that proceedings before the CCMA will commence afresh in terms of my order, there does not appear to me to be any true prejudice to Adecco if the matter were to be remitted. It will be afforded an opportunity to present its case afresh. It must also be borne in mind that Adecco had, in any event, alleged that it was the third respondent's employer. Consequently any subsequent finding in terms whereof it might be declared to be the employer would merely confirm its own allegation.


The only remaining issue for determination is the costs of these proceedings. Mondi has asked for a costs order in its favour as against the third respondent.

In my view, the irregularity in the proceedings was not occasioned by the third respondent, who appears to be a relatively unsophisticated person. In such circumstances, it would appear to me to be unfair to visit the third respondent with a costs order.

The following Order is accordingly hereby made:

1. The Arbitration Award made by the First Respondent on 8 July 2009 under case number WE4323-09, is hereby reviewed and set aside.

2. The dispute between the applicant, third respondent and Adecco Recruitment Services (Pty) Limited is remitted to the Second Respondent for arbitration afresh before a senior Commissioner other than the First Respondent.
  
3. No order as to costs is made.



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A M DE SWARDT, A J

Date of Hearing:	28 April 2010
Date of Judgment:	16 November 2010
For Applicant:	Mr Lance Witten of Deneys Reitz attorneys
For Third Respondent:	Mr C S Kahanovitz S C instructed by Legal Resources Centre