IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG
REPORTABLE
Case Number: JR 596/09
In the matter between:
SHELL SA ENERGY (PTY) LIMITED Applicant
and
NATIONAL BARGAINING COUNCIL
FOR CHEMICAL INDUSTRY First Respondent
CHRIS SILIZI MBILENI N.O Second Respondent
V MASEKO N.O Third Respondent
ELMUATASIM IBRAHIM AHMED ALI Fourth Respondent
JUDGMENT-LEAVE TO APPEAL
MOSHOANA AJ 2

INTRODUCTION

[1] This is an opposed application for leave to appeal against the whole order of this court handed down on 25 February 2010. After filing the application, parties were directed to file written submissions. Both parties did so. However the applicant sought to have the matter heard in an open court. Accordingly, the Registrar enrolled the matter for hearing on 21 June 2010. On the day only Mr Maserumule for the applicant appeared. Upon perusal of the court file it became apparent that the respondent was not notified. Mr Maserumule agreed that the matter could be disposed off without oral submissions.

GROUNDS FOR LEAVE.

[2] For the purpose of this judgment, it may not be necessary to repeat the grounds upon which the applicant seeks to obtain leave. Save to say, the applicant believes that it was entitled to legal representation at the forum, the issue in dispute-whether the fourth respondent was an employee of the applicant- was not a simple one, the mistake on the onus issue vitiates the ruling, the fourth respondent was not dismissed by the applicant and that the jurisdictional issue dealt with by the court was not an ordinary one, accordingly the key findings are open to challenge as it is not based on previous precedents by this court or the Labour Appeal Court. 3

EVALUATION.

[3] The test for applications of this nature remains that of a reasonable possibility of another court coming to a different conclusion than the one this court arrived at. In applying the test, one considers the facts and the law. See in this regard ***Dince v Department of Education North West Province [2010] 6 BLLR 631 (LC) at 632 paragraph 3.***

[4] With regard to the issue of legal representation, the LAC has accepted in the *Netherburn* judgment that there is no absolute right to legal representation. The fact that the forum contemplated by the applicant in this matter is so-called pre-conciliation hearing does not alter the principle that in any forum other than a court of law there is no absolute right to legal representation. To that extent, even if another court may accept that the forum was not conciliation but pre-conciliation forum as argued, there would still be no automatic right to legal representation. Accordingly, it is my considered view that another court cannot come to a different conclusion. Therefore this ground must fail.

[5] Regarding the issue of leading of oral evidence, there exists no reasonable possibility that another court may come to a conclusion that by allowing submissions and considering the documents submitted by the parties before him, the second respondent committed a reviewable irregularity. It cannot be said that by law or the enabling statute for that matter, the second respondent was obliged to hear oral evidence in order to resolve a simple issue of who the true employer 4

is. In ***Sanlam Life Insurance Ltd v CCMA and others [2009] 30 ILJ 2903 (LAC) at 2911 paragraph 27***, Jappie JA said the following:
"It seems to me that, had the commissioner applied his mind to the terms of the contract and to earlier rulings in similar cases before the CCMA, he would not have arrived at the conclusion that the third respondent was an employee of the appellant."
Sanlam matter dealt with the issue of whether the third respondent there was an independent contractor or an employee. Of importance, is the finding of applying mind to the terms of the contract. In *casu*, application of mind to the contents of the letter of appointment led to a simple conclusion that the applicant appointed the fourth respondent. The LAC did not pronounce that in determining such an issue, oral evidence is required, otherwise there is an irregularity. Instead, the LAC by implication approved the making of submissions. It said:
"Neither the appellant nor the third respondent led any evidence in the CCMA on its jurisdiction nor both parties elected to confine themselves to written submissions regarding the nature of the contractual relationship between them"
Nowhere in the judgment is the LAC critical of that approach. In *casu* parties chose to make submissions and handed in certain documents. The fact that they elected not to lead evidence does not in any way render the ruling reviewable. Accordingly, there exists no reasonable possibility that another court may come to a different conclusion. Therefore this ground too must fail. 5

[6] The issue whether the applicant dismissed the fourth respondent is a separate inquiry, which the second respondent was not called upon to determine. As pointed out in the main judgment, if the applicant is of that view then the provisions of Section 192 must be resorted to. It is fallacious to suggest that by allowing the applicant to lead evidence, it would have been able to deal with this question. If that was the applicant's case it could easily have been submitted that the applicant was not dismissed. Such can still be dealt with at arbitration stage.
[7] Contrary to what the applicant submits, this kind of jurisdictional points had been dealt with by this court in *Ebantu EOH* matter and by the LAC in *Sanlam* matter. In *Sanlam,* as pointed out earlier, the issue was that of an independent contractor. However the approach and the principle remains the same. Therefore the fact that there is no previous precedent per se cannot be a ground to grant leave. The issue of the mistake on the onus aspect is not material at all. No court would come to the conclusion that the mistake vitiates the ruling. It is only material errors of law that can vitiate a ruling. In *casu*, the second respondent relied on the documents presented to him.

CONCLUSION.

[8] In the light of the above stated, I am of a firm view that there are no reasonable prospects that another court may come to a different conclusion than the one the court arrived at. Accordingly, the **APPLICATION FOR LEAVE IS DISMISSED WITH COSTS.** 6

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G.N MOSHOANA

Acting Judge of the Labour Court

Date of Judgement: 24 June 2010

APPEARENCES

For the Applicant: Mr P Maserumule of Maserumule Inc, Forest Town

For the Fourth Respondent: Mr M Kolisi of Mogashwa Attorneys, Johannesburg