REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 418/11

In the matter between:

KHULULEKILE DYOKWE **Applicant**

and

COEN DE KOCK N.O. **First respondent**

CCMA **Second respondent**

MONDI PACKAGING

SOUTH AFRICA (PTY) LTD **Third respondent**

STRATOSTAFF (PTY) LTD **Fourth respondent**

t/a ADECCO RECRUITMENT SERVICES

Heard: **5 June 2012**

Delivered: **21 June 2012**

Summary: Review – true nature of employer – whether employed by Temporary Employment Service or its client at time of dismissal. LRA s 198.

JUDGMENT

STEENKAMP J:

Introduction

[1] This application for review concerns the true nature of the employer in the contentious labour broking environment.

[2] The applicant was initially employed by the third respondent, Mondi Packaging South Africa (Pty) Ltd ("Mondi") for more than two years. He was then informed that he would have to sign a new contract of employment with the fourth respondent, Stratostaff (Pty) Ltd trading as Adecco Recruitment Services ("Adecco"). Adecco is a temporary employment service as defined in section 198 of the LRA[1] or, in common parlance, a labour broker. The applicant did so but continued working in the same position at Mondi. He was dismissed 5 ½ years later, in January 2009. The question arises who his true employer was at the time of his dismissal.

[3] The first respondent ("the arbitrator") ruled that Adecco was the employer. The applicant wishes to have that ruling reviewed and set aside in terms of s 145 of the LRA.

[1] Labour Relations Act 66 of 1995.

Background facts

[4] The applicant was initially employed by Mondi on a three-month contract in 2000. He continued to be employed and a series of fixed term contracts.[2] On 9 December 2002 Mondi's human resources manager sent the applicant a letter in these terms:

> "Dear Mr Dyokhwe
>
> **RE: NOTICE OF TERMINATION OF CONTRACT**
>
> We regret to advise that due to a drop-off in our workload your contract of employment will only be extended to 20th December 2002 and will therefore terminate on that date. We will advise of the final arrangements with regard to your payment in due course."

[5] Despite this notice, the applicant continued to be employed by Mondi into 2003 without signing a further contract of employment. It appears, therefore, that he continued to be employed on a permanent basis. For example, he received a payslip from Mondi on 23 February 2003, as before, clearly indicating Mondi as the employer. The arbitrator accepted on the evidence before him that the applicant "continued to work for [Mondi] until 30 June 2003".

[6] On 7 July 2003 the applicant's manager at Mondi, Len Williams, told him to go to Tyger Valley to "sign a form." According to the applicant's uncontested evidence, Williams told him:

> "The reason why you must go to Tyger Valley, whenever we are recruiting, we want to recruit people who have experience, people who know what kind of job we are doing here."

[7] Williams also told the applicant that, if he didn't want to go to Tyger Valley, he should go home – and that is what the applicant did. The next morning, Williams phoned him and told him again to go to Tyger Valley. After that, a woman who was not known to him phoned him and told him to take the

[2] These contracts appear to have been "rolled over" for a number of years. There is little doubt that the applicant would have formed a reasonable expectation of renewal as contemplated in s 186(1)(b) of the LRA. But that is not the dispute before this court.

train to Bellville station. She would meet him there. He did so and telephoned her when he got there. She then gave him directions to what turned out to be the offices of Adecco.

[8] At Adecco, two women present showed the applicant two forms. The one was his employment contract with Mondi. The other turned out to be a new employment contract with Adecco; but the applicant explained that he cannot read English and he did not read or understand the document. He was able to sign his name. The woman present – apparently a representative of Adecco – asked him to sign the new (Adecco) contract and told him:

> "We want you to be with us for the time being and nothing is going to change. Whenever they are looking for permanent staff they will know where to find you."

[9] The Adecco contract is headed, "Contract of employment defined by time". It purports to be a fixed term contract "defined by time". It is no such thing. It contains no fixed term. The introduction reads as follows (handwritten portions indicated by italics):

> "**Adecco South Africa,** herein after [*sic*] referred to as the Employer, hereby agrees to employ *K Dyokhwe* **(Name),** *530916546086* **(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:
>
> 1.1 You will be employed primarily in the capacity of *Asst* Reporting to *L WILLIAMS* Employed at *MONDIPAK."*

[10] The contract further stipulates an hourly rate of R10. It also states, contrary to the terms of the contract itself:

> "As this contract is for a fixed period, you will not be entitled to any discharge or severance benefits on 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."

[11] After signing the Adecco contract, the applicant returned to work at Mondi and continued working at the same place in the same position and reporting to the same supervisor and manager as before. However, he now received a payslip from Adecco and his hourly rate was reduced from R12, 56 to R10, 00 per hour. When he complained, Williams told him to go to Adecco. He went to the CCMA instead, where an official told him that he should just "continue working".

[12] The applicant continued to work at Mondi for another 5 ½ years until 5 January 2009, when Mondi summarily informed him that his employment had been terminated, without any notice or other procedure. His supervisor, Gert Manuel, showed him a list of employees – including his name – and said:

> "If your name is on the list your contract of employment is terminated, the work is finished."

[13] Manuel told the applicant to go to Adecco. He did so, and the woman to whom he spoke at Adecco told him they did not have work for him as he was too old. He then referred an unfair dismissal dispute to the CCMA.

The arbitration proceedings

[14] The arbitration took place on 4 April 2011. Mondi and Adecco were both cited as respondents.[3] The applicant and Mondi were legally represented by their current attorneys. Adecco was represented by Mr G Howard, a representative of an employers' organisation.

[15] The Commissioner directed that the parties lead evidence to determine the identity of the applicant's employer at the time of his dismissal. He led evidence in the form of his own testimony and a bundle of documents. Adecco's representative (Howard) cross-examined the applicant, but did not lead any evidence. So did Mondi's representative, Mr Witten.

[3] This was subsequent to a previous joinder ruling; an arbitration award against Mondi; and a prior review in this court. The previous arbitration award was reviewed and set aside because one respondent had only been joined after the other had given evidence. The dispute was remitted to the CCMA and a fresh arbitration took place before commissioner De Kock.

The commissioner's ruling

[16] The Commissioner found that Adecco was the applicant's employer at the time of his dismissal; that Mondi "is excused from attending any further arbitration proceedings regarding this matter."; and that the matter should be rescheduled for arbitration between the applicant and Adecco in order for a decision to be made as to the existence of the dismissal and, if so, the fairness thereof.

[17] In coming to the finding that Adecco was the employer, the Commissioner took the following factors into account:

17.1 The applicant signed a new contract with Adecco on 7 July 2003. It is clear from the contract that he was to be regarded as being employed by Adecco, and no longer by Mondi, from that date onwards.

17.2 Despite the fact that the applicant was illiterate and could not understand the written terms of the new contract, he was advised that he was needed at Mondi; that, "whenever they wanted to find him, they would know where to find him"; and that he signed the document "for the time being until [Mondi] started recruiting."

17.3 The applicant realised that this rate of pay had been reduced and that he received a payslip from Adecco at the end of July 2003.

[18] The Commissioner was not convinced that the applicant had been misled all the facts were misrepresented him when he signed the contract with Adecco. He held that:

> "it is simply unacceptable for an employee, who at worst case scenario knew that he signed a contract of employment with a new employer (in this case a temporary employment service) in July 2003 and that he would henceforth be employed by this new employer, to continue to work until 2009/2010 and then only to challenge the validity of the contract of employment when he was allegedly dismissed."

[19] The Commissioner took the provisions of section 198 of the LRA into account and found that Adecco was the applicant's employer. He noted that Adecco "at no stage has tried to run away from the fact that they are

applicant's employer and they conceded as much during the arbitration proceedings."

Grounds of review

[20] The applicant relies on four grounds of review, being conclusions that, in his view, are so unreasonable that no other commissioner could have come to the same conclusion[4]:

20.1 The Commissioner's finding that the applicant was "no longer employed by [Mondi]" after signing the Adecco contract;

20.2 the Commissioner's finding that the applicant was not induced to sign the Adecco contract by misrepresentations;

20.3 the Commissioner's reliance on incorrect legal advice provided to him by a CCMA official in finding that the applicant had lost or abandoned rights that he would otherwise have had; and

20.4 the Commissioner's failure to consider the contention that it would be contrary to public policy to enforce the applicant contract against the applicant in the circumstances of this case.

The legal context: Labour brokers under the LRA, the Constitution and international law

[21] The overarching basis of this review application is the Commissioner's approach to a temporary employment service ("TES") in terms of section 198 of the LRA. The relevant part of that section reads:

> '198. Temporary Employment Services.—(1) In this section, "temporary employment services" means any person who, for reward, procures for or provides to a client other persons—
>
> (a) who render services to, or perform work for, the client; and
>
> (b) who are remunerated by the temporary employment service.
>
> (2) For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is

[4] i.e. the test set out in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC).

the employee of that temporary employment service, and the temporary employment service is that person's employer.'

[22] Section 3 of the LRA requires courts to adopt a construction of section 198 that complies with the Constitution and public international law, while at the same time giving effect to the LRA's primary objects. This principle is reinforced by section 39(2) of the Constitution, which requires courts interpreting legislation to seek to promote the spirit, purport and objects of the Bill of Rights.

[23] The applicant argues that the Commissioner failed to adopt an approach to section 198 consistent with the requirements of the provision itself and the purposes of the LRA, interpreted in the light of the spirit, purport and objects of the Bill of Rights in terms of section 39 of the Constitution and having regard to relevant international law.

Section 198 in the context of the purposes of the LRA and the Constitutional right to fair labour practices

[24] Section 1 of the LRA provides that --

> "The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the work-place by fulfilling the primary objects of this Act, which are—
>
> (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;
>
> (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
>
> (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can—
>
> (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
>
> (ii) formulate industrial policy; and
>
> (d) to promote—
>
> (i) orderly collective bargaining;
>
> (ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the work-place; and

(iv) the effective resolution of labour disputes."

[25] The Constitutional Court recognised in *NEHAWU v UCT*[5] that one of the core purposes of the LRA and of s 23 of the Constitution is to safeguard workers' employment security, especially the right not to be unfairly dismissed. Although that case concerned the application of s 197 in the context of transfers and outsourcing, a similar concern arises in the context of labour broking. To the extent that employment through a TES as opposed to a former employer – while the employee carries on doing the same job, but at a lower rate – may threaten employment security and other aspects of the constitutional right to fair labour practices, section 198 must be interpreted strictly in order to protect workers governed by s 198.

[26] This judgment is being prepared at a time when amendments to the LRA contemplating extensive amendments to s 198 and taking account of the pitfalls of labour broking generally have been tabled before Parliament. The court does not make policy – that is the province of the legislature. I must consider the facts of this case in the context of a review application and in an effort to interpret the provisions of section 198 as they stand at present. At the same time, I must consider the constitutional prerogatives outlined above.

[27] The Namibian Supreme Court has had occasion to consider the constitutionality of an absolute ban on labour broking. The relevant section of the Namibian Labour Act[6] read as follows:

> "No person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party."

[28] In *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia & others*[7] the court, while striking down that section as unconstitutional, nevertheless recognised a need to strike a balance between the interests of employers to be flexible and the interests of

[5] 2003 (3) SA 1 (CC) para [42].

[6] Act 11 of 2007 s 128.

[7] [2011] 1 BLLR 15 (NmS) para [70].

employees not to be treated as 'mere commodities' on the basis of the contractual arrangements between the TES and the client:

> "[L]abour is not a tradable innate object but an activity of human beings. Unlike a commodity, it cannot be bought or sold on the market without regard to the inseparable connection it has to the individual who produces it: it is integral to the person of a human being and intimately related to the skills, experience, qualifications, personality and life of that person. It is the means through which human beings provide for themselves, their dependants and their communities; a way through which they interact with others and assert themselves as contributing members of society; an activity through which to foster spiritual wellbeing, to enhance their abilities and to fulfil their potential. All these elements must be brought into the equation of labour relationships if social justice and fairness are to be achieved at the workplace; if social security, stability and peace are to be maintained. Employees may be subordinate to their employers in employment relationships but that does not mean that they are lesser beings or that they do not have equal rights and freedoms as such."

[29] This court, too, has recognised the vulnerability of workers in TES arrangements, as the weakest and most vulnerable party in the triangular relationship, and held that they may not be treated "in a way that would effectively treat employees as commodities to be passed on and traded at the whims and fancies of the client."[8]

[30] I must agree with Mr *Ngcukatoibi* and with Mr *Brickhill*[9] when they argue that, against this background, arbitrators and courts must ensure that alleged TES arrangements meet all the requirements of s 198 and not to regard labour broking arrangements as presumptively valid on face value as soon as a signed contract is put up by an employer.

[31] Our courts have recognised that an employee employed by a TES cannot be dismissed at will in terms of a contractual clause that specifies that a contract is terminated 'automatically' simply because the client of the TES

[8] *Nape v INTCS Corporate Solutions (Pty) Ltd* [2010] 8 BLLR 852 (LC) para [60].

[9] who drafted the applicant's heads of argument.

no longer requires the employee's services. In *Mahlamu v CCMA & others*[10] Van Niekerk J held:

> "In the present instance, the upshot of the commissioner's award is that the applicant's security of employment was entirely dependent on the will (and the whim) of the client. The client could at any time, for any reason, simply state that the applicant's services were no longer required and having done so, that resulted in a termination of the contract, automatically and by the operation of law, leaving the applicant with no right of recourse. For the reasons that follow, and to the extent that the commissioner regarded this proposition to be the applicable law, he committed a material error of law that must necessarily have the result that his ruling is reviewed and set aside."

'Disguised employment relationships' and international law

[32] The International Labour Organisation (ILO), of which South Africa is a member, has addressed 'disguised employment relationships' – mainly in the context of employment relationships being dressed up as independent contractor arrangements – but its concerns are equally apposite where the nature of the true employer is obfuscated by TES arrangements.

[33] The Private Employment Agencies Convention, 1997 (C181)[11] seeks to ensure that workers placed by employment agencies receive adequate protection under labour law. For the purpose of this Convention the term ***private employment agency*** means any natural or legal person which provides one or more of the following labour market services:[12]

> "(a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;
>
> (b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to as a 'user enterprise') which assigns their tasks and supervises the execution of these tasks;

[10] [2011] 4 BLLR 381 (LC) para [10].

[11] Convention concerning Private Employment Agencies, C181 of 1997 (Adopted 1997, came into force 10 May 2000).

[12] C181 article 1.

> (c) other services relating to jobseeking, determined by the competent authority after consulting the most representative employers and workers organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment."

[34] The Convention requires that ratifying countries have adequate machinery for lodging complaints concerning agencies.[13] National legislation should stipulate the responsibilities of employees and 'user enterprises' for collective bargaining, wages and conditions of employment, social security benefits, and health and safety.[14] However, the Convention does not deal specifically with the security of employment of workers engaged through private employment services.

[35] ILO Recommendation 198[15], albeit not of the binding force of a Convention, enjoins member states to:

> "combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due."

[36] ILO R198 recommends that an employment relationship should be determined –

> "primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties."[16]

[37] In the instant case it is common cause that the employee was being paid by the TES, Adecco, from July 2003; yet I must approach the true nature

[13] Article 10.

[14] Article 12.

[15] Recommendation concerning the employment relationship, 2006 (adopted 15 June 2006). [The commensurate numbering of the section in the LRA is purely coincidental].

[16] R 198 para 9.

of the relationship, in circumstances where the workplace and the nature of the employee's remained the same for almost nine years, conscious of the obligation to combat disguised employment relationships and to examine the substance rather than the form of the relationship.

[38] Prof Paul Benjamin provides, as is his wont, a thought-provoking, insightful and thorough discussion of this topic in a recent publication.[17] He points out that, while s 198 was enacted to regulate the temporary employment sector, it has become a vehicle for permanent triangular employment:[18]

> "Despite the use of the term 'temporary employment service' (TES), its application is not limited to agencies supplying temporary employees. This coupled with the fact that joint and several liability does not extend to unfair dismissal protection and the contract of employment has led to widespread permanent triangular employment of employees who generally earn less than those workers hired directly by the employer."

[39] This is exactly the situation that prevails at Mondi. From one day to the next, the applicant found himself ostensibly employed by a new employer; but the only difference was that he was being paid more than 20% less.

[40] As Benjamin points out with regard to the TES being deemed the employer in terms of section 198:[19]

> "The 'deeming' approach seeks to clarify the issue of who the employer is in triangular employment relationships. However, its rationale breaks down once the employee's placement with a firm is no longer temporary and the employee has a closer relationship with the client than the agency. It is an entirely superficial construction (and one that gives rise to immense scope for abuse) to make an agency the employer of an employee working on an on-going or indefinite basis for a 'client' merely because the employee's pay is routed through the agency."

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[17] Benjamin, 'To regulate or to ban? Controversies over temporary employment agencies in South Africa and Namibia', in Malherbe and Sloth-Nielsen (eds), *Labour Law into the Future: Essays in Honour of D'Arcy du Toit* (Juta 2012) pp 189-209.

[18] *Ibid* p 196.

[19] *Ibid* p 197.

[41] Once again, the learned author could have been describing the relationship in the case before this court; except that, in this case, the TES did not even 'place' the applicant; on the contrary, Mondi simply purported to transfer him to the TES.

[42] Benjamin[20] expresses the opinion that s 198 in its current form offends the constitutional entrenchment of labour rights guaranteed in terms of section 23 of the Constitution. He goes on to say that is remarkable that no serious legal attack has been mounted on the section's constitutionality. And so it is; but this is not that case either. At most, the applicant has asked this court to interpret the section purposively in terms of the Constitution and to assess the arbitration ruling accordingly.

[43] In this regard, the two main hurdles the applicant has to overcome is the deeming provision in s 198; and the fact that this is a review, not an appeal. Was it unreasonable for the arbitrator to have found that, applying s 198, Adecco was the employer?

[44] This question must also be considered in the light of the fact that our labour laws provide for joint and several liability by the TES and the client in certain circumstances, but perhaps tellingly, this does not include protection against unfair dismissal. In terms of s 198(4), the TES and the client are jointly and severally liable if the TES contravenes a collective agreement concluded in a bargaining council; a binding arbitration award; the BCEA[21]; or a determination in terms of the Wage Act. And the Employment Equity Act[22]holds a TES and a client jointly and severally liable for unfair discrimination. As Benjamin[23] points out, there are two exceptions to the ruling that the TES is the employer: For the purposes of affirmative action, a person supplied by a TES placed with the client for more than three months is considered to be the client's employee; and the client is the employer for purposes of compliance with health and safety legislation, but not compensation for occupational injuries and diseases.

[20] *Ibid* p 199.

[21] Basic Conditions of Employment Act, Act 75 of 1997.

[22] Act 55 of 1998 s 57(1).

[23] *Op cit* p 200

First ground of review: No longer employed by Mondi?

[45] The commissioner accepted that, from the time he signed an employment contract with Adecco on 7 July 2003, the applicant was no longer employed by Mondi. The problem is that Mondi never terminated the employment relationship.

[46] The applicant puts up two legs to his first ground of review:

46.1 The first leg is factual: there is no evidence that Mondi terminated the employment relationship before his dismissal in January 2009.

46.2 The second leg is conceptual: that is whether the contractual arrangements between the applicant, Mondi and Adecco was one contemplated by s 198 or whether it was a 'sham' arrangement or *in fraudem legis.*

Evidence of termination by Mondi?

[47] In order to terminate its employment of the applicant, Mondi had to take a positive step.[24] It is common cause that the applicant did not resign – there was no termination at the behest of the employee.

[48] Mondi argued that it did terminate the applicant's employment. However, it presented the commissioner and this court with a number of different and contradictory versions.

48.1 In its founding affidavit in its *in limine* application before the CCMA – disputing that Mondi was the employer – its human resources manager, Mr Spurgeon Lange, stated that:

> "The applicant thus had no further employment relationship with [Mondi] since the end of December 2002.[25] The applicant was one of approximately 25 ad hoc workers whose services were terminated by [Mondi] at the end of 2002."

48.2 This version was repeatedly advanced by Mondi during the arbitration proceedings and its representative, Mr *Witten*, repeatedly put it to the applicant in cross-examination.

[24] Cf *SA Post Office Ltd v Mampeule* (2010) 31 *ILJ* 2051 (LAC) para [12].

[25] My emphasis.

48.3 When the applicant pointed out that he remained employed by Mondi in 2003, Mr Witten persisted with the same version, putting it to the applicant that, even from January to June 2003, he didn't work for Mondi any more.

48.4 After the applicant had referred to a payslip from Mondi issued in February 2003, Mr Witten put a new version to him. This was that, when Williams told the applicant to go to Tyger Valley in July 2003, he (Williams) had told the applicant that he no longer worked for Mondi. The applicant denied it and Mondi led no evidence in support of either version.

48.5 In its answering affidavit in this application Mondi advanced a third version. That is that Mondi "advised the applicant in December 2002 it would no longer be requiring his services" and that the effect of entering into the Adecco contract on 7 July 2003 "terminated the employment relationship between the applicant and [Mondi] at the end of June 2003." This version is not supported by any evidence led at the arbitration.

48.6 Although the contention that, by entering into a contract with Adecco, the applicant (or Mondi) terminated the contract between them, appears superficially attractive, it begs the question.

48.7 There was no evidence before the arbitrator that Mondi terminated the applicant's employment prior to his dismissal in 2009. The commissioner's mere acceptance, without any evidence, that the employment relationship had been terminated in July 2003 is not sustainable in the absence of any evidence.

Arrangement in fraudem legis?

[49] The arbitrator also failed to have regard to the true relationship between the parties. On the evidence before him, the only reasonable conclusion was that the new agreement between Adecco, Mondi and the applicant was *in fraudem legis.*

[50] In considering who is an employee, our courts have consistently had regard to the true nature of the employment relationship. For example, in

Denel (Pty) Ltd v Gerber[26] Zondo JP held, after considering the authorities:

> "On the above authorities it seems to me that the parol evidence rule does not preclude the leading of oral evidence where the purpose of leading such oral evidence is to show what the true relationship was between parties to a dispute or where the evidence tends to show or may tend to show what the true relationship was between the parties or where it may tend to show that the relationship between the two parties falls or fell within the ambit of the definition of the word "employee" in section 213 of the Act."

[51] I can see no reason why the well-known principles relating to sham independent contractor relationships should not also apply to TES relationships. The question remains who the true employer is; and although no presumption akin to that in s 200A addresses this question in a TES relationship, the court should not shy away from examining that relationship.

[52] It may, at face value, appear obvious that Adecco is a TES as contemplated in s 198; and, indeed, it accepts that it was the applicant's employer. But this glib assertion needs closer examination.

[53] Section 198 defines a TES as an entity that "procures for or provides" to a client other persons who render services to, or perform work for, the client; and who are remunerated by the temporary employment service.

[54] In the present case, Adecco paid the applicant from July 2003 and he continued to perform work for Mondi (the "client"). But did Adecco procure or provide the applicant to Mondi? The answer must be in the negative. The applicant had been working for Mondi since 2000. Three years later, he was told to sign a new employment contract (that he could not read and that was not properly explained to him) with Adecco. For the next five years, he continued doing the same work at the same place as he had done for the previous three years. Mondi sent the applicant to Adecco; the latter neither procured his services nor provided him to Mondi. (As an aside, it should be noted that neither party argued that s 197 of the LRA

[26] [2005] 9 BLLR 849 (LAC) para [17].

applied to the arrangement between them. I need not consider that possible aspect).

[55] It is so that s 198 creates a fiction or presumption that the TES is, in most instances, the employer; but, as Jan Theron has pointed out, that presumption is rebuttable.[27]

[56] The actual nature of the relationship between the parties did not support the finding that Mondi had terminated the applicant's employment.

[57] The factual situation is akin to that described by Landman J in *Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinet CC & another*[28], albeit in the context of a so-called independent contractor relationship:

> "Mr Mawa was a humble employee prior to entering into the independent contract agreement with Melmons. Since entering into the contract his position has not changed insofar as he does the same work, is subject to a new form of regulation of his working hours and his methods of work and a slightly improved pay. He may theoretically be his own boss but he still has to clock in and out at Melmons factory. He is entitled, according to Mr Louw of Melmons, to go fishing if he chooses to do so rather than work. Of course, if he wet his line while Melmons required him to clean newly installed cupboards he would soon find that Melmons would not be placing any further orders with him and that he would possibly be held liable for damages.
>
> Mr Mawa's activities form an integral part of Melmons' organisation. He would not be able to enter into contracts with other manufacturers to clean their cupboards, no matter how well he may do it. The dominant and overwhelming impression that the agreement and the evidence gives is that Mr Mawa is still a mere employee, albeit one encumbered by sets of rights and duties which operate to his detriment. One's impression on reading the record is that one has to deal with the surreal. Melmons, with the assistance of its employers' organisation, COFESA, has perpetrated a cruel hoax on Mr Mawa. He believes that he is a self-employed entrepreneur, earning more than he did as an employee. He is blissfully ignorant of his

[27] Jan Theron, "The Shift to Services and Triangular Employment: Implications for Labour Market Reform" (2008) 29 *ILJ* 1 at 18.

[28] [2001] 3 BLLR 329 (LC) paras [20] – [21].

> newly acquired obligations and the loss of rights and privileges which Melmons has persuaded him to forego.... The agreement which purports to be an independent contractor/principal relationship is a sham and it remains a sham even though Mr Mawa has consented to it. In truth Mr Mawa is an employee and Melmons is his employer."

[58] Having regard to the true nature of the employment relationship in this case, Mondi remained the applicant's employer. The commissioner's finding to the contrary is not sustainable, having regard to the uncontested evidence led at arbitration. And even if the arbitrator's interpretation of section 198 could be sustained on the basis that the section creates a legal fiction that the TES is the employer, it cannot be sustained for the further grounds of review discussed below; because, in this case, Adecco neither procured nor provided the employee to the client; and the arrangement on the facts of this case was not that of a temporary employment relationship.

Second ground of review: misrepresentation

[59] Our law recognises that it would be unconscionable for one party to seek to enforce the terms of an agreement where he misled the other party, even where it was not intentional. Where the misrepresentation results in a fundamental mistake (*iustus error*), there is no agreement and the 'contract' is void *ab initio*. The purpose of this principle is to protect a person if he is under a justifiable misapprehension, caused by the other party who requires his signature, as to the effect of the document he is signing.[29] It has also been held that the *caveat subscriptor* principle will not be enforced if the terms of the contract have been inadequately or inaccurately explained to an ignorant signatory.[30]

[60] The commissioner's conclusion must be assessed against this principle, and bearing in mind that the applicant's evidence was uncontested.

[61] The commissioner nevertheless rejected the applicant's evidence that he did not understand that he was entering into a new contract of

[29] *Brink v Humphries & Jewel (Pty) Ltd* 2005 (2) SA 419 (SCA); [2005] 2 All SA 343 (SCA).

[30] *Katzen v Mguno* [1954] 1 All SA 280 (T).

employment with Adecco. The commissioner did so on the basis of two factors:

61.1 The fact the applicant did not challenge the validity of the new contract after 2003; and

61.2 The applicant's testimony under cross-examination summarised by the commissioner as a 'concession' that the applicant "knew that he was signing the contract for the time being until [Mondi] recruited again".

[62] As Mr *Ngcukatoibi* argued on contractual principles, misrepresentation renders a contract void *ab initio*. Events subsequent to its alleged conclusion cannot be taken into account in determining whether or not such misrepresentations vitiated the agreement. Accordingly, in relying on subsequent events, the commissioner took irrelevant considerations into account.

[63] Furthermore, the commissioner's reliance on a 'concession' by the applicant cannot support his conclusion that the applicant knew that he was entering into an employment contract with Adecco. This is so for the following reasons on the record of the arbitration proceedings:

63.1 The uncontested evidence – which the commissioner purported to accept elsewhere in his ruling – was that the applicant is illiterate and that the terms of the Adecco contract were neither read nor explained to him. (In argument, I pointed out to Mr *Ngcukatoibi* that the applicant could sign his name; on the other hand, he testified that he identified the Adecco offices only by the "red lettering" and not because he could read the name. The fact remains that his own evidence that he was illiterate was not challenged).

63.2 The women at the Adecco office presented the applicant with his current employment contract with Mondi and the Adecco contract and told him that "nothing is going to change"; and indeed, in his mind and in fact, nothing did – he went straight back to doing the same job at the same place. It was only later that he realised he was now being paid less.

[64] In the face of the applicant's evidence, no reasonable decision-maker could conclude that the applicant understood at the time that he was entering into a new employment relationship. On the evidence, the contract was void for the reason of material misrepresentation. A finding to the contrary is not in accordance with established legal principles and cannot be said to be reasonable.

Third ground of review: The commissioner's reliance on advice provided to the applicant by a CCMA official

[65] The commissioner relied on the fact that the applicant had received advice from the CCMA, on the basis of which he acted to his detriment, to reject the contention that the Adecco contract was vitiated by misrepresentation, even though the applicant received that advice only after he had signed the contract.

[66] The fact that the applicant accepted the advice from an unknown CCMA official to continue working as he was, cannot breathe life into a contract that was void. By relying on this basis to hold that the contract was valid, the commissioner reached a conclusion that was unreasonable.

Fourth ground of review: public policy

[67] This review ground is based, not on public policy as a principle (as this a review, not an appeal), but on the contention that the commissioner failed to even consider the argument that was represented to him that it would be against public policy to enforce the Adecco contract and to hold that Adecco, and not Mondi, was the employer, given the particular circumstances of the case.

[68] The commissioner disregarded this argument altogether. This in itself is a reviewable irregularity. Had he considered it, he could not reasonably have rejected it, given post-constitutional legal precedent.

[69] In *Barkhuizen v Napier*[31] the Constitutional Court held that courts must not enforce a contractual clause if "implementation would result in unfairness

[31] 2007 (5) SA 323 (CC).

or would be unreasonable for being contrary to public policy". And in *Nape v INTCS*[32] this court expressed the view that:

> "...any clause in a contract between a labour broker and a client which allows a client to undermine the right not to be unfairly dismissed, would in my view be against public policy."

[70] The applicant submitted that it would be contrary to public policy to enforce the agreement signed by Adecco and the applicant. There was extreme inequality of bargaining power between the applicant and Adecco. This was exacerbated by his illiteracy and inability to read and understand the document. Neither was it explained to him. In *Barkhuizen v Napier*[33] Cameron JA held that inequality of bargaining power may be a factor in declining to enforce a contract on the basis of public policy. And in this case, Adecco and Mondi exploited the applicant's illiteracy and vulnerability to induce him to sign the contract.

[71] As Craig Bosch[34] has pointed out, whether contracts such as this one are contrary to public policy must be decided on a case-by-case basis in the light of the evidence presented in each case.

[72] On the clear evidence of the circumstances in which the contract in this case was signed, it would be contrary to public policy to enforce the Adecco contract. But is a contrary conclusion so unreasonable that no other reasonable decision-maker could have come to that conclusion?

[73] I am of the view that it is, given the specific circumstances of this case. I am reinforced in that view when I have regard to the wording of section 198 itself, and bearing in mind that I need to interpret it in the light of the constitutional right to fair labour practices and the public international law obligations of the Republic.

[74] Section 198 describes the TES as employer as the entity that –

> "procures for or provides to a client other persons—
>
> (a) who render services to, or perform work for, the client;".

[32] *Supra* para [70].

[33] *Supra* para [29].

[34] Craig Bosch, "Contract as a barrier to 'dismissal': The plight of the labour broker's employee' (2008) 29 *ILJ* 813 at 819.

[75] The New Shorter Oxford English Dictionary[35] describes the verb "to procure" as:

> "Obtain, esp. by care or with effort; gain, acquire, get."

[76] In the case before the arbitrator and before this court, Adecco neither "procured" nor provided the applicant to perform work for Mondi. The applicant had been working for Mondi for more than two years before he signed a contract with Adecco. If anything, Mondi "provided" the applicant to Adecco; and then, in a swift sleight of hand, the applicant returned to Mondi to continue his work as before, yet Adecco and Mondi wish to perpetuate the fiction that he had now been "procured" or "provided" by Adecco.

Conclusion

[77] The applicant's employment with Mondi was anything but temporary. Mondi never terminated his employment. Adecco neither procured nor provided his services. In these circumstances, it would do violence to both the language and the purpose of section 189 to hold that Adecco was his true employer.

[78] I am of the view that the arbitrator's contrary conclusion was so unreasonable that no reasonable arbitrator could have come to the same conclusion. The ruling should therefore be reviewed and set aside. The arbitration on the merits of the applicant's dismissal should proceed with Mondi as the employer party.

[79] With regard to costs, I take into account that Mondi (the only respondent opposing this application) already had a ruling in its favour; and that the issues raised in this application may have wider public interest ramifications. It would not be appropriate in law or fairness to order Mondi to pay the applicant's costs.

Order

[80] I therefore issue the following order:

[35] Oxford University Press, 1993.

80.1 The ruling of the first respondent under case number WECT 4323-09 dated 21 April 2011 is reviewed and set aside.

80.2 The ruling is replaced with a ruling declaring that Mondi (the third respondent) was the applicant's true employer at the time of his dismissal.

80.3 The CCMA (the second respondent) is directed to set the unfair dismissal dispute down for arbitration before a commissioner other than the first respondent.

80.4 There is no order as to costs.

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Steenkamp J

APPEARANCES

APPLICANT:	T Ngcukaitobi Instructed by the Legal Resources Centre (A Andrews).
THIRD RESPONDENT:	L Witten of Norton Rose.