CASE NO. P478/00

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

DATE 8.11.2000

In the matter between:

THE BUILDING BARGAINING COUNCIL (SOUTHERN AND EASTERN CAPE)	Applicant
and	
MELMONS CABINETS CC	First respondent
F E LE ROUX	Second respondent

J U D G M E N T

LANDMAN, J:

[1] Melmons Cabinets CC (Melmons), manufactures and installs cupboards. It operates from business premises in Jeffreys Bay. Previously Melmons employed a number of employees for the purposes of its business. However, during March 1999 Melmons persuaded the vast majority of its hourlypaid employees to resign as employees and enter into a standard form of contract which was supplied by COFESA, an employers' organisation. In terms of these contracts the former employees became contractors who contracted their services to the CC for an indefinite period.

[2] A dispute arose between the Building Industry Bargaining Council (Southern and Eastern Cape) (the Council) and Melmons as to whether the contractors were employees and subject to the collective bargaining

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agreement administered by the Council. The matter was referred to arbitration in terms of clause 38 of the collective agreement which appears in the Government Gazette of 11 December 1998, Gazette No. 19568.

[3] The dispute was arbitrated by Mr F E le Roux, the second respondent. In a closely reasoned award, the arbitrator came to the conclusion that the contractors were not employees for the purposes of the collective agreement and that Melmons was consequently not an employer and that there had been no breach of the collective agreement. The Council was dissatisfied with this award and seeks to review and set it aside in this Court.

[4] The Council launched the review proceedings in terms of Sec 145 of the Labour Relations Act 66 of 1995. At the commencement of the hearing Mr Buchanan SC, who appeared for the Council, properly conceded that Sec 145 which deals with the review of awards rendered by commissioners of the CCMA, was not applicable to this matter. He consequently argued that Sec 158(1)(g) of the Labour Relations Act was applicable and that the Council had shown that the award should be set aside. Mr Johan du Toit, an official of COFESA, who appeared for Melmons, submitted that Sec 158(1)(g) was also inapplicable. Clearly this is so because the arbitrator was not a functionary of the Council, nor was he performing a function in terms of the Labour Relations Act. The arbitrator was appointed to arbitrate a dispute in terms of the collective agreement. The arbitration therefore took place in terms of the Arbitra-

tion Act 42 of 1965. See Sec 40 of the Arbitration Act which reads:

> "This Act shall apply to every arbitration under any law passed before or after the commencement of this Act, as if the arbitration were pursuant to an arbitration agreement and if that other law were an arbitration agreement: provided that if that other law is an Act of Parliament, this Act shall not apply to any such arbitration insofar as this Act is excluded by or is inconsistent with the other law or is inconsistent with the regulations or procedure authorised or recognised by that other law."

[5] In this case the Labour Relations Act does not regulate the way in which a collective agreement is to be arbitrated and consequently the Arbitration Act of 1965 is applicable. See also discussion of this problem in PORTNET, A DIVISION OF TRANSNET LTD v FINNEMORE AND OTHERS (1999) 20 ILJ 1104 (LC). This being the case the arbitration award must be reviewed in accordance with Sec 33 of the Arbitration Act of 1965. Although it was argued that the test in CAREPHONE (PTY) LTD v MARCUS, N.O. AND OTHERS (1998) 19 ILJ 1425 (LAC) was applicable to such reviews, I am, for the reasons set out in ESKOM v HIEMSTRA, N.O. AND OTHERS (1999) 20 ILJ 2362 (LC), of the view that this is not the case. In

any event, I should point out that the right of the arbitrator to enter into the arbitration and his prin-

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cipal purpose in doing so coincide insofar as the question of whether the contractors are employees or not, is a jurisdictional fact. An arbitrator cannot decide this question decisively on his or her own. It is essentially a decision which can only be finally determined by the court of law which supervises the arbitration. In this case it is the Labour Court. See Sec 157 (3) of the Labour Relations Act read with the Arbitration Act of 1965. See also PINETOWN TOWN COUNCIL v PRESIDENT, INDUSTRIAL COURT AND OTHERS 1984 (3) SA 173 (N) at 179 B-D and PORTNET v WITCHER AND OTHERS (1999) 20 ILJ 1924 (LC).

[6] The Labour Relations Act and the system of bargaining councils which enter into what are termed "collective agreements" which bind the parties ex jure and non-parties by a decision of the Minister of Labour promulgated in the Government Gazette, are predicated on the concept of employment. Sec 213 of the Labour Relations Act defines an employee as follows:

> "Employee means:
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> (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
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> (b) any other person who in any manner assists in carrying on or conducting the business of an employer, 'employed' and

'employment' have meanings corresponding to that of 'employee'."

The definition of an employee expressly excludes an

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independent contractor from its ambit. This is consistent with the interpretation of the Labour Relations Act 28 of 1956. See OAK INDUSTRIES (SA) (PTY) LTD v JOHN, N.O. AND ANOTHER 1987 (8) ILJ 756 (N).

[7] The Constitution of the Republic of South Africa of 1996 recognises the rights of those subject to earn their living as employees and as independent contractors. See Secs 22 and 23 of the Constitution. Sec 23 is well known and provides for labour rights. Sec 22 deals with freedom of trade, occupation and profession and reads:

> "Every citizen has the right to choose their trade, occupation or profession freely. Practice of a trade, occupation or profession may be regulated by law."

[8] The law takes a special interest in persons who hire out their labour as employees. It provides them, currently, with a set of minimum terms and conditions and provides some measure of protection regarding job security. The health and safety and unemployment needs are catered for by various statutes. All this protective legislation rests upon the employee being an "employee" as defined in the applicable statute. In this case it is the Labour Relations Act. The legislature, precisely because most employees have historically been the weaker party in

bargaining their contracts of service,

has seen it fit to prohibit an employee from contracting out of the Labour Relations Act and in particular an applicable collective agreement. See Sec 199 of the Labour Relations Act. It therefore becomes necessary,

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as in this case, to determine whether a person is an employee working for an employer or not. This is not always an easy task. Our case law and that of other jurisdictions show just how difficult this can be.

[9] Several tests have been developed over the course of time to identify the contract of employment. These tests include the control test, the organisational test and the multiple or dominant impression test. See A C BASSON Essential Labour Law, Vol 1, pp 27-30. Of all these tests, the multiple or dominant impression test has gained the most currency. It is also the one which has been applied by the Labour Appeal Court as it existed before and after the introduction of the Labour Relations Act of 1995.

[10] Where, as here, the alleged employer and its alleged employees present a contract and allege a relationship of principal and independent contractor, the Council must show that the agreement and the relationship is a sham and, secondly, that the true relationship is one of employment. The arbitrator clearly understood this and he enquired into the evidence, including the documentary evidence. He was satisfied that

the two employees who testified before the tribunal, and on whose

fate it was agreed the fate of the entire workforce of Melmons hinges, had signed contracts which represented the true intention of the parties. He decided that it was not a sham, it was not a simulated transaction. The arbitrator found that the true intention was that the erstwhile employees would become independent contractors.

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Judgment 7

[11] The arbitrator then proceeded to enquire whether the parties should nonetheless be treated as employer and employees. The arbitrator examined other awards dealing with similar situations, including BUILDING BARGAINING COUNCIL (NORTHWEST BOLAND) and CHRISTOFFEL STEYN DE LANGE (BNWAAOO55/99) by Arbitrator CHRISTIE and MADLANYA and VORSTER AND ANOTHER (1999) 20 ILJ 2188 (ARB) by Arbitrator CASSIM. The arbitrator then asked himself whether there were policy considerations in this matter that required him not to give effect to the intention of the parties. The arbitrator clearly had in mind the policy considerations set out by Arbitrator CASSIM in MADLANYA's case. He concluded that he could not ascertain whether Arbitrator CASSIM found that there was no valid contract or whether he found that there was a valid one but was entitled to disregard it. Whatever the findings of Arbitrator CASSIM were, the arbitrator in this matter, considered that policy considerations alone were not sufficient to disturb a genuine contractual relationship of principal and contractor. See FCMS SUPPORT SERVICES v BRIGGS [1997] 5 BLLR 553 (LAC). I should add that the decision is a

stark one. If there is a contract of principal and independent contractor, a contract of employment between the same parties will probably not exist in respect of the same matter. This distinguishes the present case from other situations where two contracts and two contractual relationships of more or less the same kind could co-exist. See the observations in MKWANANZI v BIVANI BOSBOU (PTY) LTD and three similar cases, 1999

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(1) SA 765 (LCC) at 773G-774B.

[12] It becomes necessary in my view to consider the premise of the arbitrator's decision. This means that I must investigate his finding that the contract between the principal and the independent contractors was a genuine one. It is impliedly the Council's case that the arbitrator's finding was not only reviewable but also wrong insofar as he must have found that he had no jurisdiction to deal with the matter as he was of the opinion that the contractors were not employees. In assessing this issue I appreciate that the arbitrator had the benefit of hearing the evidence and that this properly influenced his judgment. Nevertheless, the record has been provided and, insofar as I am dealing with the jurisdictional fact, I am in a good position to deal with the matter.

[13] The contract between Melmons and Mr Alfred Mawa, which is essentially the same as that of the other employee concerned in the arbitration, envisages a full-blown contract between a principal and an independent con-

tractor. It envisages a sophisticated relationship. Mr Mawa's duties were relatively simple and they still are. He accompanies a team which installs cupboards. He assists them with loading the truck. At their destination he waits until the cupboards are installed and then wipes them clean, using a rag and thinners. He also uses some paint and a paintbrush to touch up blemishes. In terms of his contract with Melmons he has to deliver a completed product or services. Presumably he only renders a service. He is obliged to be

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in attendance on normal business days or as Melmons may instruct. He is obliged to report to a certain Mr A J Louw, who is described as a quality controller. Mr Mawa is obliged to conform to the spirit of the agreement which inter alia requires him to be polite to customers and to be sober and alert. He is obliged to conform with Melmons administrative systems and procedures.

[14] Mr Mawa acknowledges, in terms of the contract, that he has received certain equipment or tools and he undertakes to keep the equipment washed and clean according to the manufacturers' specifications. This may conjure up notions of sophisticated equipment but the equipment in question consists of "1 sak lappe, 1 besem, 5 liter thinners". I should add that Mr Mawa does not understand, at least this aspect of the contract, for he believes that the broom is his property. It also should be noted that it is possibly not properly a contract of hire because the thinners would not be returned and neither would the used rags. If Mr Mawa is negligent as regards the equipment, Melmons may claim damages and if

the damage is extensive, cancel the contract.

[15] The payment to Mr Mawa is coupled to the amount of hours/products or service delivered. The normal payment to which Mr Mawa is entitled is R7,46 per hour/per unit. There is no indication in the contract of what a unit is. If Melmons has a break in production it may be obliged to pay Mr Mawa R7,46 per hour. Mr Mawa is obliged to submit an invoice for the products delivered or services rendered or hours worked. Mr Mawa is obliged to keep an accurate record of all productive and

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non-productive hours. He may work any number of hours but is restricted to 45 productive hours per week as it is expressed, to combat fatigue and a declining productivity. He presumably also does not work during the factory's annual shutdown. Mr Mawa is obliged to avoid breaks in production which may negatively affect the date of completion of projects. He is obliged to deliver production, services and standards of the highest quality.

[16] Melmons deducts PAYE from the contract fees and Mr Mawa pays Melmons R1,00 per month for bookkeeping services. Mr Mawa is entitled to employ other persons to help him clean the cupboards. Mr Mawa has indemnified Melmons from any claim from the Receiver of Revenue, VAT, accident insurance, Regional Councils and Inland Revenue. Melmons does not guarantee Mr Mawa an income but undertakes to do its best to provide instructions or contracts. Mr Mawa hires from Melmons office/factory space at R10,00 per month. Mr Mawa does not seem to have the exclusive use of any space in the

factory in the sense that one would find in a normal contract of letting and hiring. Melmons is not responsible for any damages arising out of any injury which Mr Mawa may sustain.

[17] Melmons is entitled to retain retention monies of up to R50,00 of contract fee to pay for the wastage of material, time or unacceptable services or products or damage to Melmons property. Provision is made for liability regarding damage to vehicles, insurances excesses and traffic offences. Mr Mawa is obliged to

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report to Melmons about any incident which could affect its relationship with its client or its public image. Provision is made regarding client services, the driving of company vehicles and includes an undertaking to comply with all relevant laws.

[18] It is recorded that Melmons is a client of Mr Mawa and that the agreement does not constitute a princi- pal/agent relationship or a joint project or a partnership between them. Mr Mawa is prohibited from having any direct or indirect interest in any business in competition with Melmons and he may not do business directly or indirectly with any client or potential (moontlike) client of Melmons for a period of three from the termination of the agreement. Mr Mawa is prohibited from disclosing information to third parties about Melmons activities or methods of work. If Mr Mawa breaches the contract Melmons is entitled to cancel the agreement and to claim damages or retain any monies due to him. The agreement may be terminated immediately if Mr Mawa is guilty of dishonesty or thought to be guilty of dishonesty. Mr Mawa must sub-

ject himself to an honesty audit and/or a polygraph (leuenverklikkertoets) if and when demanded by Melmons. In the event of a dispute, the parties agreed to arbitration or the jurisdiction of the Magistrate's Court at Humansdorp. This last obligation, prima facie, appears to be in conflict with Sec 46 of the Magistrate's Court Act 32 of 1944. Mr Mawa agrees to follow the provisions of the Occupational Health and Safety Act 35 of 1993 and indemnifies Melmons against

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any claim for damages and undertakes to register himself in terms of the Compensation Act of 1993.

[19] The agreement commenced on 1 March 1999 and endures until Melmons no longer place any orders with Mr Mawa. The agreement refers to without describing a notice period. If Melmons does not use the services of Mr Mawa during the notice period, whatever that may be, it undertakes to pay him an amount equal to his average gross earnings for a similar period as the past three months. The parties record that the agreement is the full contract and that it has been interpreted although this does not seem to be the case as regards Mr Mawa.

[20] Mr Mawa was a humble employee prior to entering into the independent contract agreement with Melmons. Since entering to the contract his position has not changes 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.

[21] 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

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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 newly acquired obligations and the loss of rights and privilegeswhich Melmons has persuaded him to forego. He has no job security, he has no claim for unfair termination of his services, he is prohibited from relying on the benefits of a collectivity such as a trade union. It is fanciful to believe that he would be welcome in any employers' organisation. He has no protection against accident or illness at work. He has no safety net in the event that he cannot find work to do. He has no minimum terms and conditions such as paid holidays, paid sick leave or severance benefits. 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.

[22] In the light of this finding it is unnecessary to deal with the situation regarding Mr Jantjies or Mr Yellow as he is now known. The fate of Mr Mawa by agreement seals the fate of the other contractors working for Melmons and that of Melmons itself. In the premises the

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award of the second respondent is REVIEWED AND SET ASIDE and replaced with the following:

1. The first respondent, Melmons, is ORDERED to comply retrospectively as from 1 March 1999 with the provisions of clauses 6, 9, 14, 16, 17 and 18 (alternatively clause 10) of the Building Industry Council's collective agreement.

2. The first respondent is ORDERED to pay the applicant's costs.

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A A LANDMAN

JUDGE OF THE LABOUR COURT