IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

C641/99

In the matter between:

DEMOCRATIC NURSING ORGANISATION OF SOUTH AFRICA First Applicant

MYRA DU PLESSIS & 8 OTHERS Second to Tenth Applicants

and

SOMERSET WEST SOCIETY FOR THE AGED Respondent

JUDGEMENT

MASERUMULE AJ

1. The applicants have referred a dispute to the Labour Court for adjudication, alleging that the respondent unfairly dismissed them in October 1999. They seek reinstatement and compensation.

2. The respondent disputes that the second to tenth applicants are employees as defined in the Labour Relations Act, 66 of 1995, as amended, ("the Act"). The respondent has pleaded and contends that the second to tenth applicants were independent contractors. The court is accordingly required to decide the status of the second to tenth applicants first, prior to embarking on an examination of the merits of the alleged unfair dismissal. It is so that in the event that I conclude that the individual applicants are not employees as defined in the Act, it becomes unnecessary to examine the merits of the matter.

3. The applicants called two witnesses, Susana Van der Merwe, the second applicant, and Hawa Khan, an official of the first applicant and its Provincial Manager. The respondent called Wilfred Bird, its Human Resources Manager,Deon Jordaan, its Industrial Relations Consultant and Margaret de Reuck, its Healthcare Manager.

4. The summary of facts as set hereunder, relating to the terms of engagement of the second to further applicants, is based on the evidence of these witnesses and documents submitted by both parties and referred to in evidence. Where there is a material dispute of fact, this is indicated in the summary.

5. The second to tenth applicants are all qualified and registered professional nurses. They all performed work for the respondent as “sessional sisters”. They were all required to work one night shift of twelve hours a week, on a fixed day, unless otherwise agreed to with the respondent. As and when requested, they worked additional shifts or day shifts, or portions thereof on other days of the week.

6. The sessional sisters assisted the respondent in the care of the frail and elderly who were accommodated in homes owned and operated by the respondent. The primary function of the sessional sisters was to dispense medicines to the tenants of respondent’s homes at night, due to a legal requirement that only registered nurses can dispense such medicines, and to supervise the other junior nursing staff. Each sessional nurse was responsible for at least one ward in the home. The sessional sisters reported to a matron in the full time employ of the respondent. The matron did not work with the sessional sisters at night and reports were made to her in the mornings. The respondent employed other professional nurses as fulltime employees who worked during the day and had the same responsibilities during their shift as the sessional sisters. The respondent engaged the services of the sessional sisters to fill subsidised posts,(subsidized by the provincial government) which it stood to loose if they were not filled.

7. A letter of appointment signed by one of the sessional sisters engaged by the respondent, but who is not an applicant in this matter, sets out the terms and conditions of engagement applicable to her. Susana Van der Merwe testified that she was not given a letter of appointment and her contract with the respondent was verbal. The terms applicable to the other sessional sisters who are applicants are not known, save for those referred to in paragraphs 5 and 6 of this judgement, which applied to all

sessional sisters engaged by the respondent.

8. The sessional sisters were all paid at the same rate of R23-95 per hour, paid monthly in arrears, based on the number of hours worked during that month, irrespective of their relative seniority and experience to one another. Their hourly rate, when added up, meant that they earned more per month than a registered professional nurse employed fulltime in a provincial hospital. Their higher rate of pay was intended to compensate for the fact that they would not be entitled to sick and annual leave as well as a uniform allowance. Pay As You Earn (PAYE) and UIF contributions were deducted from their monthly pay. They were not entitled to payment of a thirteenth cheque, vacation leave or sick leave and did not participate in the respondent's pension or medical aid funds.

9. It is not clear what the sessional sisters did on the other six days or such other days on which they did not work for the respondent, save for Susana Van der Merwe, who assists one of her children in running a tuck-shop at their school and Lumka Bakana, the fifth applicant, who was in the fulltime employ of a provincial hospital.

10. It is on the basis of these facts that I must determine whether or not the sessional sisters are employees within the meaning of the Act, and therefore, subject to the provisions of the Act in relation to their employment by the respondent.

11. Section 213 of the Act defines an employee as follows:

"(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**

(b) any other person who in any manner assists in carrying on or conducting the business of an employer."

12. The Act does not define an independent contractor and one has to look at the common law for a definition.

13. The courts have for a long time grabbled with the distinction between the contract of employment, ***locatio conductio operarum***, on the one hand, and the contract of work, (independent contract), the ***locatio conductio***

operis, on the other. The diverse authorities on the subject are comprehensively dealt with by Zondo AJ, as he then was, in **Medical Association of SA & Others v Minister of Health & Another** (1997) 18 ILJ 528 (LC) **and by Myburgh JP in SA Broadcasting Corporation v McKenzie** (1999) 20 ILJ 585 (LAC).

14. The dominant impression test is summarized in the two judgements as the test most frequently used by our courts in determining whether or not a person is an employee or an independent contractor and I intend to apply it to the facts of this case as well.

15. There are at least six characteristics of both the contract of employment and the contract of work summarized in the two judgments and which I set out below and test against the facts of this case. The characteristics are the following:

15.1 **The object of the contract of service is the rendering of personal services by the employee to the employer. The services are the object of the contract.**

The object of the contract of work is the performance of a certain specified work or the production of a certain specified result.

15.2 **According to a contract of service, the employee will typically be at the beck and call of the employer to render his/her personal services at the behest of the employer.**

The independent contractor, on the other hand, is not obliged to perform the work himself/herself, or to produce the result himself/herself, unless otherwise agreed upon. He/She may avail himself/herself of the labour of others to assist him/her in the performance of the work.

15.3 **Services to be rendered in terms of a contract of service are at the disposal of the employer who may in his own discretion decide whether or not he wants to have them rendered.**

The independent contractor is bound to perform a certain specified work or produce a certain specified result within the time fixed by the contract of work or within a reasonable time where no time has been specified.

15.4 **The employee is in terms of the contract of service subordinate to the will of the employer. He is obliged to obey the lawful commands, orders or instructions of the employer who has the right of supervising and controlling him by prescribing to him what work he has to do as well the manner in which it has to be done.**

The independent contractor, by contrast, is notionally on a footing of equality with the employer. He is bound to produce in terms of his contract of work, not by the orders of the employer. He is not under the supervision or control of the employer. Nor is he under any obligation to take any orders of the employer in regard to the manner in which the work is to be performed. The independent contractor is his own master.

15.5 **The contract of service is terminated by the will of the employee whereas the death of the parties to the contract of work does not necessarily terminate it.**

15.6 **A contract of service terminates on expiration of the period of service entered into, while a contract of work terminates on completion of the specified work or on production of the specified result.**

16. The status of the sessional sisters must be determined on the basis of the test as summarized above.

17. The services rendered by the sessional sisters are personal in nature, they were rendered on the dates and at the time on which the respondent required them, a matron employed by the respondent supervised the sessional sisters as and when such supervision was required and their contracts would certainly terminate in the case of the unfortunate death of any of the sessional sisters.

18. It may be so that the sessional sisters only worked one shift per week unless the respondent specifically requested them to work additional shifts. This fact alone does not, in my view, render them independent contractors. It may mean that their services were not required on a regular basis in any one week but it does not change the nature of their relationship with the respondent. As professional registered nurses, they did not require constant and immediate supervision, but they were still answerable to the matron, to whom they reported at the end of their shifts.

19. In addition, the union negotiated on behalf of sessional sisters who were its members in respect of wages. The respondent did not object to their representation on the basis that they were not employees. Even when the respondent initiated the process of consultations in respect of the retrenchment of the sessional sisters, it seems to have acted on the basis

that they were employees. This is because if they were not, there would be no need to seek to consult over their “retrenchment”. The respondent would simply have given them notice of termination of their contracts. One does not consult with independent contractors over possible termination of their contracts.

20. The fact that the sessional sisters were, by agreement with the respondent, not entitled to leave and other benefits available to other employees does not affect their status in terms of the Act. It may be so that their agreement contravened the provisions of the Basic Conditions of Employment Act, 75 of 1997(“the BCEA”). They nonetheless fit the definition of an employee in the Act and for the purposes of the Act, are employees entitled to all the rights and protection afforded by the Act.

21. I accordingly conclude that the sessional sisters were employees as defined in the Act. It follows that the court has jurisdiction to adjudicate the dispute regarding their alleged unfair dismissal. Respondent’s point in limine is accordingly dismissed.

22. I now turn to the sessional sisters’ claim that they were unfairly dismissed by the respondent.

23. Hawa Kahn testified that prior to May 1999, the union and the respondent had concluded a recognition agreement. The union represented its members in collective bargaining regarding terms and conditions of employment, inclusive of the sessional sisters. The union did not, on behalf of the sessional sisters, table demands relating to compliance with the leave provisions in the BCEA because the sessional sisters were financially compensated for forfeiting their entitlement to leave.

24. At a meeting to negotiate increases to wages held on 5 May 1999, the union tabled a demand that the sessional sisters should also be covered by the provisions of the BCEA. At the end of this meeting, the union requested that the respondent should meet with the sessional sisters within a month to discuss the implementation of the BCEA with them.

25. On 11 June 1999, Susana Van der Merwe, a sessional sister and a union shop steward, wrote a letter to the respondent in which she accused the respondent of delaying tactics in respect of the meeting that was meant to take place within a month of 5 May. She also listed the issues which the sessional sisters wished to discuss with the respondent and confirmed that a meeting had been arranged with the union for 17 June 1999.

26. Nombuleleo Mabeka, the union's professional officer (organizer or official), Susana Van der Merwe and two other sessional sisters attended the a meeting with the respondent on 17 June 1999. At this meeting, Mabeka stated that the sessional sisters worked for more than 24 hours a month and were therefore, entitled to the benefits provided for by the BCEA. The respondent, represented by Jordaan and de Reuck, informed the union that the sessional sisters were contract workers and were not entitled to such benefits, as the cost of these benefits was included in their hourly rate. The respondent also advised the union that it had applied for "exemption" from the BCEA and was still waiting for a reply. No agreement could be reached and the union advised the respondent that it was going to declare a dispute and refer same to the CCMA. The union subsequently referred a dispute to the CCMA on 17 June, alleging that the respondent's refusal to implement the provisions of the BCEA to sessional sisters was an unfair labour practice in terms of section 2(1) of Schedule 7 to the Act.

27. Following correspondence between the union and the respondent, a meting was finally held between the two on 21 July 1999. Mabeka represented the union and Jordaan the respondent. At this meeting, Jordaan handed the union delegation a notice of the same date, headed "NOTICE OF INTENTION TO RATIONALISE OPERATIONS". In summary, the notice stated that:

26.1 the respondent had explored the sessional sisters' demand that their employment be subject to the BCEA;

26.2 the government had reduced its subsidies to the respondent by 40%, with the result that the respondent was facing financial difficulties, necessitating drastic measures which would affect the sessional sisters; and

26.3 a meeting would be held with the union on 30 July to discuss potential retrenchments of employees, including the matters referred to in section 189 of the Act;

28. From the above notice, it is clear that at the time that it was written and sent to the union, the respondent included the sessional sisters amongst employees who could be affected by the retrenchments and that the consultations that were to follow would include them as well. In fact, as it turned out, the consultations that followed only dealt with the possible dismissal of the sessional sisters, and not other employees.

29. The meeting scheduled for 30 July 1999 did not take place as the union adopted the stance that it would first wait for the final determination of the dispute that it had already referred to the CCMA in respect of the respondent's alleged refusal to implement the BCEA, before entering into discussions about the retrenchments. Nonetheless, and following further correspondence between the parties, a consultation meeting was held on 18 August 1999. The respondent advised the union that:

28.1 it had decided to restructure its operations and to implement such restructuring immediately;

28.2 the sessional sisters, whom it viewed as independent contractors, would be offered new contracts as such; and

28.3 the respondent could not afford to have the sessional sisters viewed as employees.

30. The respondent's position as outlined above was reiterated in a letter sent to the union the next day. The parties next met on 30 August 1999. The union informed the respondent that the sessional sisters were not prepared to sign the new contracts, which specifically designated them as independent contractors. The respondent then advised the union that it would proceed with the restructuring on the basis that the sessional sisters were independent contractors.

31. The respondent convened a meeting with the sessional sisters on 28 September 1999. The respondent informed the sessional sisters that they

were being given ultimatum to sign the new contracts as independent contractors by 5 October 1999 and that the services of those who failed to comply with the ultimatum would no longer be used as from that date. The ultimatum was later confirmed in writing.

32. Applicant's attorneys wrote a letter to the respondent on 1 October demanding that the sessional sisters should not be dismissed. The respondent nonetheless proceeded to terminate the employment of those sessional sisters who had failed to sign the new contract by 5 October as required in the ultimatum of 28 September 1999. It is these sessional sisters who are applicants in this matter. Other sessional sisters signed the new contracts and the respondent continued to make use of their services in terms of the new contracts that they had signed.

33. It is common cause that only the sessional sisters were retrenched. None of the respondent's other employees, who would presumably also be affected by any reduction in subsidies, were retrenched.

34. It cannot be seriously disputed that the respondent had financial difficulties, arising largely from the reduction in the subsidy that it received from government. The financial statements of the respondent for the 1998/1999 financial years indicated a loss and its budget for 1999/2000 projected a loss of more than half a million rands. The amount of subsidies that it received from government was also gradually declining. In addition, labour costs represent the single highest expenditure, consuming more than half the respondent's total annual income.

35. The implementation of the BCEA would undoubtedly add to the respondent's financial woes. Provision would have to be made for payment for sick and annual leave as well as overtime where applicable. The sessional sisters had been employed on the basis that they would receive an hourly rate and were not entitled to additional benefits such as payment for annual or sick leave.

36. In my view, and based on the evidence, the respondent had a valid reason to consider the dismissal of some of its employees for operational reasons, given the financial burden that would be imposed on it by compliance with the BCEA. The sessional sisters were singled out for possible retrenchment because they had been employed on the basis

that they would not receive benefits which would increase the respondent's financial burden. They were a distinct category of employees whose employment terms differed materially from other employees. Whilst the sessional sisters' salaries took into account the fact that they would not get such benefits, the union's demand was simply that the additional cost of providing these benefits be added onto respondent's wage bill.

37. I do not agree with the submission on behalf of the applicants that a requirement for compliance with legislation cannot be a ground for the possible dismissal of employees for operational reasons. Clearly, where the reason for the dismissal is simply to avoid compliance with the law, such a dismissal would be unfair. However, that is not the case in the present matter. The respondent's position is that the sessional sisters worked on the basis of a fixed hourly fee, which excluded additional benefits such as leave and retirement funds. The sessional sisters now wanted to benefit from the provisions of the BCEA, which have a real and substantial impact on the ability of the respondent to afford the cost thereof. The respondent sought to dismiss the sessional sisters due to its financial inability to comply with the provisions of the legislation. Its financial problems, as a non-profit organisation, were known to the union. The reason for contemplating the retrenchment of the sessional sisters was, in the circumstances, a valid and fair one.

38. The procedure followed by the respondent in seeking to achieve its objectives, however, is not entirely faultless. It is clear from the evidence led that having formed the view that the sessional sisters were not employees, the respondent's stance in its consultations with the union was greatly influenced thereby. It tabled one alternative only, that of the engagement of the sessional sisters as independent contractors. The truth however, is that it still attempted to consult with the union.

39. The union, on the other hand, did not adopt a helpful attitude either. It initially refused to consult with the respondent at all, citing its referral of a dispute to the CCMA as a reason. Even when it attended meetings, its attitude, as reflected in the evidence of Mabeka and minutes of the meetings, was that it would not consider the retrenchments in the context of the respondent's stance regarding the employment status of the sessional sisters. It made no meaningful contribution to the consultation process.

40. The union at times did not attend scheduled meetings. The union did not attend two meetings scheduled for 16 and 22 September. Even when the respondent informed the union that the respondent would then consult directly with the sessional sisters, this did not elicit any response from the union. In fact, the last meeting that the union attended was the meeting of 30 August 1999. The union did not take part in any consultations after the meeting of 30 August 1999.

41. This is a case where both the applicant and the respondent did not entirely do their part to ensure that the objects of section 189 of the Act are met. It is so that the primary obligation rests with the respondent to initiate the process and to guide it to its conclusion. There is, however, an obligation on the union to contribute to the process by attending meetings, responding to proposals and making its own proposals, see **Johnson and Johnson v CWIU & Others** (1999) 20 ILJ 89 (LAC) at 96F-J.

42. In my opinion, whilst the procedure followed by the respondent was not perfect, it did attempt to reach consensus with the union regarding the possible dismissal of the sessional sisters and the alternatives available. The union, in my view, spurned the opportunity for consultations by initially adopting an unco-operative attitude and then making very little if any contribution during the process. The claim that the dismissal of the sessional sisters was not in accordance with a fair procedure is accordingly without merit.

43. I do not believe that, having regard to the requirements of the law and fairness, that this is a case where costs must follow result.

44. In the result, applicants' referral is dismissed and there is no order as to costs.

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MASERUMULE AJ

For Applicants : J Whyte of Chennels Albertyn Attorneys

For Respondent : Willem Jacobs of Willem Jacobs Attorneys

Date of trial : 19-21 June 2000

Date of judgment: 19 December 2000