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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J3564/00

2002.05.31

In the matter between

NUMSA Applicant

and

TSHIGI Respondent

J U D G M E N T

NGCAMU, A.J: The applicants seek to review and set aside the arbitration award made by the first respondent in his capacity as an arbitrator. The third respondent is opposing the application.

The application for review is one day late. This is an insignificant period of time. The applicant has explained that

the delay was caused by communication difficulties between the second applicant and the applicant's attorneys. The reason given is acceptable. The respondents have not opposed the application for condonation. There will be no prejudice on the respondent if the condonation is granted.

Taking into account the factors usually considered as set out in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) the applicant has made a case for condonation. The application is accordingly granted.

The first applicant is a union, which has brought the application on its own and on behalf of the second applicant. The second applicant was an employee of the third respondent, and a member of the first applicant.

The second applicant commenced working for ESCOM in August 1994. There was no signed contract of employment. His duties were to deliver electricity bills to customers as well as ESCOM's pamphlets. He collected information from customers, meter numbers and meter readings. Applicant worked in Sebokeng Zone 6. He was paid 55c per account delivered. In January 1995 he was transferred to administrative work at Sebokeng Zone 7. He performed the same job he did in Zone 6. In August he was transferred to

Polokong Township to recruit customers. He worked in a steel container provided by ESCOM. He was supervised by an ESCOM employee. He explained the ESCOM project to the customers. At the completion of the project he remained to deal with the queries the customers had. In January 1997 applicant signed a 6-month contract of employment. In terms of this contract he was employed as an electricity representative. He was remunerated monthly for services provided. He was required to complete an invoice for services rendered. The contract expired in June 1997. On expiry of this contract he signed another contract for the same period. This contract provided that applicant was an independent contractor. The contract expired in December 1997. At the expiry of this agreement no further agreement was signed by the applicant. However he continued working.

All temporary employees, except for the applicant, were employed as permanent employees. In October 1998 the applicant referred an unfair labour practice dispute to the CCMA. The Conciliation did not resolve the dispute. The dispute was then referred for arbitration. This dispute was however never arbitrated.

On 31 March 1999 second applicant was advised that his

services were no longer required. This was confirmed by a letter dated 8 April 1999. Applicant then referred an unfair dismissal dispute to the CCMA for conciliation. The dispute was not resolved, and a certificate was issued. He then referred the dispute for arbitration. During the arbitration ESCOM's representative raised a point *in limine* that the applicant was not an employee and therefore the arbitrator had no jurisdiction.

The second point raised was that the applicant should have exhausted internal process. The arbitrator then ruled that the applicant was not an employee as defined by the Labour Relations Act, and accordingly the CCMA had no jurisdiction. In respect of the second point the arbitrator ruled that even if she had ruled that applicant was an employee, she would not have had jurisdiction because the dispute was referred prematurely.

The applicants have sought to review the ruling of the commissioner on several grounds. These grounds of review are set out in the applicant's affidavit, and I do not have to set them out again. The applicant has made bald allegations in regard to several issues, unsupported by evidence. These issues were not taken up in argument. The review was argued on two grounds.

The applicant submitted that the commissioner did not consider the evidence that the applicant performed his job as an employee of ESCOM, although he signed a contract to the effect that he was an independent contractor. It was further submitted that the commissioner did not consider applicant's evidence to the effect that after December 1997 no further contract was signed. The applicants further submitted that the commissioner did not consider certain evidence placed before her.

The issue between the parties is whether the second applicant was employed by the third respondent as an employee in the context of the Labour Relations Act. The second applicant's submission is that the third respondent regulated his hours. He performed the same functions as those performed by the ESCOM employees. ESCOM provided him with an office and equipment for his job. He further submitted that he was supervised by managers of ESCOM and he attended the team session meetings with ESCOM's employees. It was submitted by Mr Daniels on behalf of the applicants that the commissioner did not consider this evidence placed before her.

The applicant's further submission is that the second

applicant was paid regularly. It was therefore submitted that the applicant was not employed to perform specific tasks. The evidence however discloses that the second applicant was employed to work on projects. The arbitration record is not a good one. The dispute raised by the parties can however be determined on the evidence available.

The applicants have to show that there is a defect in the award as contemplated in section 145 of the Labour Relations Act. The defects in the award would include the commissioner's misconduct. In *Hyper Chemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd* 1992 (1) SA 89 (W) the court held that if and where an arbitrator's award is wrong in law, this is not enough to set it aside. The court held that a mistake, no matter how gross, is not misconduct. At most gross mistake may provide evidence of misconduct in the sense that it may be so gross or manifest that it could not have been made without the arbitrator committing a misconduct. In such a case the court might draw the inference of misconduct.

For the applicants to succeed in proving misconduct they have to show that the commissioner did not consider relevant issues in accordance with the law and the interests of justice.

Mr Mokoena, for the third respondent, submitted that the commissioner considered all the relevant evidence.

It is common cause that there was no tax or provident funds deductions deducted from the second applicant's salary. ESCOM did not deduct any PAYE from the salary of the second applicant, unlike other employees of ESCOM. The second applicant submitted invoices for services rendered. As a result of this the second applicant did not have a fixed salary. His salary was determined by the hours he spent providing services, which had to be verified from the records.

Clause 4.3 of the agreement signed between ESCOM and the second applicant provides that:

"This agreement does not entitle the electricity representative to any expectation to be appointed in future by ESCOM neither in the capacity as an employee nor in the capacity of an independent contractor."

Paragraph 5 provides:

"This agreement shall, notwithstanding the date of signature, be deemed to have commenced on the effective date, and continue for a period of three months (as a trial period) subject to either party giving the other not less than one month's written notice of termination. This agreement may also be

extended in writing by additional monthly periods after the initial six months' period. All other terms and conditions will still apply."

These clauses indicate that second applicant was not entitled to expect to be an employee of ESCOM. It was a term of the agreement that the second applicant would be paid on a monthly basis.

Clause 11 of the agreement provides:

"11.1 The electricity representative shall keep and regularly maintain the necessary timeous and accurate books and records of all transactions related to or contemplated by agreement to permit verification at any reasonable time of all amounts to be paid by ESCOM.

11.2 The electricity representative shall also keep any other financial or statistical information which may be required by ESCOM from time to time."

It was not submitted that other employees of ESCOM were required to keep a record book recording the transactions to verify the amounts payable to the second applicant. The applicant was not entitled to benefits afforded to other ESCOM employees. He also did not have the company number like other employees of ESCOM. This to my mind

indicates that the applicant was differentiated from other employees.

One of the factors to be taken into account to determine if a person is an employee or an independent contractor is to see if the employer has control over him. I would venture to state that the business of the employer has to be taken into account. If the work to be performed has to be done during certain hours of the day, the employer is entitled to stipulate when the task has to be performed. It does not assist the employer to allow the contractor to do work at a time when it is not possible to check the work.

Applying this scenario to the present case, it is logical that the second applicant had to submit the meter readings and queries from customers during ordinary working hours. This is done to enable ESCOM to solve the queries submitted at a time when the staff is available. Similarly, the employee is entitled to determine how the task is to be performed. The employer is accordingly entitled to train the contractor on how the task is to be performed. In so doing the independent contractor may be required to attend the sessions provided by the employer. The employer would then be entitled to check if the task is done to the satisfaction of the employer.

In my view it would be proper for the employer to provide working equipment to be used by the contractor, particularly where certain forms have to be completed as in the present case.

The second applicant has further submitted that he had to report when he would be absent from work.

In my view it would be absurd to conclude that the contractor is an employee for the reason that he has to report when he would be absent. ESCOM required that there would be a representative at a particular area on a daily basis. It was therefore entitled to know if the representative was not available so that alternatives could be made if need be.

It was also submitted that ESCOM employed other employees as full-time employees, who were in a similar work environment. The second applicant did not provide evidence to show that the others had signed as independent contractors agreement. In the absence of such evidence the inference can be inferred that he was different from the others. There is no evidence that the second applicant applied for a vacant post to become a permanent employee. The fact that the second applicant continued to work on the same terms and conditions after the expiry of the agreement does not entitle him to be

treated as a permanent employee.

Another problem facing the applicant is that he does not show from which period he regards himself as an employee, as defined in the Labour Relations Act, in view of the agreement that he had signed. Even if the second applicant is regarded as a temporary or casual employee, as provided for in clause 12.4 of ESCOM's conditions of employment, the termination of employment is by notice. The applicant was given a notice. The termination of employment could not therefore be said to have been unfair. However, the applicant lived with the independent contract agreement, and performed in terms thereof. He only declared a dispute when other employees were taken on permanent basis. This, to my mind, shows that the applicant had regarded himself as an independent contractor as opposed to the other employees of ESCOM.

In my view the commissioner considered all the facts placed before her. The award has been reasoned out and arrived at after considering all the evidence before her.

The applicants further criticise the commissioner for not applying the correct legal test.

The applicants have failed to show that the commissioner failed to apply the correct test which should

justify the review of the award. The award made was based on the evidence before the commissioner. If the applicants wanted to rely on a mistake or law, they must show that the mistake is so gross that the award cannot be allowed to stand. In my view they have failed to do so.

It was contemplated within the framework of the Labour Relations Act that some awards may not be satisfactory. This however does not provide a ground for the review. The court is not empowered, in a review, to scrutinise the award to find the loopholes in order to set aside the review. As long as the court is satisfied on the evidence provided that the commission applied his mind to the facts the award would pass the test. This will be the case even if the commission arrives at the wrong conclusion. The court is not looking for the correctness of the award, but for the reasons for arriving at a particular decision. In short, the commissioner simply applies logic on the facts presented.

In the present case I am not persuaded that the commissioner committed any irregularity, or committed any misconduct. I am not persuaded that any injustice was perpetrated as a result of this, and also as contemplated in *Pure Fresh Foods (Pty) Ltd v Dayal and Another* (1999) 20 ILJ

1590 (LC). The applicants have failed to show that he was deprived of a fair hearing in this matter.

In the light of the above the award cannot be interfered with.

O R D E R

The order that I make is therefore the following:

(a) The application for review is dismissed.

(b) The applicants are ordered to pay the costs of the third respondent.

ON BEHALF OF THE APPLICANTS: ADV DANIELS

ON BEHALF OF 3RD RESPONDENT: ADV MOKOENA