IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH **REPORTABLE**

CASE NO: P734/02

HEARD:1/11/02

DELIVERED:7/11/02

In the matter between:

M L JACK **APPLICANT**

and

DIRECTOR-GENERAL DEPARTMENT

OF ENVIRONMENTAL AFFAIRS **RESPONDENT**

J U D G M E N T

PILLAY, J

1. In this urgent application, the applicant seeks to enforce a contract of employment.

2. On 2nd September 2002, the respondent informed the applicant that his application for the position of Conservation Inspector at Port Elizabeth was successful.

3. On 19th September 2002, a day after receiving the letter of appointment, the applicant confirmed his acceptance of the appointment. He resigned from his employment on the same day so that he could take up his new job on 1st October 2002.
4. On 29th September 2002, the respondent informed the applicant that his appointment was revoked because of an administrative error. The applicant discovered that the respondent was considering appointing a woman to the post.

5. On 10th October 2002, the applicant's attorney wrote to the respondent, urging it to abide by the contract of employment, failing which the applicant would approach this Court for relief. The respondent did not reply. This application was launched on 28th October 2002.

6. The dispute was settled at Court on the basis that the respondent would employ the applicant for one year only. However, the respondent resisted paying costs on two grounds:

7. Firstly, Mr Kroon for the respondent submitted that the matter was not urgent. Financial difficulty occasioned by unemployment, which was one of the reasons advanced for urgency, has been held not to be a sufficient ground for urgent relief, he submitted.

8. I accept Mr Kroon's submission as a general statement of our case law. However, the additional reason advanced for urgent relief is that the post, which has not yet been filled, might be filled, thereby inconveniencing the other appointee and the respondent if the applicant were to take up his position later.

9. In my view, as the respondent put the applicant to such inconvenience through its own inefficiency, it cannot complain about being inconvenienced by an application of this kind. The applicant could be seriously disadvantaged if the post is filled by the time the dispute is determined in the ordinary course.

10. Secondly, it was submitted that this Court does not have jurisdiction as the Basic Conditions of Employment Act 75 of 1997, (hereinafter referred to as the "BCEA") does not apply, as the applicant was not an employee as defined: The applicant had not rendered services and had not been remunerated as yet.

11. Historically, the requirements for a contract of employment were derived from the statutory definition of "employee". It is logical to follow that approach as there cannot be a contract of employment unless the parties thereto are employer and employee either at common law or as defined in statutes.

12. At common law, a contract of employment (*locatio conduction operarum*) was a consensual contract whereby an employee undertook to place his personal services for a certain period of time at the disposal of an employer who in turn undertook to pay him the wages or salary agreed upon in consideration for his services. (Smit v Workmen's Compensation Commissioner 1979 (1) 51 @56E-F).

13. The BCEA defines "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,….

14. From these definitions it follows that the two criteria that distinguish a contract of employment from other contracts are : rendering personal services or working for another and receiving remuneration. The presumption as to who is an employee facilitates the factual enquiry and seeks to overcome the difficulty of distinguishing employees from independent contractors. (section 200A of the Labour Relations Act 66 of 1995 (the "LRA"))

15. Additionally, "remuneration" is defined as:

" …any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State,…."

16. The International Labour Organisation (ILO) also defines "wages" as remuneration or earnings which are payable by virtue of a contract of employment by an employer to an employed person for work done or for services rendered or to be rendered. (Article 1 of Convention Concerning the Protection of Wages Convention No. 95)

17. The BCEA applies to all employees and employers, with certain exceptions, none of which apply to this case. (section 3 of the BCEA).

18. There is a view that remuneration is not an *essentialia*. (Brassey, M:

Employment Law (Butterworths) at B1:20-B1:21; Mureinik, Etienne The contract of Service : An Easy Test for Hard Cases 1980 SALJ 246 at fn16 and 262)

19. Firstly, that view may have been valid before the current definitions of "employee" and "remuneration" were statutorily entrenched in the BCEA. Constitutionally speaking, I doubt that it can ever be a fair labour practice to permit an employee to work for no remuneration either in cash or kind. (section 23 of the Constitution Act No 108 of 1996)

20. Mureinik seems to have held that view out of concern for those who rendered services but who were deprived of the protection of the labour legislation, for example those who worked for commission. Nevertheless, he found support for it in Rodrigues and Others v Alves and Others 1978 (4) SA 834 @ 841 (A), a case dealing with vicarious liability. In view of our constitutional democracy and the labour laws promulgated under it, there is less of a need to strain the interpretation of the law for egalitarian effect.

21. Secondly, insofar as the payment of remuneration is not a requirement in delictual claims based on vicarious liability, it may be distinguishable from employment law. (See Wallis, MJD Labour and Employment Law (Butterworths)at 8 fn1 and the judgment of Conradie J in RH Johnson Crane Hire (Pty) Ltd 1992 (3) SA 907 (C))

22. If parties have reached agreement on all the *essentialia,* a contract of employment will be enforceable on those terms that are agreed. (Wallis at 12). That a contract of employment has come into existence is not disputed. The respondent's letter of appointment constituted the offer to remunerate in exchange for services, which the applicant accepted on 19

September 2002.

23. It is implied from the terms of the contract that performance would only take place from 1st October 2002. Hence the tender of services and the payment of remuneration were delayed or suspended until then. If regard is had to the ILO Convention (above), it is conceivable that remuneration may be paid in advance before services are rendered.

24. There is nothing in the contract of employment that suggests that the parties did not intend to create an employer-employee relationship. The letter of appointment stipulates the date of appointment as 1st October 2002. Therefore the applicant became an employee and the respondent his employer on 1st October 2002. In my view a valid, binding contract of employment governed by the BCEA was concluded.

25. Mr Kroon referred me to the Labour Court decision in Whitehead v Woolworths (Pty) Ltd 1999 20 ILJ 2133 LC, which supported respondent's cause. In that case Waglay AJ, as he then was, found that the applicant was not an employee as defined in the LRA, but an applicant for employment who was entitled to compensation. Firstly, that case is distinguishable from the facts and the law applicable in this case. Secondly, if that argument were to prevail in the circumstances of this case, the effect will be that an applicant for employment will be better secured by legislation than one who has concluded a contract of employment. Such differentiation is irrational and constitutionally untenable.

26. Mr Kroon, however, neglected to refer me to the obviously more authoritative decision of the Labour Appeal Court in that matter

(Woolworths (Pty) Ltd v Whitehead [2000] 6 BLLR 640 (LAC) where Judge President Zondo said that an employer is entitled to change his mind between the date of the interview and the date of taking the final decision to appoint a candidate "provided he has not yet made an offer to anyone (*sic*) of the candidates."

27. In University of the North v Franks & Others (2002) 8 BLLR 701 (LAC) Van Dijkhorst AJA held that an irrevocable offer for a given period, which is communicated to the offeree, becomes irrevocable upon receipt unless the offeree rejects the irrevocability. It is arguable that the offer was couched in language that implied that it was irrevocable. Apart from the usual platitudes about the applicant's successful candidature, words of welcome and expressions about a "long and successful" association, the respondent asked the applicant to report for duty. Having regard to employment practice, the offer must by implication be irrevocable as an employer who makes such an offer must anticipate that the employee who accepts may consequently terminate her current employment. The irrevocability of an offer of employment also seems to underly the comments of Zondo JP cited above.

28. Furthermore, it was submitted that the Court ought not to grant specific performance by way of an application, having regard to the legal difficulties that such relief raises. (Stewart Wrightson v (Pty) Ltd v Thorpe 1977 (2) SA 943 (A)

29. In my view, those difficulties arose as a result of the absence of adequate legislation and the Courts having to interpret the common law. Now section 77A(e) of the BCEA specifically mandates the Court to order specific performance. If such relief is inappropriate in the circumstances of

this case, the respondent should have filed opposing affidavits.

30. Finally, the respondent failed to respond timeously to the applicant's attorney's appeal to resolve the dispute and thereby to avert this application. Furthermore, the terms of the settlement gives the applicant twelve months employment which he might not have secured but for this application.

31. The respondent is ordered to pay the applicant's costs.

_____

JUDGE D. PILLAY

FOR THE APPLICANT : ADVOCATE M. GROBLER
INSTRUCTED BY : SCHOONRAAD, DELPORT & VAN DER MERWE

FOR THE RESPONDENT : ADVOCATE KROON
INSTRUCTED BY : STATE ATTORNEY