

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: J537/04

In the matter between:

ZIPHAKAMISE CAPITOL

First Applicant

CATERERS (PTY) LTD

And

G WOLMARANS

1ST Respondent

**N MILES NO
COMMISSION FOR CONCILIATION**

2ND Respondent

MEDIATION AND ARBITRATION

3RD Respondent

JUDGMENT

MOLAHLEHI J

Introduction

- 1] This is an application in terms of which the applicant sought an order to review and set aside the arbitration award issued by the second respondent (the commissioner) under case number MP 3841/03. In terms of the arbitration award the commissioner found firstly that

the third respondent, the third respondent, the Commissioner for Conciliation Mediation and Arbitration (CCMA) had jurisdiction to entertain the dispute and secondly that the dismissal was unfair.

- 2] The applicant also brought an application for the condonation of the late filing of its review application.
- 3] The first respondent (the employee) applied for condonation for the late filing of the opposing affidavit.
- 4] The main course of the delay was the negotiation process that the parties were engaged in. In my view this is a reasonable and acceptable explanation. Accordingly, the late filing of the opposing affidavit is condoned.
- 5] The 2 (two) issues for consideration arising from the jurisdictional point raised by the applicant relates to: (a) was there an employment relationship between the applicant and the employee. (b) if there was an employment relationship between the parties which law between South Africa and Swaziland is applicable. If found that there was employment relationship between the parties, and that the applicable law is this of South Africa, then the issue in relation to the merits is whether the decision of the commissioner was reasonable.

Background facts

- 6] The employee who was arrested on two occasions in Swaziland for working without a work permit resigned and thereafter referred an unfair dismissal dispute to the CCMA. employee claimed constructive dismissal in that according to him the applicant failed to address the issue of him not being able to perform his duties because of being posted to Swaziland where he did not have a work permit.
- 7] The applicant did not attend the arbitration hearing and thus the commissioner having heard the version of the employee issued a default award in favour of the employee.
- 8] Before considering the merits of the constructive dismissal claim, the commissioner conducted an inquiry into whether or not the CCMA had jurisdiction to entertain the dispute. After concluding that the CCMA had jurisdiction the commissioner proceeded to determine whether a constructive dismissal as alleged by the

employee did take place. concerning the issue of jurisdiction the employee testified that the applicant promoted and posted him to manage the Mpumalanga and Swaziland region.

9] As indicated earlier the applicant had difficulties in renewing his work permit. After his second arrest for working in Swaziland without a work permit he contacted Mr King (King) the managing and director of the applicant and told him that he had to leave Swaziland because of the problem with the work permit.

10]The employee was then contacted by King who informed him that the applicant was in the process of tendering for a government catering contract in the far north, Polokwane (formerly Pietersburg) and Messina areas. He was then required to go and do an assessment of those tenders. On return to South Africa the employee stayed with his sister in Mpumalanga.

11]After completing the assessment the employee was contacted again by King who enquired from him if he could go to Swaziland over a weekend to do a catering function there. The employee told him that he was unable because of the problem of the work permit.

12]It would appear that the employee then drove to Pietermaritzburg,

the Friday preceding the weekend he was required to return to Swaziland. On his way he contacted King who told him it was too late and that he should come on Monday.

13]On arrival on Monday, the employee met Mr Robertson who demanded that he should hand in the car keys to another employee who needed to use the vehicle. King arrived at 10h00 and on arrival required the employee to hand over the cell phone. King then informed the employee that he was placed on unpaid leave.

14]The employee went back to Mpumalanga where he contacted the Swaziland consulate in Johannesburg to inquire as to what is the best way to resolve his work permit problem. He was advised to contact the Swazi authority directly in Swaziland. The employee further testified that he ran into financial difficulties at the end of July because the applicant did not pay his salary. The other cause of his difficulties arose from the cancellation of both the medical aid and the provident fund contribution.

15]On the 8 August 2003 the employee sent his resignation letter to the applicant. The letter reads as follows:

“As a result of me not having received any notice or termination of my employ with Capitol Caterers, and nor receiving any salary payment for the month of July 2003.

As a result of economical pressures, I am forced to resign my services from Capitol Caterers to seek other employment in an attempt to ensure my economical survival. It is thus with duress that I submit my resignation. Should you wish to discuss the issue then please contact my solicitor Mr Nel with whom you are already in dialog?”

Ground for review

16]The applicant contended that the CCMA did not have jurisdiction to entertain the dispute because the employee was employed in Swaziland by Capitol Caterers Swaziland (Pty) Ltd (Swaziland Caterers). The applicant further contended that the employee’s claim that he was employed in Mpumalanga was untrue because neither the applicant nor Swaziland Caterers never carried on any business activities in that area. Even in his return from Swaziland, the employee did not do any work for the applicant in Mpumalanga.

17]The applicant contended that after the employee was evicted from Swaziland and was placed on paid leave because he could no longer continue the functions of which he was employed i.e as area

manager for Swaziland, Mr Tshabalala who is also a director of the applicant and King contacted the employee and asked him to attend pre-tender briefings in respect of certain defence force contracts in Nelspruit, Pietersburg. The rule of the employee according to the applicant, in this tender process was required to be present and not to do anything.

18]In as far as the problem of the work permit encountered by the employee in Swaziland the applicant contended in its supplementary affidavit that; the employee had a valid work permit before joining the applicant, when he worked for another company known as Compus Group during January 2000. The applicant further contended in this connection that the employee evaded the Swaziland authorities by claiming that the Compus Group and the applicant was one entity.

19]It has to be noted that this evidence was never presented before the commissioner because the applicant had abstained from attending the hearing.

20]In further support of its contention that the employee was employed by Capitol Caterers Swaziland, the applicant relied on the application letter for a work permit written by the employee on the Capitol Caterers which reads as follows:

“Re application for work permit

Capitol Caterers is a Swazi registered industrial catering company established in 2002. With our sister company in South Africa that is a well established company on the basis of developing from previously disadvantaged communities in South Africa. Our goal is to have Capitol Caterers Swaziland fully established as an individual company with only Swazi citizens employed by Capitol Caterers Swaziland and by utilising only Swazi suppliers.... We hereby wish to make application for a work permit or an extension of its current work permit for two years for Mr Wolmarans. He is currently employed by Capitol Caterers”.

21]The arbitration award was also challenged on the basis that the commissioner misdirected himself in that he failed to establish the following:

(a) *“The First Respondent’s employment history with the Applicant or Capitol Caterers Swaziland (Pty) Ltd.*

(b) *Whether or not the First Respondent was in possession of a valid work permit to work in Swaziland whether for Capitol Caterers Swaziland (Pty) Ltd or the Applicant, and if not, why was he not in possession of such permit;*

(c) Why the First Respondent was evicted from Swaziland;

(d) Why the First Respondent was not able to obtain a work permit after he was evicted from Swaziland so that he could continue working as area manager for Swaziland;

(e) How was it that the First Respondent was able to work in Swaziland initially for twelve months until his so called relocation to Ndogwana when he was appointed as area manager Mpumalanga and why he was unable to return to Swaziland to continue his duties as area manager for Capitol Caterers Swaziland (Pty) Ltd;

(f) That the Applicant's letterheads which disclosed the branch offices of the Applicant failed to disclose Mpumalanga as a branch area".

22]As far as the impossibility of performance of his duties in Swaziland the applicant attributed this to the employee himself.

Evaluation

23]The case of the applicant is that the employee was employed in Swaziland and was under the direct control and instruction of Capitol Caterers Swaziland (capitol Swaziland). It is also the applicant's case that although the applicant is the parent company, Swaziland Caterers, operates as an independent and autonomous registered legal entity.

24]The letter that appointed, the employee "projects Manager" at Waterford Swaziland, dated 13 February 2002, was signed on the letter head of the applicant and signed amongst others by King.

25]The employee's letter of promotion also signed by King on the letterhead of the applicant and dated 18 December 2002. The letter reads as follows:

"It gives me pleasure to inform you of your promotion to Area Manager-Swaziland and Mpumalanga regions. This is effective from 1 January 2003. Your monthly salary package has been increased to R7400.00 with effect from the same date. However I must inform you that unless there is a status change your next review date is 1 March 2004 in line with the rest of the company. Other than the conditions already discussed with you for an Area Manager, all conditions for your original letter of appointment will

remain the same. Well done on your performance over the last year and we look forward to further personal and company growth in the year ahead. Should you have any queries please contact me.

26]Contrary to the contents of the letter of promotion referred to above, King suddenly when an unfair labour practice is declared signs a letter dated 7 August 2003 on the letter head of Swaziland Caterers wherein he stated the following:

“I refer to the abovementioned case number where the referring party is Mr G Wolmarans. Please note, said referring party is not an employee of Capitol Caterers South Africa, he is an employee of Capitol Caterers Swaziland (Pty) Ltd, fully registered and totally operative Swaziland Company. Other than some South African Company stationery being used on occasions, there is no other connection whatsoever. The South African CCMA therefore has no jurisdiction in this matter whatsoever and we recommend that you advise Mr Wolmarans to refer any dispute to the relevant labour authorities in Swaziland.

27]The record reveals that the salary of the employee was paid for by the applicant and not Swaziland Caterers. The company profile of

Swaziland Caterers also gives a different picture to the one which the applicant sought to present, that the employee was employed by Swaziland Caterers. There is no argument that the employee is a South African and not a Swazi citizen. In this connection the Capitol Caterers company profile states:

1.1 While Capitol Caterers does have a South African parent company, the Swaziland Company operates completely autonomously.

1.2 All staff employed are Swazi citizen.

1.3 Directors are British/ South African and Lesotho/ South African.

1.4 The South African connection is used exclusively for training and dietetic services at present. As soon as possible, these will become Swaziland employees and functions.

1.5 All supplies, where possible, are purchased in Swaziland.

28] Paragraph 1.4 of the Company profile in fact is consistent with what the employee said in his application for a permit when she said:

“The South African connection is used exclusively for training and dietetic services at present. As soon as possible, these will become Swaziland employees and functions.

Thus, reliance on the letter as indication of the employment

status of the employee does not advance the case of the applicant.

29]In seeking to build up a case that the employee was employed by Swaziland Caterers, King addressed a letter to the employee wherein at clauses 6 & 7 he states:

6. “While in Swaziland you had limited private use of a company delivery truck and cell phone. Both were company possessions and are for company use in Swaziland. Your misrepresentation to the CCMA I find frivolous and immature. Besides should you wish to continue to claim that you had a company car according to South African benefits I am sure the South African Receiver of Revenue would be interested to know where all the tax is for a company car benefit!!.

7. *Having eventually sorted out the mess you left in Swaziland (including not paying your own personal maid) we realise that there is an amount of R7 308. 00 that you have not accounted for. You are fully aware that any company money taken for any purpose whatsoever has to be fully accounted for. Besides the*

obvious fact of this adding to concern over your honesty, integrity and intentions we will give you until 25 August to return all this money and / or original valid documentation on what you have spent for company purposes. Failing which we will report this as theft to the police and seek a warrant of your arrest”.

30]In this letter King does not say that the employee did not declare the car allowance benefit to the South African Receiver of Revenue, but he doubts if he has. However the pay slip of the employee issued by the applicant reflects a travel allowance in the amount of R6000, 00. In this connection the pay slip also reflects that the employee contributed to the South African Unemployment Insurance Fund and not Swaziland.

31]On 27 August 2003, the applicant addressed a letter to the employee's attorney' and after referring to clause 7 quoted earlier King states:

"We have this day 26 August 2003 laid a charge of theft with the SAPS. The physical address used is c/o Mrs A Arnold of Ngodwana. Mpumalanga Province. We recommend you advise Mr Wolmarans of this charge and should he make an arrangement that is to our satisfaction as requested in the

previous letter these charges will be withdrawn. Should he make no attempt to rectify this matter we have no option but to seek redress including all costs involved.

32]It would appear that in laying the charge King handed to the South African police an unsigned affidavit where amongst others he stated the following:

“I am the Managing Director of a company known as Capitol Caterers based at 121 Loof Street Pietermaritzburg. One of our employees absconded from the company during August 2003. His name is Gerrie Wolmarans.

33]From the above analysis there can be no doubt that the, probabilities supports the version that the then employer was employed by the applicant and not Swaziland Caterers.

34]It has now been accepted in our law that the preferred test when dealing with the question of whether or not there exist an employment relationship between the parties is the dominant impression test. The enquiry in applying this test goes beyond what the parties themselves claim to be the true nature of their relationship. The courts and other dispute resolution bodies have gone beyond even the written description of the nature of the relationship in the contract, to uncover the underlying and the

nature of the relationship. The dominant test has since **Ongevallekommissaris v Onderlinge Verskeringsgenoodskap AVBOB 1976 (4) SA 446 (A)** and **Medical Association of SA & others v Minister of Health & others (1997) 18 ILJ 528**, gained more support from the courts and the various dispute resolution bodies. It has been found that when a court or other dispute resolution bodies are called upon to decide whether a person is an employee or not, they are enjoined to determine the true and real position between the parties. In this regard, the issue is not exclusively decided on what the parties have decided to call their relationship. In **Denel (Pty) Ltd v Gerber (2005) 26 ILJ 1256 (LAC)**, the court held that the realities of the relationship between the parties should be taken into account in assessing the true nature of the relationship. The expression by the parties as contained in the agreement is an impartial factor, can be ignored.

35]I now proceed to deal with the issue of the employee being posted to perform work in a foreign country. The issue here are the rules which legal system should govern the dispute arising from the employment relationship which is concluded later in this judgement, existed between the parties.

36]In **Kleinhans v Parmalat SA (Pty) Ltd (2002) ILJ 1418 (LC)**,

the court per Pillay J held that consistent with the common law principle of party autonomy, parties to international contract are free to agree, expressly or tacitly, on the specific legal system to govern their contract, and as to which country law would govern the relationship, is for the court to assign the proper law of contract and jurisdiction.

37]In terms of the test to apply in determining the proper law of contract and jurisdiction the court in **Kleinhans** (supra) noted that the subjective test which was applied in **Standard Bank of SA v Efroiken & Newman 1924 AD 171 at 185** had not been rejected. However, the court preferred the objective test which was enunciated in **Ex parte Spinazze & Another NNO 1985 (3) SA 650 (A)**.

38]The enquiry in terms of the objective test entails an investigation into which law and jurisdiction “does the contract have the most real connection?” see **Kleinhans** (supra) [19]. The factors to consider in determining the proper law of contract includes **locus contractus, locus solutionis, nationality and domicilium** of the parties. These factors are also applicable in the determination of

jurisdiction, including as was held in **Kleinhans** (supra) weighing of those features of the employment relationship which fall outside the jurisdiction of the court of the CCMA against those that link the relationship to the South Africa. This approach was also followed in **Sertfontein v Balmoral Control Contracts SA (Pty) Ltd (2002) 21 ILJ 1091 (CCMA)**.

39]In the present instance and in as far as the issue of who the true employer was, the dominant features indicate strongly and in fact undoubtedly to the fact that the applicant was the employer. The dominant features are:

- (a) A contract of employment was concluded between the parties.
- (b) Although no work seem to have been done in Mpumalanga, she was posted to work in both Mpumalanga and Swaziland.
- (c) The applicant paid her salary and effected deductions for the purpose of South African Unemployment Insurance Fund (SA UIF), Pay As You Earn (PAYE), Medical Aid and Trading Allowance.

(d) After his appointment on the 1st of March 2002, the employee received his increase from R6600.00 to R7400.00 from the applicant.

40]In as far as the choice of law is concerned the main features that connect the contract to South Africa are:

(a) The contract was concluded and terminated in South Africa.

(b) The parties were both South Africans.

(c) The salary was paid in rands and in South Africa.

(d) On his return from Swaziland after his second arrest the employee was given an assignment to assess tenders in the various parts of South Africa.

(e) The calculation and administration of salary and benefits of the employee were done in South Africa.

(f) The arrangement for the return of the applicant's property which was in the employee's possession was done in South

Africa.

41]In the light of the above the review application stand to be dismissed with costs.

MOLAHLEHI J

DATE OF HEARING : 30 MAY 2008

DATE OF JUDGMENT : 20 JUNE 2008

APPEARANCES

For the Applicant : Adv K Lapham

Instructed by : COLYN TOWNSEND ATTORNEYS

For the Respondent: Attorney C Jessop

Instructed by : WIKUS VAN RENSBURG ATTORNEYS

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