IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

D749/06

In the matter between:

ANGELIQUE NIEWOUDT **APPLICANT**

And

ALL - PAK **RESPONDENT**

JUDGMENT

Cele J

Introduction

1. The applicant has contended that she was an employee of the respondent and that she was subjected to an automatically unfair dismissal by the respondent on account of her pregnancy. Both contentions of the applicant were opposed by the respondent with a version that the applicant was an independent contractor who, in that capacity, decided to terminate the services she had rendered to the respondent.

Background Facts

2. The applicant, Ms Niewoudt commenced an employment relationship with the respondent in November 2005 in the position of an administration clerk, in charge of book keeping. She was employed through a labour broker called Zibandlela which provided labour services to the respondent. Her contract with Zibandlela was for four months and ended in February 2006. She then left to go and work for another company for a period of one week. She discovered during that period that she was pregnant.

3. Ms Niewoudt met the sole proprietor of the respondent Mr Dean Sumpton. She disclosed to him that she was pregnant. It was agreed between the two that she would come back to the respondent to render her services there. Some terms under which she was to render the services were reduced into writing by her and were subsequently confirmed by Mr Sumpton. Both appended their signatures to that document with its contents reading:

> "First I would like to thank you for giving me the opportunity to come work for you well knowing that I am pregnant.
>
> As you asked me to put on paper what I want and we have come to the agreement that I will get:
>
> - 3 months maternity leave: R3330 per month which adds up to R10 000.
> - To be paid out my annual leave, which is R5000.
> - And annual Bonus, which is R5000.
>
> All of the above adds up to R20 000 (sic)
>
> Keeping my salary constant at R5000 a month for the 4 months that I will be off-October-November-December-January respectively will add up to the above of R20 000. I do prefer to have R20 000 over a period of 4 months.
>
> Also making shore that yourself and Caryn are capable to work on pastel, if any further information is required from myself while I am on maternity leave please do not hesitate to call. (sic)
>
> I would also like to know that my position will still be available when I return from my maternity leave.
>
> I do promise that I will come and visit while being on leave.

> I hope that you find this letter to your satisfaction and agree with all the remarks that are stated."

4. The core business of the respondent was the manufacture of boxes and wrapping papers for packaging. Apart from Caryn, a sales lady Ms Niewoudt was the only office bound staff of the respondent and had to answer incoming telephone calls. She started with a salary of R3500 per month but in April 2006 she was earning R5 000 per month. She received her monthly payments through ABSA after the respondent would have deposited her salary payment cheques with them. The respondent provided her with the office where she worked from 07:30 to 17h00.

5. During or about August 2006, at which time Ms Niewoudt was approximately 30 weeks pregnant, she was instructed by Mr Sumpton to refile some invoices which Mr Sumpton had been looking for from various filing boxes that he had brought to her office. Mr Sumpton complained that she had not done the invoice filing properly as he had great difficulty in retrieving those invoices. He then instructed her to file the invoices in the boxes properly. She told him she would do so when she came back from maternity leave. He insisted on his instruction and said if she did not comply she had to go home and to look for a place to pay her in doing whatever she wanted. She immediately telephoned her fiancée who came and took her away. Before she left, she had asked for the UIF form and Mr Sumpton told her that she had not registered herself. She then referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA") for conciliation. On the next day she attended to a Dr F.W. Hart who then issued a letter dated 2 August 2006 in which he stated that Ms Niewoudt had a threatened miscarriage that she and her baby survived. He said that he felt she was still to be regarded as a high – risk case until delivery of her baby. On 28 August 2006 a certificate of outcome was issued stating that the dispute remained unresolved and Ms

Niewoudt referred the dispute to this court on 14 November 2006 by means of a statement of claim.

The trial issues

Whether Ms Niewoudt was an employee

Applicant's version

6. The issue to be resolved is whether Ms Niewoudt was an employee of the respondent or that she was an independent contractor who offered her services. She conceded that during her first employment with the respondent, from October 2005 to February 2006, all employees, including herself, of the respondent were engaged through Zibandlela and thereafter Zibandlela would pay salaries of staff tendering their services with the respondent.

7. When she came back to the respondent to render her services for the period February to the end of July 2006, she was no longer engaged through Zibandlela. She said that Mr Sumpton undertook to register her and Caryn under the company. Caryn was to investigate how such registration had to be done. She denied that she had undertaken to facilitate getting her own independent contractor to serve the respondent under. She agreed that she did the same type of work as she would do in her first engagement with the respondent. She conceded that she had a debate with Mr Sumpton on the unemployment insurance fund (UIF) and she said it tool place when she went to him to enquire the nature of deductions which were made on her salary. She said that he had said to her that she had not made an effort to register herself for the UIF. She had responded by saying that it was Caryn who had to register them. From April to July she was being paid by the respondent an amount of R5000 as

gross earnings which after some deductions came to R4575.00 per month. Mr Sumpton would deposit a cheque for her monthly earnings and he would identify such payment in the deposit slips as salary. She conceded that she had telephoned Mr Sumpton in respect of the first cheque which took about seven days to clear. She said that she did not know that cheques were thereafter marked salary to help facilitate them being cleared within 2 days by the bank, so as to help her.

8. It is common cause between the parties that Ms Niewoudt drafted and typed out an undated letter addressed “To whom it my concern” (sic) and that it was signed by Mr Sumpton. The latter was to help her to buy a cellular telephone. She stated in it that Mr Sumpton was confirming that she worked for All-PAK/SOLUTIONS, the respondent.

9. She testified that she had no other employment when she worked for the respondent and that she worked under the control of Mr Sumpton. She said that her only income was from the respondent.

Respondent’s version

10. Mr Sumpton testifies that he never had an employee in his company. He preferred to concentrate on the operational needs of his company and to leave staff administration to a labour broker as that would take from him all the trouble of staff management away.

11. When he engaged Ms Niewoudt for the second time, she had said that she did not want to be under Zibandlela as it meant losing some money which was paid to Zibandlela. She wanted to be an independent contractor or to form a close corporation. They had not reduced that arrangement into writing as it had nothing to do with him.

12. She had seen how much she earned under Zibandlela and she knew that Zibandlela took off an amount of R5 000. She asked if the respondent could pay her an equivalent of R5 000, in which event, she would then invoice the respondent for that amount. The respondent would also give a bonus of R5 000 at the end of the year to Zibandlela. The respondent had to pay for the maternity leave as well. It would close down the business for the December recess. He agreed with her suggestion as he never wanted to employ her. She was to be a sole agency employer and she had to invoice herself as well. He had never promised to register her with the UIF nor did he promise to ask Caryn to do it for him. The R5 000 payment to her was to take effect from April 2006. She however never invoiced the respondent thereafter, even though he had asked her several times about it. She would say that she was experiencing a difficulty in getting information she needed. He agreed that he paid her R5 000 up to July 2006 minus R50 for UIF and R375 for income tax. When paying her, he issued cash cheques which cleared immediately, instead of the 7 days waiting period.

13. A period of three months went by without Ms Niewoudt invoice the respondent. Mr Sumpton had become concerned. He then approached Zibandlela to enrol her. He was concerned that she was getting what she wanted, but without getting invoices, he ran the risk of getting penalties.

14. Mr Sumpton agreed that he provided Ms Niewoudt with a place to work at, everything she needed to work with and that he told her what to do as well as how to do it. He admitted that he controlled her hours of working. He conceded that she was financially dependent on the respondent. He agreed that he would keep her position at work for the period that she was away to deliver her baby and that he had paid her for a week when she had been hospitalised sometime in April or May 2006.

Submissions

15. Mr Forster appearing for the applicant argued for a finding that the relationship in which Ms Niewoudt tendered her services to the respondent were those of an employee because:
    - The respondent determined the work that was to be done, the place where it was to be carried out and the manner of doing it;
    - The working hours were determined by the respondent to be 07h00 – 17h00 for 4/5 days in a week;
    - Ms Niewoudt would be granted a maternity leave.
    - Ms Niewoudt financially depended on the respondent and no one else.
    - In her salary payment, deductions for UIF and income tax were made by the respondent.
    - The letter which she had drafted and typed had working conditions pointing to her being an employee.

16. The submission made by Mr Alberts in this regard was fairly brief. He submitted that the respondent had never employed its own staff but relied on labour supplied by various labour brokers such as Zibandlela. He said that no reason was shown to be existing why the applicant would be treated differently from other staff such as Caryn.

Analysis

17. Section 213 (a) of the Act defined an employee to mean:

> "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."

18. Section 213 (a) of the Act clearly therefore excludes an independent contractor from the definition of an employee. Section 200 A of the Act also provides a guide in the process of determining whether the person is an employee where services are rendered to another. Section 200 A creates a presumption and provides:

> "(1) Until the contrary is proved, a person who works for or renders services to, any other person is presumed, regardless of the form of the contract, to be *an employee, if any one or more of the following factors are present:*
>
> (a) the manner in which the person works is subject to the control or direction of another person;
> (b) the person's hours of work are subject to the control or directions of another person;
> (c) in the case of a person who works for an organisation, the person forms part of that organisation;
> (d) the person has worked for that other person for an average of an least 40 hours per month over the last three months;
> (e) the person is economically dependent on the other person for whom he or she works or renders services;
> (f) the person is provided with tools of trade or work equipment or renders services to one person."

19. The Code of Good Practice as published in Gen N1774 in GG29445 of 1 December 2006 also provides guidelines for the determination whether a person is or is not an employee. Paragraph 18 of the Code provides a detailed elaboration on each of the presumptions which section 200 A provides. I have considered the provisions of the Code and need not restate their provisions here for present purposes.

20. This court, per Van Niekerk AJ, as he then was, dealt with the complex and indeed, a controversial question, "is a foreign national who works for another person without a work permit issued under the Immigrations Act

13 of 2002, an “employee” as defined by the Act. The question was answered in the affirmative, see *Discovery Health Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2008) 29 ILJ 1480 (LC). The enquiry before me is however a different one then that which confronted this court in the *Discovery Health Ltd* case and such difference was identified in paragraph 53 of that judgment. The line to draw in the present matter is between employment and genuine self employment.

21. Courts in South Africa have evolved various tests to distinguish between the employment contract proper and other various forms through which work or services are rendered. These tests such as the control test and the organisation test had their own inherent problems-see in this regard *S v AMCA Services & another* 1962 (4) SA 537 (A). In that case, a company had been convicted of a contravention of regulation 2 read with regulation 6 (1) (a) of the regulations set forth in the Annexure to War Measure 43 of 1942, for failing to pay cost of living allowance to certain persons engaged as collectors and alleged to have been “employees” of the company within the definitions of the regulations. They were engaged in the collection, on behalf of the company, of regular payments in respect of policies of insurance or saving accounts. Court had to decide whether the collectors were “employees” within the definition of the regulations. The court drew a distinction between “working for” a person and “having work done” for him. It held that the latter expression clearly did not imply the rendering of personal services, as does the former, but merely the production of a certain result by the labour of others. The court further held at page 543:

> “It follows that in my view the expression “working for any other person” in the definition of “employee” should be construed as implying the rendering of personal services. A person who is not bound to render his personal services to another, cannot therefore, be said to be “working for” that other person within the meaning of the definition. I should add that it

> does not, however, follow that every person bound to render his personal services, necessarily falls within the intention of the regulation.
>
> It is, I think quite clear from the features mentioned above that the collectors in the present case are not obliged to render their personal services to the company. By their agreement with the company they are bound merely to produce a certain result either by their own labour or the labour of others. Nor is the commission they receive on collections made on behalf of the company, paid for their personal labour, but is the contract price from which they may derive a profit by the assistance or labour of others and after allowing for transport expenses."

22. With all of this in mind, I return to the facts before me. In my view, it is necessary to determine that which the parties agreed to at the commencement of the rendering of services, whether it translated to reality and the consequences thereof, if any.

The parties' agreement

23. According to Ms Niewoudt she was to be an employee of the respondent. Mr Sumpton was to get Caryn to register both Ms Niewoudt and herself (Caryn) with the UIF as both were to be employees of the respondent. The services she rendered to the respondent were of the same nature as those she had tendered while she worked for the respondent through Zibandlela. Her earnings were to be R3500 per month which was to increase to R5 000 per month during her maternity leave. Her position would be kept by the respondent until she returned from the maternity leave, she could not dispute that her monthly earnings were described as salary in the bank deposit slip to facilitate the early clearance of the cheque deposited by the respondent. She fell under the direct control and supervision of Mr Sumpton who told her what to do, when to do it and how to do it.

24. I find the version of the respondent to have been more plausible and consistent with the probabilities of this matter. There are aspects of it which when put to Ms Niewoudt, remain undisputed. Firstly, Ms Niewoudt testified that Caryn and herself were employees of the respondent and that Caryn was to attend to their registration for the UIF. Caryn testified and disputed that version. She said that she was not an employee of the respondent. She denied that she had to attend to the UIF registration. Secondly, Mr Sumpton said that the earnings initially agreed upon between the parties were to be R3200 and that Ms Niewoudt would soon attend to the registration of herself under a sole employment agency in which case she would then be paid R5 000 monthly as was the case with Zibandlela and she would invoice the respondent and pay herself the salary. For the period April-July 2006, she was paid R5 000. Her version could not explain why she was given that increase. In the version of the respondent, she was to invoice the respondent and to pay the statutory deductions through the agency. Thirdly, it became common cause between them that Mr Sumpton had confronted her about the UIF registration issue. If the respondent wanted to have her as an employee, it could not shift to her such registration. Fourthly, it remained undisputed that the rest of the people who rendered their services with the respondent, did so through a labour broker and that the respondent did not have any administrative functions that were to take care of any person as its employee. Fifthly, the version of the respondent was that Mr Sumpton wanted to re-register Ms Niewoudt with Zibandlela when she failed to register herself and to invoice the respondent for the payment of R5 000. That version was not seriously challenged except to the extent that it would have amounted to a unilateral change of working conditions.

25. Accordingly, I find that on total probabilities of this matter, both parties agreed that Ms Niewoudt was to render her services to the respondent

through a labour agency akin to Zibandlela and that Ms Niewoudt was to have secured the necessary documentation.

Did the agreement translate to reality?

26. Ms Niewoudt failed to bring into being a labour broker which she was to serve the respondent under. There existed a direct relationship between the respondent and Ms Niewoudt. Ms Niewoudt never became an independent contractor. What she tendered to the respondent were her personal services. If she had gone away for a confinement, her place with the respondent would have been kept for her, in terms of their agreement. That arrangement suggested that she would have been on maternity leave. That leave would be consistent with her being an employee of the respondent. While Caryn would be assisting the respondent in the absence of Ms Niewoudt, there was no agreement that the monthly payments which the respondent agreed to pay to Ms Niewoudt would be passed on to Caryn. When Ms Niewoudt took ill and was hospitalised for a week in April or May 2006, she received her monthly remuneration. That indicated that the payment of such money was not linked to the deliverance of services to the respondent. When Mr Sumpton had deducted the UIF and income tax money from the R5 000 paid monthly to Ms Niewoudt, it appears that he took charge of it and handled it himself in the manner he deemed appropriate. All of that contradicted Ms Niewoudt being in the position of an independent contractor.

The consequence

27. In *Ongevallekom v Onderlinge Versekeringsgenootskap A.V.B.O.B* 1976 (4) SA (AD) the court had to deal with the determination of whether a person was a workman in terms of section 3 of the Workman's Compensation Act 30 of 1941. The court adopted an approach of

determining what sort of relationship most strongly appeared from all the facts or what the "dominant impression" was which the contract made on a person. In *Midway Two Engineering & Construction Services v Transnet Bpk* (1998) 19 ILJ 738 (SCA) the appellant, a labour broker had supplied 40 drivers to the respondent because of a prolonged strike by the respondent's workforce. One of the supplied drivers caused serious damage to a building belonging to another company. The respondent settled the claim of damage and obtained cession of the companies claim and it sought redress from the appellant. Court had to deal with the issues whether the driver had acted within the course of his employment with the appellant when the damage was caused. The appeal court held that the control test, traditionally used to distinguish between an employee (employer liable) and an independent contractor (principal not liable) was obsolete and simplistic. It held that what was required was a multifaceted test that took into account all the relevant factors in order to determine who as a matter of policy and fairness had been more closely associated with the risk creating act.

28. The application of a multifaceted test in the facts of the present case has the consequence that the failure of the intention of the parties to come to fruition resulted in Ms Niewoudt being an employee of the respondent. Mr Sumpton realised the consequence and that is why he said he wanted to re-register her as an employee under Zibandlela to obviate being fined by the Department of Labour.

29. The next enquiry is whether as an employee of the respondent, Ms Niewoudt was dismissed. Dismissal is defined in section 186 (a) of the Act to mean that an employer has terminated a contract of employment with or without notice. From the given facts, it is common cause that the termination of employment was consequent upon an alternative instruction given by Mr Sumpton to Ms Niewoudt. I find therefore that as a result of

Ms Niewoudt not complying with the instruction to do the refiling, she was dismissed by Mr Sumpton.

Was the dismissal automatically unfair?

30. Section 187 (1) (e) of the Act provides that a dismissal is automatically unfair if the employer in dismissing the employee has the reason for such dismissal being the employee's pregnancy, intended pregnancy or any reason related to her pregnancy. On the date of her dismissal, Ms Niewoudt was about 9 weeks from the date the baby was due to be delivered. Her undisputed evidence was that she was visibly pregnant. She had a threatened miscarriage for which she had to be hospitalized for a week in April or May 2006 and had reported that to the respondent. More importantly, when the instruction was given to her to refile the invoices, her answer was that she would do it upon her return from her maternity leave. She therefore unequivocally indicated to Mr Sumpton that there was a link between her inability to render her services, at the time, with her pregnancy and that once pregnancy was over, she would be able to execute her duties normally. Mr Sumpton was therefore alerted by Ms Niewoudt that her inability to carry out the instruction given to her was related to her pregnancy. Notwithstanding that explanation, Mr Sumpton dismissed her. I agree with Ms Niewoudt that her dismissal was indeed associated with or related to her pregnancy and was therefore automatically unfair, see also *Mnguni v Gumbi* (2004) 25 ILJ 715 (LC) at 721.

Relief

31. Ms Niewoudt made it clear that she did not wish to be reinstated. On the contrary she asked for a compensatory order. She testified that she was studying and had decided against working for the time being.

Compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but must not be more than the equivalent of 24 months' remuneration on the date of dismissal-section 194 (3) of the Act.

32. Mr Sumpton was very considerate when he took Ms Niewoudt back to his employment soon after becoming aware that she was pregnant. He even offered to pay her an increased salary of R5 000 per month during her maternity leave and to keep her position until she would have delivered her baby. He tried to accommodate her in a plan to have her employed under a labour brokerage of her own. He came across as not knowledgeable about staff management.

33. He took the trouble of carrying the invoice boxes to Ms Niewoudt's office so that she could trace the invoices he needed. The facts of this case suggest that Mr Sumpton recapitulated to frustration when he discovered a misfiling of invoices and he reacted with anger towards her.

34. Ms Niewoudt did not come to court with clean hands. She lied about the agreement pertaining to her status with the respondent. On the facts of this case, she very well knew the plan they had mooted to disguise her as the single employee of a labour brokerage. She and her fiancée decided against her continued employment so that she could focus on her studies.

35. All these considerations tend to mitigate in favour of the respondent when a just and equitable compensation is considered.

36. The following order will consequently issue:

1. The respondent is ordered to compensate Ms Niewoudt in an amount of money equivalent to ten

months of the remuneration she earned on the date of her dismissal, being R5 000 x 10 = R50 000.

2. The respondent is ordered to pay the costs of this claim.

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Cele J

Date of Hearing: 8-9 September 2008

Date of Judgment: 14 January 2009

Appearances

For the Applicant: Mr Justin Forster-Forster Attorneys

For the Respondent: Adv S Alberts instructed by J Sellick Attorneys