

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD IN JOHANNESBURG**

**REPORTABLE**

**CASE NO: JR 1720/08**

In the matter between:

**STATE INFORMATION TECHNOLOGY**

**AGENCY (PTY) LTD (“SITA”)**

**APPLICANT**

AND

**WMJ SWANEVELDER**

**1<sup>ST</sup> RESPONDENT**

**THE COMMOSSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION**

**2<sup>ND</sup> RESPONDENT**

**BHEKI MSIZA N.O.**

**3<sup>RD</sup> RESPONDENT**

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**JUDGMENT**

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**MOLAHLEHI J**

**Introduction**

[1] This is an application to review the ruling issued by the Third Respondent (the Commissioner) under case number GAPT 4335-08 dated 3<sup>rd</sup> June 2008. In terms of that ruling the Commissioner dismissed the point *in limine* raised by the Applicant and found that the First Respondent, Mr Swanevelder (Swanevelder) was an employee in terms of the Labour Relations Act 66 of 1995 (the LRA).

[2] The Applicant has also applied for condonation for the late filing of its review application. The review application was 6 (six) days late. In my view having

regard to the degree of lateness and the explanation proffered by the Applicant there is no reason to decline the condonation application.

### **Background facts**

- [3] It is common cause that the Applicant engaged the services of Swanevelder during September 2005. However, what was in dispute between the parties is the nature of that relationship. The Applicant contended that Swanevelder was employed on a temporary basis and through the Labour Broker Gijima AST (Gijima). Swanevelder on the other hand contended that whilst his salary was paid by Gijima, he was employed by the Applicant and not by Gijima.
- [4] During July 2005, the Applicant complained in a letter addressed to Gijima about the performance of Swanevelder. The Applicant addressed another letter to Swanevelder, few years later, on 25<sup>th</sup> February 2008 informing him that the contract between it and Gijima will not be renewed after 31<sup>st</sup> March 2008. On 28<sup>th</sup> February 2008, the Applicant addressed a letter to Gijima informing it that its contract would not be renewed.
- [5] Apparently according to the Commissioner's award, Swanevelder testified that he was informed by Mr Naidoo of the Applicant that his services were no longer required and this was also confirmed by Gijima. Subsequently, Swanevelder referred a dispute concerning an alleged unfair dismissal by the Applicant to the CCMA.
- [6] As indicated earlier the Applicant raised a point *in limine* concerning whether or not Swanevelder was its employee. The Commissioner dismissed the point *in*

*limine* and concluded that Swanevelder was an employee of the Applicant as envisaged by the LRA. In arriving at this conclusion the Commissioner considered the factors set out in section 200A of the LRA.

- [7] Section 200A of the LRA provides for a presumption that a person is an employee regardless of the form of the contractor as long as the factors listed therein are satisfied. In this respect the Commissioner found that the factors listed in section 200A were satisfied and therefore an employment relationship existed between the Applicant and Swanevelder. The fact that the salary of Swanevelder was paid through Gijima was regarded as irrelevant by the Commissioner because Swanevelder relied on the Applicant for his financial stability. The Commissioner further relied on the decision of *State Information Technology Agency (SITA) Pty Ltd v CCMA & others case no JA 16/2008*.

### **Grounds for review**

- [8] The Applicant has raised several grounds of review in its founding affidavit. These includes the contentions that the Commissioner exceeded his powers, committed gross-irregularity, arrived at an unjustifiable and irrational ruling, took into account irrelevant facts and ignored relevant factors. The Applicant further contended that the Commissioner misapplied legal authority and ignored relevant legal authority.
- [9] The other ground upon which the Applicant relies on relates to the issue of non-joinder. In this respect the Applicant contends that the ruling of the Commissioner is materially defective because the Commissioner did not call for

the joinder of Gijima into the proceedings. The reason for this contention is based on the submission that Gijima paid the salary of Swanevelder and that Gijima was of the view that he was its employee.

- [10] In the heads of argument Mr Scheepers for Swanevelder argued that it was for the first time in the review application that the Applicant submitted that Gijima should have been joined as a party in the proceedings. It was further argued that the Applicant should have joined Gijima as a party in terms of rule 26(3)(b) of the Rules of the CCMA.

### **Evaluation of the ruling**

- [11] In my view there are two issues that have arisen in this matter. The first issue relates to mis-joinder/non-joinder and the second to whether or not Gijima was a labour broker and also the employer of Swanevelder. It is further my view that this matter turns on the first issue and on that issue alone this matter stands to be reviewed. I do not deem it necessary to deal with the later issue. The reasons for agreeing with the Applicant that this matter stands to be reviewed on the grounds of non-joinder alone are set out below.

- [12] This court in *Minister of Safety v De Vos* (2008) 29 ILJ 688, held that the Commissioner has a duty, to raise the issue of non-joinder *mero motu* where none of the parties have done so. This duty arises from the principle that a third party should be joined in proceedings if he or she has a direct and substantial interest in a matter and has not consented or undertaken to be bound by any judgment or award that may be given in the matter. The duty arises from the

principle that the Commissioner should not pronounce on matters that may adversely affect the rights of a party who is not before him or her. See *Public Service Association & Department of Justice & Others (2004) 25 ILJ 692 (LAC)*. Thus failure by the Commissioner to raise the issue of non-joinder renders the arbitration award reviewable and makes it irrelevant whether or not it was raised by any of the parties. The duty also arises in terms of rule 26 of the Rules of the CCMA.

- [13] The broad principle at common law is that if a third party has or may have a direct and substantial interest in any order that a court may make or if such order cannot be carried into effect without affecting or prejudicing a third party, he or she is a necessary party and should be joined in the proceedings. See *Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)*. A “direct and substantial interest” has been held to be “an interest in the right which is the subject matter of the litigation and not merely a financial interest.” it is a “legal interest in the subject matter of the litigation” see *Henry Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O) at 169, 170*. This principle has been incorporated into the CCMA rules. Rule 26 of the CCMA rules reads as follows:

“(1) The Commission or a commissioner may join any number of persons as parties in proceedings if their right to relief depends on substantially the same question of law or fact.

(2) *A commissioner may make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.*

(3) *A commissioner may make an order in terms of sub-rule (2)-*

*(a) of its own accord;*

*(b) on application by a party; or*

*(c) if a person entitled to join the proceedings applies at any time during the proceedings to intervene as a party.”*

[14] The approach to be adopted when dealing with the issue of non-joinder was set out in De Vos (supra) as follows:

*“In my view a court or an arbitrator can mero motu raise the issue of joinder at any stage of the proceedings. In other words a court or an arbitrator can raise the issue of joinder at the beginning of the case where the cause of action or the dispute as defined by the applicant is such that it clearly reveals that there is a third party that may have a substantial interest in the matter. Where the pleadings or the dispute as defined in the referral form of the applicant does not reveal that there is a third party that may have an interest in the matter, a court or an arbitrator may raise the issue of joinder at any stage when the evidence presented by any of the parties reveals that there is a third party that has an interest in the matter.”*

[15] The two principle upon which this approach is based on was found in Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A), to be:

*“(1) That a judgment cannot be pleaded as res judicata against someone who was not a party to the suit in which it was given; and*

*(2) That the Court should not make an order that may prejudice a party not before it.”*

[16] In the present instance the Commissioner made a finding that Gijima was a labour broker and that the salary of the Swanevelder was paid by it. This in my view indicates very clearly that Gijima had a substantial interest in the matter and therefore the Commissioner was on the facts which were presented before him obliged to have *mero mutu* raised the issue of non-joinder and should have exercise the discretion given to him by rule 26 (3)(a) of the CCMA rules.

[17] I have already indicated that this matter turns on the issue of non-joinder and that the ruling of the Commissioner stands to be reviewed on that ground alone. I therefore do not deem it necessary to deal with the other issues that arose in these proceedings. It would however be unfair to impose costs in this matter.

[18] In the premises the following order is made:

- (i) The late filing of the review application is condoned.
- (ii) The ruling of the Commissioner is reviewed and set aside.

(iii) Accordingly the Second Respondent did not have jurisdiction to entertain the dispute of the First Respondent.

(iv) There is no order as to costs.

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**Molahlehi J**

Date of Hearing : 26<sup>th</sup> February 2009

Date of Judgment : 16<sup>th</sup> March 2009

**Appearances**

For the Applicant : Adv Boda

Instructed by : Cliffe Dekker Hofmeyr Inc

For the Respondent: Marius Scheepers of Marius Scheepers Attorneys