REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 345/11

In the matter between:

MELOMED HOSPITAL HOLDINGS LTD	**Applicant**
and	
CCMA	**First Respondent**
D WILSON N.O.	**Second Respondent**
DR ADRIAN BURGER	**Third Respondent**

Heard: **3 August 2012**

Delivered: **15 August 2012**

Summary: Review – true nature of employment relationship – parties formed an Inc in order not to contravene HPCSA rules. True employer remained Melomed.

JUDGMENT

STEENKAMP J

Introduction

1] Who was the true employer of the third respondent, Dr Adrian Burger? That is the pertinent question that arises in this application for review.

2] The arbitrator (the second respondent) found that the applicant (Melomed) was the true employer. Melomed wishes to have that finding reviewed and set aside. Its argument is that Dr Burger was employed by an incorporated company, Dr Adrian Burger Inc ("the Inc"). The further question, if Burger was Melomed's employee, is whether his dismissal was fair.

Background facts

3] The applicant, Melomed, operates three private hospitals in the Western Cape.

4] It is common cause that Melomed wished to make use of the clinical services of the employee, Dr Burger, in its emergency services units. This need arose in the context of a previous arrangement it had with a Dr Lamprecht. Lamprecht employed and paid doctors to perform clinical duties at Melomed's emergency services units. He had his own administrative and practice staff. But Melomed was concerned that it had very little control over Dr Lamprecht's movements and availability, *inter alia* because he was often busy with cat scans of a different kind – he is an international adjudicator at feline shows.

5] Having recently returned from a stint abroad performing *locum* duties, Burger entered into discussions with Melomed. They had a number of meetings in September and October 2009. Burger was, at least initially, firmly under the impression that he would be employed by Melomed. Apart from his own evidence at arbitration, this is apparent from a contemporaneous email dated 2 October 2009 where he sought clarity on the terms and conditions of employment:

> "Mr Chohan
>
> With regard to the meeting that we had last week, attended by Mr Bhorat,

> Ismail Bhorat, Mr Allie, Junaid Akoojee and myself, I would like the opportunity of opening discussions with Melomed for me to work as Clinical Director of Emergency Services forthwith.
>
> I am interested in taking on this job opportunity and would request from Melomed a formal proposal of job description, responsibilities, position, reporting structure and salary at their earliest opportunity."

6] Burger followed this up with a further email after a further meeting took place on 6 October 2009. In this email, addressed to Messrs Bhorat, Allie and Chohan, Burger set out what he believed to be "a reasonable package in terms of my future employment as Head of Clinical Services" for Melomed, including his job description; monthly salary; a 48 hour work week; annual leave; clear reporting structure and key performance indicators, linked to an annual performance bonus.

7] The parties agreed to a monthly salary of R90 000; a work week of 48 hours; and 22 days' leave per year.

8] While the parties were busy with their discussions, a problem became apparent. In terms of the ethical rules of the Health Professions Council of South Africa (HPCSA), private hospitals are precluded from employing doctors to perform clinical duties.

9] In a clear attempt to circumvent these rules – or, at the least, in order not to contravene the rules – Melomed instructed its attorneys to form an incorporated company through which Burger's – and other doctors' – services would be provided to it. Melomed concedes that the Inc was formed as a "special purpose vehicle", although it took umbrage at Burger's use of the word "device".

10] Burger consulted with Melomed's attorney, Mr Mohamed Darsot of Edward Nathan Sonnenbergs, on 19 October 2009. It is common cause that Mr Darsot was tasked with drafting a contract; what is not, is what form the contract would take.

11] Some nine months later, by 14 July 2010, Darsot – who is also a Melomed board member -- had not produced the contract. Burger's attorneys

addressed a letter to Melomed asking that it confirm that it had indeed instructed ens to draft a written agreement, failing which it would be seen as a repudiation.

12] In the meantime, Burger had started working at Melomed from 1 November 2009. At that stage, the Inc had not been incorporated. He fulfilled clinical as well as administrative functions. Melomed paid him a monthly salary, although the payslip reflected "Dr Adrian Burger Inc". Melomed deducted PAYE and UIF from his salary. The employer's income tax number was that of Melomed. He was given a Melomed business card on which his job title was reflected as "Clinical Manager – Emergency Services". He was required to work 48 hours per week for Melomed.

13] Chohan issued a letter to all staff and to doctors referring patients to Melomed, announcing Burger's appointment as "General Manager – Medical Emergency Services."

14] The Inc was registered on 26 November 2009. There is no evidence before the arbitrator or this court of a pre-incorporation contract.

15] Burger was the sole shareholder and director of the Inc; however, Melomed exerted control over it, to the extent that only Melomed officials, and not Burger, had signing powers on the Inc's account. The registered address of the Inc was that of Melomed.

16] Melomed handled all human resources functions, administration and payroll regarding Burger's employment, as well as the employment of other doctors.

17] Burger had weekly meetings with Melomed's Chief Operating Officer, Mr Ahmed Chohan. According to Burger, this was necessary because he reported to Chohan; Chohan's version is that Burger merely "reported" to him in the capacity of a service provider. Burger wanted to have a personal assistant employed; Chohan refused.

18] At no stage did the parties enter into a written agreement, despite Melomed having retained the services of attorneys throughout. This failure

would lead, as it so often does, to an unfortunate obfuscation of the true agreement between the parties. And it shows that often, as Samuel Goldwyn supposedly remarked, “a verbal contract isn’t worth the paper it’s written on”.

19] In January 2010 it came to Melomed’s attention that foreign doctors (known as “supernumeraries”) were not allowed to be employed in South Africa in accordance with HPCSA guidelines. Chohan brought this to Burger’s attention. Chohan also told Melomed’s HR department that no supernumeraries were to be employed.

20] Burger testified that he wanted to give the ‘supernumeraries’ some time to structure their affairs before they ceased performing services for Melomed.

21] Melomed terminated the purported agreement between it and the Inc on 16 July 2010 – i.e. two days after Burger’s attorneys had demanded that the contract between the parties be finalised -- claiming that the Inc was in breach of contract, as the services of the supernumeraries had not been terminated. On 15 July 2010 Burger had met with Melomed and demanded to see the bank statements of the Inc, which he had not seen until then. He saw that two amounts of R170 000 and R100 000 respectively had been transferred to Melomed without his knowledge. He then revoked the signing powers of Melomed’s officials and became the sole signatory on the Inc’s bank account.

22] At this stage, there was still no written agreement in existence between Melomed on the one hand, and either the Inc or Burger on the other hand.

23] Burger reported for duty on 19 July 2010 and Melomed’s Allie told him that Melomed had terminated the agreement. Burger referred an unfair dismissal dispute to the CCMA.

24] On 10 September 2010 Melomed launched liquidation proceedings against the Inc.

The argument at the CCMA

25] At the CCMA, Melomed raised a jurisdictional point that Burger was not its employee. The arbitrator ruled that he would first hear evidence and argument on the merits, and then rule whether Burger was indeed Melomed's employee or not.

26] In its founding affidavit dealing with the jurisdictional point, Melomed's CEO, Rielthewaan Allie, submitted that the Inc was in fact a temporary employment service ("TES") as defined in section 198 of the Labour Relations Act[1]; and that Burger was employed by the Inc acting as a "labour broker" or TES.

27] It appears that this argument was not pursued at arbitration, once the parties had led their evidence. Instead, Melomed's attorney argued that it was not the true employer, based on the 'dominant impression' test. (Both parties were legally represented at arbitration).

The arbitration award

28] The arbitrator summarised the evidence of all four witnesses at the arbitration comprehensively in his arbitration award comprising 22 pages. He then analysed the evidence and arguments before him, firstly having regard to the question whether Burger was Melomed's employee. (The legal representatives for both parties had filed written submissions).

29] The arbitrator had regard to the definition of 'employee' in s 213 of the LRA, ie:

> "(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..."

30] He noted that the presumption in s 200A of the LRA was not applicable in

1 Act 66 of 1995 ("the LRA").

view of Burger's remuneration being above the threshold; but he correctly noted that the factors outlined in that section could provide "valuable insight" in deciding the question based on a 'dominant impression' test. He also noted, once again correctly, that our courts have stated that regard must be had to the true nature of the relationship between the parties, regardless of how the parties had chosen to describe that relationship in contract.[2]

31] The arbitrator took six primary factors into account in order to establish the true nature of the relationship between the parties:

31.1 The object of the contract was for Burger to render personal services to Melomed, not to perform a specified job or to produce a specified result.

31.2 Burger rendered services to Melomed personally and not through others.

31.3 Burger was required to work for Melomed on a full-time basis.

31.4 Chohan had a significant degree of control over Burger; this was evident, *inter alia*, from the weekly meetings to discuss operational issues and the fact that Chohan instructed Burger to cease using supernumeraries.

31.5 The contract would have terminated on Burger's death.

31.6 The parties had agreed on a five-year contract; the work was of an ongoing nature and there was no specific result that would have brought about an end to the contract.

32] The arbitrator further took into account that Burger worked only for Melomed and was wholly economically dependent on it. Furthermore,

2 With reference to *SABC v McKenzie* (1999) 20 *ILJ* 585 (LAC).

Melomed equipped him with "tools of the trade" in the form of fully equipped emergency units, a laptop and a white coat. He was designated as a General Manager and was issued with a business card identifying him as part of the organisation.

33] Further factors pointing to an employment relationship were the following:

33.1 Melomed deducted PAYE from Burger's salary (although it did not pay it over to SARS);

33.2 Burger was offered the opportunity to join Melomed's medical aid and pension schemes;

33.3 Burger's monthly remuneration was for a fixed amount.

34] On the basis of all these factors, the arbitrator came to the conclusion that the dominant impression was of an employment relationship between Burger and Melomed.

35] Turning to the fairness of the dismissal, the arbitrator found that it was clearly procedurally unfair: Burger was not informed of the allegations against him, nor was he given an opportunity to state a case in response.

36] With regard to the first reason for dismissal – that Burger had breached the agreement relating to repayment of money to Melomed – the arbitrator found that Burger had transferred money from time to time and had undertaken to continue doing so. This was not a fair reason for termination.

37] The second reason – the continued use of supernumeraries – was found to be unfair as well. The arbitrator found that Burger was in the process of phasing them out and Chohan – who was aware of the fact that they were still being used – did nothing about it until things came to a head on 15 July 2010.

38] Having found the dismissal to have been unfair, the arbitrator awarded Burger twelve months' compensation. He took into account that Melomed

appeared to have acted vindictively in terminating what should have been a five-year contract after nine months.

Grounds of review

39] Mr *Ellis*, for Melomed, did not pursue the argument on review that the Inc was a TES as defined in s 198 of the LRA, and therefore deemed to be Burger's employer – perhaps wisely so.

40] As was the case in *Dyokhwe v De Kock N.O. & others*[3], the Inc in this case neither "procured" nor "provided" Burger to perform work for Melomed. When Burger started working at Melomed, the Inc had not even been formed. Legally or factually, there was no TES in existence.

41] Instead, Mr *Ellis* focused his argument on the arbitrator's finding that Melomed was the true employer and the manner in which he arrived at his conclusion. This conclusion, he argued, was unreasonable: a different legal structure (the Inc) had been created, and this legal entity was the true employer. He argued that, in coming to the conclusion that he did, the arbitrator did not clearly analyse the evidence of the parties' respective witnesses.

42] This argument must be considered in the light of the purpose of the legal structure that had been created and the evidence before the arbitrator.

43] The further review ground – which becomes relevant only if Melomed was Burger's employer – is that the finding of an unfair dismissal is unreasonable; and that the award of compensation equal to twelve months' remuneration is not justified.

Evaluation

44] This application for review was premised on the reasonableness test set out in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[4].

3 [2012] ZALCCT 25 (21 June 2012).

4 2008 (2) SA 24 (CC); *(2007) 28 ILJ 2405 (CC)*; [2007] 12 BLLR 1097 (CC).

However, as this court has pointed out previously[5], it is bound by the decision of the Labour Appeal Court in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*[6], in which the LAC held that, in regard to a commissioner's finding on jurisdiction, the question is not whether the commissioner's finding was reasonable but whether on the facts the applicant was an employee. The basis of this approach, as Van Niekerk J pointed out in *Workforce Group,*[7] is that a ruling on jurisdiction made by the CCMA is made for convenience - the CCMA is a creature of statute and cannot decide its own jurisdiction. Whether the CCMA has jurisdiction is a matter for this court to decide. In other words, the issue before the court is whether, objectively speaking, there existed facts which would give the CCMA the jurisdiction to entertain the dispute, ie that established that the third respondent (Burger) was an employee as defined by s 213 of the LRA. That was indeed the first question posed by Melomed at the arbitration. If so, the further question is whether the arbitrator reasonably concluded that his dismissal was unfair.

45] The applicant's main argument on review with regard to the true nature of the employment relationship was that the arbitrator did not properly assess the evidence before him by evaluating the respective parties' evidence and making findings on credibility and the probabilities. The applicant further submitted that the arbitrator did not properly apply his mind to the true nature of the relationship.

Who was the employer?

46] The question of the true nature of the employment relationship has vexed labour law scholars for decades.[8]

47] Davis JA summed up the current state of the law in *SITA v CCMA*[9]:

---

5 Eg *Workforce Group (Pty) Ltd v CCMA & others* (2012) 33 *ILJ* 738 (LC) para [2].

6 *(2008) 29 ILJ 2218 (LAC)*.

7 Ibid.

8 See, for example, Paul Benjamin: "An accident of history: Who is (and who should be) an employee under South African Labour Law" (2004) 25 *ILJ* 787.

'[W]hen a court determines the question of an employment relationship, it must work with three primary criteria:

1 an employer's right to supervision and control;

2 whether the employee forms an integral part of the organization with the employer; and

3 the extent to which the employee was economically dependent upon the employer. "

48] In the current case, the evidence before the arbitrator showed unequivocally that Burger was subjected to Melomed's supervision and control (as opposed to Dr Lamprecht); he formed an integral part of Melomed's organisation, to the extent that he was introduced as its General Manager: Medical Emergency Services and carried a Melomed business card with this designation; and he was entirely dependent upon Melomed for his remuneration, designated as a monthly "salary" and paid by Melomed.

49] The arbitrator properly considered the evidence before him in order to establish who the true employer was in this case, regardless of the legal structure that had been created in order to circumvent the HPCSA rules. In this regard, he took into account, *inter alia,* the following factors:

49.1 Melomed paid Burger's salary.

49.2 Melomed deducted PAYE and UIF from his salary (even though it failed to pay over the tax deduction to SARS).

49.3 Burger worked only for Melomed.

49.4 Melomed (and specifically Chohan) exercised a significant degree of supervision and control over Burger.

---

9 *State Information Technology Agency (Pty) Ltd v CCMA & Others* (2008) 29 *ILJ* 2234 (LAC) para [12].

49.5 Burger was wholly economically dependent on Melomed.

49.6 Melomed equipped Burger with "tools of the trade" in the form of fully equipped emergency units, a laptop and a white coat.

49.7 Burger formed part of the organisation - he was designated as a General Manager and was issued with a business card identifying him as part of the organisation.

49.8 Burger was offered the opportunity to join Melomed's medical aid and pension schemes.

49.9 Burger's monthly remuneration was for a fixed amount.

50] As Benjamin[10] suggested, the definition of "employee" in the LRA requires the courts to look more closely at the meaning of the second part of the inclusion and consider whether persons are conducting their own businesses or merely assisting an employer to conduct theirs. Along that fault-line, he suggested, lies the true divide between employment and self-employment. And that is exactly the situation that pertained before the arbitrator in this case. The evidence before the arbitrator led to a reasonable conclusion that Burger assisted Melomed in carrying on its business; he did not conduct his own business. On the evidence before the arbitrator, this conclusion was not only reasonable but correct.

51] As the Labour Appeal Court pointed out in *Denel (Pty) Ltd v Gerber*[11], the mere fact that use is made of a legal entity such as a company or close corporation to provide services, is no bar to the conclusion that a particular individual who was contracted to a company, or who owned the company in terms of which he was obligated to provide services to the alleged

---

10 *Op cit* 789.

11 *(2005) 26 ILJ 1256 (LAC)*, cited with approval in *SITA (supra)* para [10].

employer, was an employee of the company that was contractually entitled to receive such services – in this case, Melomed.

52] The arbitrator's conclusion, based on the evidence before him as outlined above, was in my view the correct one.

Fairness of the dismissal

53] Having found that Melomed was the true employer, the further question before the arbitrator was whether Burger's dismissal was fair. He found that it was not. Was this a reasonable conclusion?

54] There can be no doubt that the dismissal was procedurally unfair. Having proceeded from the premise that Burger was not its employee, Melomed did not follow any procedure in dismissing him; it simply terminated the purported (oral) agreement with the Inc. The arbitrator's finding on procedural fairness is unassailable.

55] Was the dismissal substantively fair? The only argument proffered by the applicant on review in this regard is that the arbitrator should nevertheless have considered Melomed's *bona fide* belief that it was merely terminating a commercial relationship between it and the Inc.

56] This argument begs the question. Having found that Melomed was the true employer, the question to be decided was whether there was a fair reason for dismissal. The arbitrator's finding that there was not, is not so unreasonable that no other arbitrator could have come to the same conclusion. He considered the evidence that Burger was in the process of phasing out the supernumeraries. Melomed's Chief Operating Officer, Chohan, was aware of the fact that the supernumeraries were still employed, albeit on reduced shifts, and did nothing about it until matters came to a head on 15 July 2010. The CEO, Allie, conceded that a period of grace should have been allowed on compassionate grounds, although he did not agree with the time period. He also found that Burger had transferred money to Melomed, and that the further reason for terminating the contract – ie that Burger had not placed Melomed in funds to pay

salaries – was not a fair reason for dismissal. The arbitrator's finding that neither reason for terminating the agreement was a fair reason for dismissal, falls within the bounds of reasonableness, whether or not this court agrees with the finding.

57] The same holds true for the amount of compensation awarded. The arbitrator found that Melomed acted vindictively when it terminated what should have been a five-year contract after nine months. In those circumstances, it was not unreasonable for the arbitrator to exercise his discretion to award the maximum compensation of twelve months' remuneration.

Conclusion

58] The arbitrator's conclusion, based on the evidence before him, is not unreasonable. The dominant impression created by the way in which the parties structured their relationship is that Melomed was Burger's true employer. That finding appears to me to have been the correct one. Having made that finding, the further finding that the dismissal was substantively and procedurally unfair was not so unreasonable that no other arbitrator could have come to the same conclusion. The award is not open to review.

59] Both parties asked that costs should follow the result. I see no reason to disagree.

Order

60] The application for review is dismissed with costs.

Anton Steenkamp

Judge of the Labour Court of South Africa

APPLICANT:	Edwin Ellis of Edward Nathan Sonnenbergs Inc.
THIRD RESPONDENT:	Peter Kantor
	Instructed by Slabbert Venter Yanoutsos Inc.