REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C552/14

In the matter between:

LIQUOR RUNNERS PE	Applicant
And	
THE NATIONAL BARGAINING COUNCIL FOR THE ROAD FRIEGHT AND LOGISTICS INDUSTRY	First Respondent
NEIL PAULSEN N.O.	Second Respondent
DONAVAN ADOLOPH	Third Respondent
SAYED NORDIEN	Fourth Respondent
MAYIBUYE HADI	Fifth Respondent

Date heard: 17 February 2015

Delivered: 30 April 2015

JUDGMENT

RABKIN-NAICKER J

[1] The applicant seeks the review of a jurisdictional ruling under case number PERFBC 29140 on an unopposed basis. The second respondent (the arbitrator) found that the second to fifth respondents were employees and that

the second respondent (the bargaining council) had jurisdiction to hear their alleged unfair dismissal dispute

[2] The applicant is part of a larger group of six other Liquor Runners depots operating in all the major areas in the country. Up until February 2013, its staff were all provided by a labour broker, Cheetahmode CC. In December 2012 applicant informed Cheetahmode CC that it intended to re-structure and establish an owner-driver scheme and that it would no longer need their staff working as drivers and their assistants. As a result those employees were retrenched by the labour broker.

[3] Applicant explains that it was agreed with Cheetahmode CC that first consideration should be given to offer owner-driver contracts to the staff members who were to be retrenched. Pursuant to this arrangement third to fifth respondents were offered these contracts. It is averred by applicant that owner-driver contracts were offered to the vast majority of drivers and the owner drivers then employed the vast majority of van assistants.

[4] The owner-driver scheme is catered for in a collective agreement which was before the arbitrator. After their retrenchment third to fifth respondent entered into a written agreement on the 28th February 2013 which was also before the arbitrator.

[5] The applicant concedes that on face value the owner-drivers would appear to meet most of the criteria of section 200A of the LRA. However, it submits that a specific collective agreement makes special provision for the scheme and the third to fifth respondents have in any event invoiced for amounts over the threshold applicable to the application of the section. They thus argue that they are in practice independent contractors of the applicant.

[6] One of the grounds of review in this application concerns the fact that no evidence was led at the arbitration but parties merely argued their version on the jurisdictional point. The arbitrator then proceeded to make his ruling on the basis of the documents before him including the contracts of employment. It is trite that a reviewing court in a matter such as this, is not concerned with whether the ruling is reasonable. The issue is simply whether objectively

speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. [1]

[7] The problem confronting this court however is that given the arbitrator failed to direct the parties to lead evidence before him so as to establish whether the relationship between them was an employment relationship, it is not possible for the court to apply the necessary test to determine whether the bargaining council had jurisdiction or not. The wording of the contracts between the parties and the content of the collective agreement simply do not suffice.

[8] **In Shell SA Energy (Pty) Ltd v National Bargaining Council for the Chemical Industry & others**[2] the LAC found that a conciliator had committed a material irregularity by refusing to hear oral evidence when determining whether an employment relationship existed between the parties.[3] Even where the need to hear evidence is not raised by a party, the parole evidence rule is not sufficient in circumstances where a contract may have been drafted to disguise the true nature of the relationship between the parties. As the "Code of Good Practice: Who is an Employee" provides:

> "29 However, the contractual relationship may not always reflect the true relationship between the parties. In these cases, the court must have regard to the realities of that relationship, irrespective of how the parties have chosen to describe their relationship in the contract. Adjudicators should look beyond the form of the contract to ascertain whether there is an attempt to disguise the true nature of the employment relationship or whether there is an attempt by the parties to avoid regulatory obligations, such as those under labour law or the payment of tax. Our courts have frequently noted that the inequality of bargaining power within an employment relationship may lead employees to agree to contractual provisions that do not accord with the realities of the employment relationship. This is particularly important in the case of low paid workers who may have agreed to be

[1] SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others (2008) 29 ILJ 2218 (LAC) at paragraph 41
[2] (2013) 34 ILJ 1490 (LAC)
[3] At paragraph 6

classified as independent contractors because of a lack of bargaining power."is review

[9] In this matter, the failure of the arbitrator to conduct the proceedings appropriately, and hear oral evidence, means that the Labour Court does not have sufficient evidential material before it to apply the relevant review test and determine whether the jurisdictional ruling was correct. In these circumstances, I make the following order:

Order:

1. The jurisdictional ruling under case number PERFBC 29140 is reviewed and set aside.
2. The dispute is remitted back to first respondent for arbitration anew before an arbitrator other than second respondent.

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H Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: Adrie Hechter Attorneys