REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C155/2019

In the matter between:

CLAUDE OCTOBER AND 15 OTHERS Applicants

and

THEUNISSEN TECHNICAL SERVICES First Respondent

WP THEUNISSEN Second Respondent

Date heard: May 9 and 10 2022

Delivered: July 26 2022 by email; Deemed received on July 27 2022 at 10.00hr

JUDGMENT

RABKIN-NAICKER J

[1] In this referral, the applicant employees seek the following relief as recorded in the pre-trial minute:

> 1. An order declaring that the termination of the employment of the Applicants for operational reasons was both substantively and procedurally unfair in terms of section 189 of the LRA;

1.2 An order that the First and/or Second Respondent reinstate the Applicants with retrospective effect on the same terms and conditions, *alternatively*;

1.3 An order that the First and or Second Respondent pay compensation to each Applicant calculated as follows:

1.4 12 Months gross compensation in respect of the unfair dismissal; and

1.5 Payment of unpaid leave and bonuses.

[2] The facts that are common cause between the parties are recorded as follows:

"**2. FACTS WHICH ARE AGREED**

2.1 The Applicants are:

2.1.1 Fumanekile Bobi;

2.1.2 Siyabulela Zakhaba;

2.1.3 Melven Ponolo;

2.1.4 Yonela Xamelsthatha;

2.1.5 Ziyanda Patrick Nombombo;

2.1.6 Llewellyn Meyer;

2.1.7 Elliot Mhlaba;

2.1.8 Vuyani Magida;

2.1.9 Nixon Lote;

2.1.10 Mzwandile David Gxiyaya;

2.1.11 Bongani Elton Funda;

2.1.12 Sivuyile Sam;

2.1.13 Brian Jonkers;

2.1.14 Abongile December;

2.1.15 Claude October; and

2.1.16 Niklaas Visser;

2.2 The First Respondent is **THEUNISSEN TECHNICAL SERVICES CC,** a close corporation with registration Ck 94/25631/23, with limited liability and duly incorporated in terms of the Close Corporations Act, 69 of 1984, having its principal place of business at 46 Lower Church Street, Somerset West.

2.3 The Second Respondent is **WESSEL PIETER THEUNISSEN,** and adult male businessman, residing at [....] J [....] Street, Strand, Western Cape. The Second Respondent is the sole member of the First Respondent (the Close Corporation).

2.4 The Applicants were previously employed with the First and Second Respondent by rendering services for the First and/or Second Respondent within the building industry.

2.5 The Applicants are no longer rendering these services to the First and/or Second Respondent."

[3] The supplementary pre-trial minute records inter alia the respondents' defence as being that the applicants were not retrenched, but were unwilling to render their services and absented themselves from the workplace. In their statement of response the respondents amplified their case as follows:

"16.Without limiting the scope and extent of this denial and in amplification thereof, Respondents states that:

16.1 the Applicants were employed as labourers and general workers on an ad hoc casual basis by the first respondent;

16.2 the Applicants were employed on a contract basis as and when work was available and were not permanent employees;

16.3 the Applicants were paid for each job as it was done and did not receive a fixed daily or monthly salary;

16.4 Applicants were not continuously employed by First Respondent;

16.5 Applicants were free agents and were not penalised if they missed a day or two of work during the contract period; and

16.6 Applicants were not entitled to leave or sick pay."

[4] The second respondent, (Theunissen) represented himself at the trial, although he had legal representation up to that stage. He argued that the applicants should begin their evidence first, stating that he believed this had been agreed. In fact, the pre-trial minute reflected an agreement that the respondents had a legal duty to begin but noted that that it was "averred" by respondents that they should begin. After hearing the parties, I ruled that the legal duty should be honoured and Theunissen began his evidence.

[5] Theunissen testified in material part as follows:

5.1 The first respondent (the CC) was established in 1994 and is situated in Somerset West. It was involved in providing construction and mechanical engineering. He said the core group of employees numbered about 20 but that sometimes up to 94 people were employed. The CC used to be under the BIBC until 2006. Then all the employees were retrenched and the CC started to contract employees to do short term work for different periods.

Theunissen stated that there was a verbal agreement with the applicants that ‘we will take it from job to job’.

5.2 In August 2018, he held a meeting with the employees about a three month contract (the Steyn Project) and the expected time of completing it. It started in September 2018. He testified there was no written contract with the applicants for the Project because various tasks were needed. It was difficult to specify the time period required. Work progressed until about the 27 November and then there was a dispute with Steyn who only wanted to pay when the work was completed. In terms of the written agreement with Steyn, payment should have been made at the end of November in order to reduce the outstanding amount.

5.3 Theunissen testified that he agreed with the applicants to stop work until client paid and the second last payment was then paid. Work continued until the 8 December 2018 which was the original project end-date. However, the work was not completed because the client had added more work. He said that he had agreed with the applicants that work would be completed and that it would continue until the project was finished. The applicants were paid their fortnightly pay on the 7 December 2018. They worked until the 14 December. On that day Steyn said he was going on holiday and the respondents agreed that while he was away the job would be completed before a final payment was made. Theunissen was at the clients on that day but the applicants went back to the CC’s offices. On that day, 14 workers agreed to carry on the work to finish it. When he got back to the office at about 5pm, only the ‘cash workers’ were there, and the rest of the workers had gone. He stated that the ‘cash employees’ do not form part of the applicants.

5.4 Theunissen testified he tried to contact the applicants and told them to come to work on Tuesday, as Monday the 16th December was a public holiday. Only two came on Tuesday. Some applicants contacted him and told him they had agreed that they were going on their annual holiday. One

said he had to look after his aunt. Two of the applicants did work until 31 December 2019. (Mr Gxiyaya and Mr Bobi) according to him.

5.5 According to Theunissen, the applicants arrived on the 7 January 2019 but refused to work at the project until they were paid one week remuneration and their holiday pay. He told them there was no money until the job was finished. He told them he had applied to the bank in December to extend the overdraft but it had not been processed and that they should start work and he will get funds in the interim. Theunissen testified that Mr Visser (Visser) was leading the group and said he didn't want to work and that he wanted his years of service paid. Some of the employees, about 5 left with him.

5.6 Theunissen said he had never refused to pay them but just did not have the money. The applicants told him to make a plan but they would not work without pay. He continued to work with those at hand. Steyn instituted legal action against the CC. There was a suggestion from Visser that the CC start a new job and then they would continue working and he told them he could not do that because Steyn was taking the CC to the High Court. He stated that the CC has not hired anyone else because he did not want to make new agreements.

5.7 He testified that there had been no disputes before about payments. There was always continuity in working situations and the CC contracted continually and contracted for new jobs in order to create stability. He said that some of the workers did work for other companies and then came back after a year. Therefore it was not continuous employment. He never dismissed them. It was 'preemptive collusion' by them in order to be forceful regarding their requirements. Since then the CC has had no clients and it was brought to its knees. He said that one cannot just take people off the street to do the work. All the contracts in the past had come from referrals. Some of the employees had approached him to ask for money. Some did come and work for him on a private basis at his house and he paid them.

Theunissen insisted he never dismissed anybody. There was work to finish so the company could get paid.

[6] Under cross examination, Theunissen stated that he had not de-registered the first respondent because then he would be personally liable. It ceased operating on the 7 January 2019. He agreed that on the 7 January 2019 the applicants reported to work but were told to return on the 14th. It was put to him that when they came on the 14th at 7.30 am they were kept outside the gate for an hour. He stated that this was because they were hostile, especially Visser. It was put to him that no threats by them were pleaded.

[7] Theunissen conceded that when he opened the gates he addressed them outside. He said that this was because he was uncertain about their attitude. It was put to him that he advised the applicants there was no work and that they should go home. Theunissen denied this and said that Visser suggested that the client should be dumped and new work found and he said no. He could not breach contract. He had nothing more to present to them. It was put to him that he told them not to come in and to go and find other work. He said this was a total misrepresentation and that he asked them to work.

[8] Theunissen was asked if the applicants were permanent employees. He said that the employees previously fell under the BIBC. In 2006 the entire workforce was retrenched. He had suffered a 1.2 million rand loss. It was put to him that the applicants had worked for him for between 6 and 16 years. He was unable to tell the Court how long the applicants had worked for him or when they had interrupted their service. He claimed that Mr Bobi (Bobi) had left several times. It was put to him that it would be argued that his operation was a sham and that no UIF was paid. He said it was not his responsibility that the employees did not want to work under the BIBC conditions. He conceded that the applicants had worked for him for more than a three month period at the time of the termination of employment and there was no written employment contract. There was no set agreement regarding the builders holiday.

[9] It was put to Theunissen that on the 14th January he told the foreman Riaan to take the applicants contact details and if work was available, he would contact them. He said that what he stated was that the client was refusing to make part payment and Riaan did take the names in case an agreement was reached with the client. He said the applicants refused to work without pay and he had to find the money. He would not have sent them away if he had money. Theunissen was asked if he renders any service or is involved in another CC. He said he does things at his home and at his daughter's house. He said he had no income, pension or investments. He said he relies on his wife. He said he did make use of one of the applicants, Mr October, to work at his house and that he makes use of a labourer.

[10] It was put to him that Mr Lotter, Mr Funda and Mr Visser of the applicants worked for him for 16 years. He insisted that all employees that fell under the BIBC were retrenched in 2006 but had no further evidence in relation to this, other than his say so. Theunissen could not dispute the amount of the salaries paid to the applicants as per the documentary evidence produced by them. He had brought no documents to Court. I noted that Theunissen had difficulty in identifying the applicants who were in Court by their full names. This despite their many years of employment by the respondents. He insisted throughout the trial that the applicants were not employees and that ending their contracts because he did not have money to pay them did not constitute a dismissal. As I noted above his stance in defending the claim, and evading liability, was on the basis of legal advice which he persisted with in Court without an attorney present.

[11] Mr Bongani Funda (Funda) was the first witness for the applicants and testified in material part as set out below.

> 11.1 He was first employed by the respondents on the 8 April 2005 and he never left their employment. He earned R3,850 a fortnight . He referred to various bank statements in the applicants' bundle of documents which indicated his salary. He received no payment for sick leave but did get overtime for Saturdays when he worked.

11.2 He stated that he agreed to work from the 7 to the 14 of December 2018. He was not asked to work after the 14th. He testified that the applicants had returned to the employer on the 7 January 2019 and it was closed. He called Theunissen who told him they should come back on the 14 January and he would explain the situation to them. Funda explained that the applicants arrived at the workplace on the 14th at 7.30 am. At about 9 o'clock Theunissen opened the gate and came out to them. He told the applicants that he did not have money for the week they were owed and their leave pay. He said that he only had work at the Steyn project and the applicants could work there but there was no guarantee of money.

11.3 Funda testified that the applicants told Theinissen that they had no money for food and an argument started with Theunissen. Theunissen said he had no money and that they should go and find other jobs. He asked Ryan to take their phone numbers and that he would call us when there is work. They received no severance pay and no UIF had been deducted.

11.4 Regarding the alleged retrenchment in 2006, Funda explained that in December of 2005, Theunissen had given him a letter to come every 20 days of the month. He said he was retrenched and given a letter and he came to work in January 2006 and was given work. He was referred to a list of the applicants which detailed their date of starting employment and date of termination. He confirmed that he knew them all and they worked with him for the respondents.

[12] Under cross-examination, Funda confirmed that he never got a pay slip after 2006. He confirmed he always received his remuneration up until December 2018. He agreed that the work at Steyn was not complete and that he didn't know when it was to be complete as work kept on coming, but it was supposed to be finished on December 2018. Funda agreed that Theunissen had never said there was no work before. He insisted that Theunissen had said he could not guarantee that he would be able to pay them.

[13] Funda stated that he had always had tiling work from Theunissen since 2005 on site, on a project or in Theunissen's house. He was asked why he was so upset on the 14th December that he went to make a complaint. He said he felt disrespected the way the applicants were treated by being left outside the gate of the company. Funda presented as an honest and credible witness.

[14] Visser testified in material part as set out below.

> 14.1 He was first employed by the respondents in 2004 and was paid fortnightly in the amount of R3850. He said he was not retrenched. On the 7 January 2019, when the applicants returned to work they were left outside the gate and they asked Funda to call Theunissen. They were told to come back on the 14th. On the 14th, they arrived at 7.30 and stood there till past 9 am. Theunissen came out and discussed with the applicants about work. He said he had no money to pay them and that they should go and look for other work. He confirmed he understood this to mean that his employment was terminated. He also confirmed he knows all of the applicants who were employed at the time of the termination.
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> 14.2 Visser testified that he had never agreed on a specific contract with his employer. In 14 years he had only worked for Theunissen. It was only from 2004 that Theunissen had paid into a provident fund and UIF but that stopped in 2006. He never received a written contract during his employment or severance or notice pay after his dismissal. He denied that he was retrenched in 2006. Visser also mentioned that his wife had worked for Theunissen and had given notice because of the way she was treated.

[15] Under cross-examination, he agreed that he was registered under the BIBC in 2004 and 2005. He agreed too that the Steyn project was not finished but stated that Theunissen had promised that they could go on holiday. The work Steyn wanted done got more and more. He also insisted that Theunissen had promised them money if they worked till the 14th and that they had had to go on leave without pay. There was no money in their accounts and it was very tough. He confirmed that the

only meeting with Theunissen was on the 14th January because the Theunissen did not turn up on the 7th.

[16] He stated that Theunissen had told them there was no work and that the applicants had families to feed. They went to make affidavits at the police station because Theunissen was rude to them and did not let them have a say. It was put to him that the employees had an ulterior motive when they said there was no work and that he only did not pay 5 days of remuneration and the Christmas bonus, plus holiday pay. Theunissen also challenged Visser's evidence that he had never worked for other employers which Visser did not accept. Visser's demeanor did reflect his anger with an employer for whom he had worked since 2005 and whose wife was, according to him ill-treated by the Theunissens. However, Visser's evidence on the material facts of the employment relationship and the dismissal accorded with that of Funda.

[17] The parties argued before me on the last day of the trial and handed up written heads. Mr Theunissen argued that the matter should not have come to Court and could have been settled at the CCMA or Bargaining Council. He submitted that the only issue that the Court has to decide is a factual one and I had to compare the evidence he gave and that of the respondents. He stated that it could not be said that he was not trustworthy and an untruthful witness and he never changed his version or contradicted himself.

[18] His argued that the duty is on the applicants to prove on a balance of probabilities that they were dismissed He submitted that they did not do so. He stated that the probabilities favoured him in that:

> 18.1. It is improbable that a business person of nearly 30 years standing with no record in the Labour Court would unfairly dismiss more than 30 people on 14 January 2019 when he was solely reliant on their services for completion of a project with a large amount of money outstanding.

18.2 Their version of dismissal is not probable since Mr Funda testified that they would continue working without payment but that they were not satisfied that I could guarantee payment or even partial payment after work was done.

18.3 It is also improbable that a worker would be under the impression that he was dismissed or retrenched with proper consultation or notification and most important after a good working relationship as testified by the two applicants.

[19] Theunissen submitted to the Court that it could not be said that his version is not at least reasonably probably true and that the applicants' version is true 'beyond a shadow of a doubt'. The application should be dismissed with costs.

[20] For the applicants it was submitted that the respondents' pleadings that the applicants were contractors was not sustainable. It was common cause that the parties had not entered into any written short term contract. The respondents did not have any documentary proof to show to contradict the applicants' evidence that they had worked for the respondents continuously for periods between 6 and sixteen years.

[21] Theunissen had admitted under cross examination that as a result of operational requirements he was unable to pay the applicants. He confirmed that he was not able to perform in terms of the agreements with the applicants in that he was unable to pay their salaries.

[22] It was further submitted that Theunissen was an unreliable witness. In his evidence in chief he had stated that all his employees were retrenched in 2006. He later stated that only the BIBC employees were retrenched. He further testified that the operations of the first respondent ceased on 7 January 2019 but argued that he wanted the applicants to continue with the Steyn project on 14 January 2019. It was submitted that these two statements were mutually destructive.

[23] Mr Du Preez for the applicants went on to argue that Theunissen should be held personally liable for the first respondent in reliance on sections 63, 64 and 65 of

the Close Corporations Act. It was emphasized that Theunissen himself testified that the reason he had not deregistered the ostensibly dormant CC was to avoid personal liability. I return to this issue below.

[24] It was further submitted on behalf of the applicants that Theunissen had a complete disregard for the employment laws of South Africa and had recklessly and fraudulently retrenched all his staff falling under the BIBC and continued to employ them without the requisite benefits including UIF and a provident fund. Instead of taking responsibility and at the very least paying the applicants their severance pay, the second respondent had opposed the matter on the basis that the applicants were employed as short term contractors when in fact some had been employed for him for up to 16 years.

Evaluation

[25] Among the legal issues which the parties agreed that the Court should decide in the pre-trial minute, was the nature of the employment of the applicants. In particular the following:

> 25.1 Whether First Respondent, a close corporation, is a separate juristic entity from Second Respondent;
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> 25.2 Whether applicants were at all material times employed by the First Respondent;
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> 25.3 Whether Second Respondent as the member of the First Respondent cannot be held liable for the debts of First Respondent;
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> 26.4 Whether accordingly, there is no cause of action herein against the Second Respondent;
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> 27.5 Whether the applicants were employed as labourers and general workers on an ad hoc casual basis by the first and/or second respondent; and

28.6 Whether the applicants were employed on a contract basis as and when work became available.

[26] It appears to the Court that even on the version of Theunissen, it is clear that the applicants were employees and not contractors. Theunissen testified that there had never been a break in referrals to the CC before. He also confirmed that all the applicants had been working for him for more than three months at the time of the termination of employment. He conceded the amount of salary they were paid per fortnight. He seemed to be of the impression that because he did not meet the obligations of an employer under the BCEA, that this Court should consider the applicants to be other than employees. In this he was mistaken.

[27] Theunissen expected the applicants to work without remuneration and he considered their refusal to do so as "willingly absenting themselves". However, on his own evidence, he told the applicants on the 14 January 2019 that he had no work for them and could not guarantee remuneration in the future. He did not dispute he owed them remuneration and leave pay. He also informed them that the CC could not take on further referrals (i.e. get work projects) because Steyn had launched a High Court application against it for breach of contract. The inference to be drawn from this in my view is that it was not in the respondents' interests for the CC to have an income in view of the High Court litigation. Theunissens submissions that Funda was not a trustworthy witness had no foundation. Funda's evidence was simply that Theunissen had told them there was no money to pay them and further that he could not guarantee that they would be paid in future for the Steyn project.

[28] Section 186 of the LRA provides inter alia that "(1) 'Dismissal' means that-

(a) an employer has terminated employment with or without notice;"

This is precisely what happened when Theunissen told the applicants that he had no work for them because the respondents could not pay their remuneration.

[29] It is the Court's view on all of the evidence before it, that the applicants were permanent employees and were dismissed. The respondents did not plead in the alternative that if the Court were to make this finding, that the dismissals were procedurally or substantively fair. What remains to be considered then is whether Theunissen can be held liable together with the first respondent for its debts.

[30] Section 65 of the Close Corporations Act 69 of 1984, which the applicants' relied on in submissions before me, provides that:

> 'Whenever a Court on application by an interested person, or in any proceedings in which a corporation is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that corporation constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the Court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration.'

[31] In **Wilson v Prinsloo: In re Prinsloo v Expidor 163 CC t/a The League of Gentlemen & another**[1] the Labour Appeal Court stated, per Davis JA, that:

> [15] ……..There is, in my view, no general, free floating discretion available to a court to disregard a corporate entity's separate juristic personality, in this case that of a close corporation, other than to seek relief in terms of s 65 of the Close Corporations Act.
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> [16] In Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd & others 1995 (4) SA 790 (A), Smalberger JA citing dicta from Dadoo Ltd & others v Krugersdorp Municipal Council 1920 AD 530 to the effect that, given particular circumstances a court might disregard corporate personality. The

[1] (2021) 42 ILJ 1714 (LAC)

decision is based on having regard to the substance rather than the form of things. Thus Smalberger JA said at para 29 that:

'Whatever the position, it is probably fair to say that a court has no general discretion simply to disregard a company's separate legal personality whenever it considers it just to do so.'

[17] The learned judge went on to say at para 31 that 'where fraud, dishonesty or other improper conduct are found to be present other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil'. In this connection, the learned judge added at para 33 that 'if a company, otherwise legitimately established and operated, is misused in a particular instance to perpetuate a fraud or for a dishonest or improper purpose, there is no reason in principle or logic why its separate personality cannot be disregarded in relation to the transaction in question (in order to fix individuals responsible for personal liability) while giving full effect to it in other respects'.

[40] In **Wilson v Prinsloo** (supra), the LAC found that the affidavits before the Court did not provide evidence to justify the lifting of the corporate veil. Nor was section 65 of the Close Corporations Act relied upon. In this matter, the evidence of the Second Respondent was to the effect that although the CC was doing no business any more, he had not deregistered it because he wanted to avoid personal liability. In the Court's view this is a patent misuse of the CC to 'perpetuate a fraud or for a dishonest or improper purpose'.

[41] In all the above circumstances, I find that the applicants' claims against the first and second respondent must succeed. Given the circumstances of this case in which the respondents sought to avoid the consequences of employment law and to misuse the CC in the way described above, it is apposite that costs should follow the result. I make the following order:

Order

1. The termination of employment of the Applicants (whose names appear in paragraph 2 of this Judgment) was both substantively and procedurally unfair in terms of section 189 of the LRA.

2. The First and Second respondents are jointly liable to compensate the applicants for their unfair dismissal in terms of section 65 of the Close Corporations Act of 1984.

3. The respondents shall jointly and severally, the one paying, the other to be absolved, pay *each* of the applicants, an amount equivalent to 12 months' of their gross salary as compensation being 12 x R7700 = R92,400 (ninety-two thousand and four hundred Rand).

4. The above compensation shall be inclusive of any leave pay and bonuses claimed by the applicants.

5. The respondents shall jointly and severally pay the costs of this referral, the one paying, the other to be absolved.

H. Rabkin-Naicker
Judge of the Labour Court of South Africa

Appearances

Applicants: T. Du Preez instructed by Malcom, Lyons & Brivik Inc
Respondents: Second Respondent in person