



THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable
Case No: DA 12/2023

In the matter between:

**SUN INTERNATIONAL MANAGEMENT LIMITED
(T/A WILD COAST SUN)**

Appellant

and

DOUGLAS PAUL POWELL

First Respondent

MBULELO SAFA N.O.

Second Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 12 March 2025

Delivered: 20 March 2025

Coram: Van Niekerk JA, Waglay AJA and Mooki AJA

JUDGMENT

MOOKI, AJA

[1] Sun International (appellant) appeals the Labour Court's dismissal of its application to have an award made in favour of the first respondent (Mr Powell) reviewed and set aside. The appeal is on petition to this court.

[2] Sun International advised Mr Powell in a memorandum dated 2 January 2019 that their working arrangement would end on 31 January 2019. The memorandum also stated that the position of Rooms Division Manager would be advertised and that Mr Powell could apply for the position.

[3] Mr Powell contended that the notification was a dismissal. Sun International, on the other hand, denied dismissing Mr Powell. That was because Mr Powell was not its employee on 31 January 2019 as Mr Powell had resigned from Sun International on 1 October 2015 and took up employment with a labour broker on 1 November 2015. Sun International contended that Mr Powell was rendering services as an independent contractor on 31 January 2019.

[4] The Commissioner agreed that Mr Powell was an employee of Sun International on 31 January 2019 and that Sun International had dismissed Mr Powell. The Commissioner directed Sun International to reinstate Mr Powell and to pay him his outstanding salary. The Labour Court (Thebela-Mkhulisi AJ) dismissed the review application.

[5] Mr Powell made his case in arbitration as follows. Sun International first employed him in 1996. He was employed as Direct Marketing and Loyalty Manager for Sibaya and Wild Coast Sun, effective 1 October 2014. He resigned on 1 October 2015. He then joined Capital Contracting, a labour broker, on 1 November 2015. He rendered the same service to Sun International as he did before his resignation -- Manager for Direct Marketing and Loyalty, except that he rendered services through Capital Contracting, which paid him.

[6] Mr Powell gave evidence that Mr Myan Moodley, Sun International's General Manager and another employee approached him with a proposition for Mr Powell to

take up the position of Acting Hotel Manager. They agreed that Mr Powell would continue in his job as Direct Marketing and Loyalty Manager. Mr Powell was told that Sun International would hire him through the labour broker as Acting Hotel Manager, with effect from 1 March 2018.

[7] Mr Powell started working as Acting Hotel Manager on 1 March 2018. He also worked as a Direct Marketing and Loyalty Manager. He rendered services to Sun International through the labour broker. The labour broker paid Mr Powell on submission of timesheets for hours worked.

[8] Mr Moodley approached Mr Powell and told him that Sun International was paying the labour broker too much for Powell's services and that Mr Moodley would bring Mr Powell across as an employee of Sun International. Mr Powell was to take up the following roles with Sun International: "The Front Office Marketing Consultant and Marketing Consultant." Mr Moodley made the approach three months after Mr Powell took up the position of Acting Hotel Manager.

[9] Mr Powell commenced duties as Acting Hotel Manager on 1 March 2018. He also worked as a Direct Marketing and Loyalty Manager for the Wild Coast Sun. Mr Powell asked Mr Moodley for his contract of employment. Mr Moodley told him not to worry as the contract was being sorted out. Mr Powell never got a contract.

[10] Mr Powell says Sun International instructed the labour broker to terminate his employment and that Mr Powell was to work for Sun International from 1 June 2018. Mr Powell's last timesheet to the labour broker is dated 31 May 2018. Mr Powell says he had been employed by Sun International since 1 June 2018 when Sun International advised him that their working relationship would end on 31 January 2019.

[11] Sun International paid Mr Powell R50 000.00 per month. Sun International did not give him a payslip. Sun International's permanent employees received payslips. He received payslips before his resignation from Sun International. Mr Powell found out, after the Financial Manager was dismissed, that Sun International had been paying him off invoices to Sun International in his name. He confronted Mr Moodley

about the invoices. Mr Moodley advised him that he was busy sorting out the issue of invoices. Mr Powell denied invoicing Sun International. He was unaware that invoices were prepared in his name.

[12] Mr Powell described his working life as follows. His working conditions did not change. He clocked in and out like other employees; he had staff who reported to him; he worked from the same office, in the executive offices; he had access to every other system available to other executives; he was given a company cellphone; a car was hired for him when he travelled and he claimed AA rates; he had a department that reported to him, and gained five departments when he took over as Acting Hotel Manager; he had the same people reporting to him as before joining on 1 March 2018; he was entitled to go on leave and had 8 leave days like other executives; he was paid for overtime. He could not comment on whether other executives were paid for overtime.

[13] He was under the umbrella employment of the labour broker. There was a process to take everyone who was with the labour broker. Sun International did away with labour brokers and on-boarded employees. He was paid by BLU during the first three months. He was paid by Sun International after Sun International on-boarded everyone. He was a member of the medical scheme –his cover started on the 10th month; Sun International gave him medical aid cover, which started on 1 October 2018. Mr Powell mentioned that he was unaware of an independent contractor receiving benefits.

[14] Sun International's Human Resources classified him as an employee, as shown in a memorandum to staff on 11 December 2018 by Sun International's Human Resources Manager. The memorandum recorded that the Wild Coast Sun had employed Mr Powell from 1 November 2015 as a Direct Marketing and Loyalty Manager, and from 1 March 2018 as the Acting Hotel Manager until such time that position was filled. Mr Powell said the memorandum invoked a sense of expectation and a sense of how the Human Resources Manager saw Mr Powell's position. The memorandum was written following uncertainty by both him and the staff reporting to him about his employment.

[15] Mr Moodley and Ms Mkhize called him to the office on 18 December 2018. They presented him with a commercial terms contract. The contract stated that he commenced as an employee on 1 March 2018. He initially refused to sign the document but did so under duress because he was threatened with the withholding of his payment.

[16] Sun International advised Mr Powell in a memorandum dated 2 January 2019 that “the working arrangement” between Sun International and Mr Powell would end on 31 January 2019. The memorandum also stated that the position of Rooms Division Manager would be advertised and that Mr Powell could apply for the position. He received a memorandum within 10 days of the commercial terms contract.

[17] Mr Powell said the working arrangement mentioned in the memorandum related to Mr Powell being the Acting Hotel Manager. Mr Powell was unhappy and told Mr Moodley so, including that Mr Powell would seek guidance from the Commission for Conciliation, Mediation and Arbitration (CCMA). Mr Moodley told him not to worry, and that Mr Moodley’s own position may become available.

[18] Mr Powell accepted that Sun International and Capital Contracting were independent entities. He said he worked for Sun International under the umbrella of Capital Contracting, and that Sun International pulled him back from Capital Contracting after three years; when he was asked to take up the portfolio of Acting Hotel Manager. He maintained that Sun International employed him through BLU¹ and denied being a consultant. That was because consultants offered services for a limited period, whereas his services were open-ended. He said his employment through BLU ended on 1 March 2018. Sun International thereafter paid him monthly through to 31 January 2019. He asked for a payslip and was told not to worry. That remained the case until his termination.

[19] Mr Powell agreed that BLU continued to pay him during the months of March to June 2018, despite Sun International, in the commercial terms contract, saying Mr

¹ Capital Contracting changed its name to BLU.

Powell was employed from 1 March 2018. Mr Powell said a document shown to him was not a timesheet but was a record of the overtime hours that he worked. The document was populated when he was working for BLU in the month of January 2019.

[20] Mr Powell summarised his history with Sun International as follows. He was employed as Gaming Shift Manager from 2008 to 2014, at the Wild Coast Sun and Umhlanga. He resigned on 1 November 2015 because he did not want to go to Sibaya. He was then employed by Capital Contracting Services, which changed its name to BLU, as Manager, Direct Marketing and Loyalty, from 2015 to 28 February 2018. Sun International's General Manager approached him on 1 March 2018 to take over the services as Acting Hotel Manager. He resigned from BLU. He was Direct Marketing and Loyalty Manager and Acting Hotel Manager from 1 March 2018 to 31 January 2019, when his position was terminated. BLU paid him for the first three months (March to May 2018). He was then paid by Sun International's Head Office from 1 June 2018 to 31 January 2019.

[21] He has no document from Sun International showing that Sun International was paying him from 1 June 2018 to 31 January 2019. He had no contract for that period, until the fabrication of a document in December 2018.²

[22] Sun International made its case in the arbitration as follows. Mr Cabe was Sun International's sole witness.

[23] Sun International employed Mr Powell in 2014 as Direct Marketing and Loyalty Manager, effective 1 October 2014. The employment relationship ended when Mr Powell resigned on 1 October 2015. He was never re-employed.

[24] Mr Powell was issued payslips whilst employed by Sun International. He no longer enjoyed the benefits listed on the payslip after his resignation. Mr Powell tendered invoices with the last invoice dated 28 January 2019.

² The 'document' referred to is the Commercial Terms Contract.

[25] Mr Powell retained the same employee number after his resignation. His employee number was for access to premises and had nothing to do with his employment status with Sun International.

[26] Mr Cabe pointed out that Mr Powell did not dispute receiving the amount referenced in the invoice, despite Mr Powell's denial that he did not produce the invoices. Mr Cabe maintained that only a service provider rendered the type of services mentioned in the invoice.

[27] Mr Cabe explained the meaning of Hotel Manager and of Manager, Direct Marketing and Loyalty. The person managed services rendered at the Front Office and housekeeping in the rooms. Mr Powell provided the services of a Marketing Manager for the Wild Coast. Sun International had outsourced those services.

[28] Mr Cabe could not say whether there was a service level agreement between Mr Powell and Sun International. Mr Powell was paid on the 30th of each month, on the issuing of an invoice. He was paid on invoices from October 2018 to January 2019. Employees were paid using the People Service Management System. Service providers, on the other hand, produced an invoice for their payment. The employees did not submit invoices to their employer. Mr Powell never tendered an invoice in the past when he was employed by Sun International.

[29] The Commissioner determined that Mr Powell was an employee and that he was unfairly dismissed. The determination was based on several considerations, including that Sun International issued a memorandum confirming Mr Powell's employment; that Mr Powell was not engaged to produce a particular output, had subordinates, was entitled to leave like other directors, was paid overtime, and that Sun International gave him work-tools. The Commissioner drew an adverse inference against Sun International for not calling Ms Mkhize, Sun International's Human Resources Manager, as a witness. The Commissioner directed that Mr Powell be reinstated and that he be paid R550 000.00, being the outstanding salary from February to December 2019.

[30] Sun International sought to have the award reviewed based essentially on how the Commissioner dealt with the evidence. First, the Commissioner ignored provisions of the commercial terms agreement; and that there was no support that Mr Powell signed the agreement under duress. Second, the Commissioner ought to have found that Mr Powell generated invoices upon which he was paid and that there was no support that the invoices were a sham.

[31] The Labour Court held that the Commissioner's decision that Mr Powell was an employee was reasonable. The Labour Court was critical of the Commercial Terms, saying the agreement was an afterthought to disguise the fact of Mr Powell being an employee. The Labour Court referenced other considerations for sustaining the award. It is unnecessary to address those considerations given this court's basis for determining the appeal.

[32] The Commissioner was called to determine a jurisdictional issue, namely the existence or otherwise of an employment relationship between Sun International and Mr Powell. The Labour Court, in dismissing the review because the decision underpinning the award was reasonable, applied the wrong standard. The Labour Court is required to have considered whether the Commissioner's decision was correct, not whether the decision was reasonable.³ The Court must in such instance determine whether, objectively speaking, the facts existed which gave the CCMA or a bargaining council jurisdiction to entertain a dispute.⁴ The decision by the Labour Court is therefore to be set aside on this basis.

[33] There were no facts, objectively considered, at the arbitration that gave the CCMA jurisdiction. The facts show that Mr Powell was not an employee of Sun International on 31 January 2019. He was paid R50 000.00 per month with no deductions. Payment was made on presentation of an invoice. His denial of knowledge of being paid on presentation of an invoice was hollow. He was, before his resignation, a long-term employee of Sun International. He became a permanent

³ *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others* (2013) 34 ILJ 1427 (LAC) at para 24.

⁴ *Transnet t/a Transnet Freight Rail v National Union of Metalworkers of SA on behalf of Manku & Others* [2021] 42 ILJ 1948 (LAC) at para 9.

employee on 3 January 2008, until his resignation on 1 October 2015. He knew that employees were not paid on presenting an invoice.

[34] Mr Powell has never received a payslip since his resignation. He did not support his claim that he requested Mr Moodley to give him both a contract and payslips. Sun International led evidence that he was paid on an invoice basis, in the same way as Mr Chris Forward, a contractor. The Commissioner's rejection that Mr Powell was paid on the same basis as Mr Forward because Mr Forward was much older than Mr Powell was unsound.

[35] The evidence on arbitration shows that Mr Powell, on resigning from Sun International, took up employment with a labour broker rendering services to Sun International. Mr Powell essentially continued to work at Sun International as he did before his resignation. He was based in the same office as before his resignation. A person unaware of his resignation would not have known that he was no longer an employee of Sun International. He was paid by the labour broker for a period following his resignation from Sun International.

[36] There would have been a change at some point because Sun International started paying Mr Powell. Sun International contended that Mr Powell was an independent contractor at that point. Payment was on the presentation of an invoice. Sun International made no deductions, such as deducting tax from an employee to be paid over to the Receiver of Revenue.

[37] An employee of Sun International confirmed to Mr Powell that Mr Powell was not being paid through payroll. This confirmation occurred soon after Sun International had advised Mr Powell of the termination of their working arrangement. This confirmation is consistent with the evidence in the arbitration that Sun International did not pay Mr Powell as it paid its employees.

[38] The Commissioner found that Mr Powell was an employee in part because Mr Powell was paid overtime. Mr Powell's contract of employment in which he was appointed Manager, Direct Marketing and Loyalty expressly states that he would not be paid overtime. This was consistent with Mr Cabe's evidence that employees were

not paid for overtime. The Commissioner erred in relying on the payment of overtime as showing that Mr Powell was an employee.

[39] The Commissioner committed a material misdirection in castigating Sun International for not calling witnesses to support its case that Mr Powell was not an employee. This was an impermissible reversal of the onus. It was for Mr Powell to make the case for being an employee. He relied on hearsay evidence. This is particularly so in relation to Mr Powell's case based on the stated dealings between Mr Powell and Mr Moodley, Sun International's General Manager.

[40] Mr Powell had been in Sun International's employ for many years. He was a permanent employee since 2008. He knew that Sun International offered employees formal contracts of employment. That included persons employed on fixed-term contracts. Mr Powell's own history with Sun International demonstrates this, as shown by the fixed term contract that he signed on 23 August 2007.

[41] There was no basis for the Commissioner's view that the Commercial Terms Contract was an after-thought because the document was backdated. Mr Powell signed the contract in which Sun International employed him as "Loyalty & DM Manager" on 24 November 2014. His employment was effective from 1 October 2014. This shows that absent evidence to the contrary, there was nothing untoward in the Commercial Terms Contract being back-dated to 1 March 2018.

[42] The record in the arbitration shows several exchanges between Mr Powell and Mr Moodley after Sun International notified Mr Powell of the end of their working relationship. Mr Powell did not, in any of those exchanges, register a protest with Mr Moodley that he had been hard done by Sun International. For example, there is no exchange in which Mr Powell said anything to Mr Moodley about Mr Powell having repeatedly requested a contract or payslips from Mr Moodley.

[43] Mr Moodley would have been the very person whom Mr Powell would have been expected to register his protest at being dismissed. There was no such protest. Instead, Mr Moodley sent Mr Powell a text message on 6 February 2019, suggesting that Mr Powell consider a food delivery service in Port Edward now that the working

arrangement had been terminated. Similarly, Mr Moodley sent Mr Powell a text message on 17 April 2019, requesting Mr Powell's assistance at the hotel because there was a prospect of a strike. Mr Powell replied that he was unable to help because he was away camping in the Eastern Cape.

[44] Mr Powell did not express outrage at Mr Moodley's suggestion that he consider a food delivery service. Mr Powell was also amenable to helping Mr Moodley given a potential strike at Sun International. Mr Powell's contemporaneous exchanges with Mr Moodley are at odds with an employee who had been unjustly dismissed.

[45] The memorandum recording that Mr Powell was an employee of Sun International is at odds with the established facts. This is apart from its author not having given evidence in support of Mr Powell's claims arising from the document. Mr Powell had not, as at the date of the memorandum, been employed by Wild Coast from 1 November 2015 as a Direct Marketing and Loyalty Manager. Mr Powell resigned from Sun International on 1 October 2015 and was employed by a labour broker for a period since that date.

[46] The Commissioner erred in discounting the Commercial Terms Contract as a sham. There was no support for Mr Powell's claim that he signed the agreement under duress. The agreement on its own is not determinative. The agreement, however, records the substance of the dealings between the parties. It reflects services rendered by Mr Powell as management and supervisory function of the daily running of the Rooms Divisions departments; including but not limited to Direct Marketing and Loyalty Manager functions. Mr Powell was paid a fixed monthly fee of R50 000.00. Payment was made on the 30th of each month, on the presentation of an invoice.

[47] The Commissioner accepted that Mr Powell did not submit invoices for him to be paid and that those invoices were prepared by Ms Sandi Burger, the Finance Manager. Mr Powell gave evidence that Ms Burger was dismissed. The dismissal was sometime in 2018. Mr Powell did not explain the genesis of the invoice dated 28 January 2019 given his evidence that Ms Burger generated invoices and that she

was dismissed in 2018. This invoice demonstrates that Mr Powell's evidence that he never submitted invoices for payment was not probable.

[48] A proper consideration of the material facts, objectively, leads to the conclusion that Mr Powell was not an employee of Sun International on 31 January 2019. He was an independent contractor to Sun International on that date. The CCMA lacked jurisdiction to entertain the referral.

[49] In the result, I make an order on the following terms:

Order

1. The appeal is upheld.
2. The order of the Labour Court is set aside and is replaced as follows:
 - "1. The review application succeeds.
 2. The arbitration award is set aside and is substituted with a finding that the CCMA lacked jurisdiction to determine the dispute given that the employee failed to prove a dismissal in terms of section 186(1)(b) of the Labour Relations Act 66 of 1995."

Mooki AJA

Van Niekerk JA and Waglay AJA concur.

APPEARANCES:

FOR THE APPELLANT: F. A. Boda SC, instructed by: Cliffe Dekker Hofmeyr Inc.

FOR THE RESPONDENTS: No appearance