IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: JR1842/16

In the matter between:

ANNABEL BEAN **Applicant**

and

COMNMISSIONER JOSEPH WILSON THEE **First Respondent**

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Second Respondent**

EDCON LTD **Third Respondent**

Heard: **20 June 2018**

Delivered: **22 June 2018**

Summary: Review of award on jurisdiction - Applicant failing to establish that she was an employee – application for review dismissed.

JUDGMENT

GUSH. J

Introduction

[1] On 4 July 2015 the first respondent handed down an arbitration award under case number GAJB25968-15 in which award the first respondent found that the applicant had failed to discharge the onus that she was an employee and that accordingly the second respondent did not have jurisdiction to hear the dispute thereby dismissing the applicant's application.

Background

[2] The applicant had in July 2003 worked as a consultant at the third respondent but was employed by a consulting firm. This had entailed the applicant *"mov[ing] permanently onto the Edcon [third respondent] site still working for Accenture".*[1] The applicant rendered services to the third respondent as a consultant or service provider and was not employed by the third respondent. In 2007 the applicant left Accenture and commenced employment with InDeed as a consultant. The applicant continued to render services to the third respondent still as a consultant, however, this time as an employee of InDeed.

[3] 17 February 2008 the applicant entered into a fixed term employment contract with the third respondent for a period of eighteen months. At the expiry of the eighteen-month contract the applicant entered into a second fixed term contract for a further period of twelve months. This contract was to, and did, automatically expire on 6 August 2010.

[4] At the conclusion of this contract the third respondent advised the applicant that the human resource policies of the third respondent did not permit an extension to or a new contract of employment to be entered into.

[5] For a variety of reasons mainly due to the applicant's requirement that she work flexible hours to enable her to deal with the children it was agreed that the applicant would enter into a consultancy agreement with the third

[1] Transcript page 11 lines 14 and 15.

respondent to provide services relating to specific projects. The agreement entailed the applicant registering as a service provider and invoicing the third respondent for the work performed in attending to specific projects at an hourly rate. The number of hours required in respect of the projects was not stipulated and appears to have depended upon the specific project itself.

[6] It is clear from the record of the arbitration that the applicant understood quite clearly from her own evidence that she understood the nature of this agreement. It was put to her that she was going to be a service provider to which replied "I absolutely was".[2]

[7] Pursuant to the applicant's agreement with the third respondent to become a consultant or service provider, the applicant applied to be registered as a supplier to the third respondent under the name "Annabel Bean Consulting".[3]

[8] Part two of this application deals with the terms and conditions and in particular the "terms of payment" where it records that the applicant had agreed to be paid "within seven days of invoice". The applicant provided the third respondent with a letter of reference from her bank as part of the application. The applicant was duly registered as a supplier under the name "ANNABELBEAN CONSULTING".

[9] In accordance with this agreement the applicant commenced submitting tax invoices to the third respondent for her consulting services that reflect *inter alia* the following information:

9.1 The invoices were issued by "Annabel Bean Consulting" marked "Tax Invoice";

9.2 That Annabel Bean Consulting is not "VAT registered";

9.3 The invoice number and the Vendor number was 15086;

9.4 The invoices appear to have been submitted for payment randomly for work done during either one month, two months or three months at a time;

[2] Transcript page 61 at line 15.
[3] Transcript - Respondents documents page 187/8.

9.5 That the invoice was for “project implementation” for a specific period and for a specific project description and an amount. In explanation of the amount the invoice refers to a “project hourly breakdown” and in so far as can be calculated such services were rendered at an hourly rate of approximately R1302 per hour; [4]

[10] A summary of the payments made to the applicant are included in the bundle.[5] This document records the “supplier payment history” for the supplier “ANNABELBEAN CONSULTING”. From this report it appears that the applicant invoiced the third respondent for amounts ranging between R 80 639-00 and R626 504-00 per invoice for services rendered.

[11] On 5 November 2015 the applicant was advised by the third respondent that her consulting services were no longer required. Shortly thereafter the applicant referred a dispute to the second respondent now alleging not only that she was an employee but that she had been unfairly dismissed.

[12] After conciliation the dispute was referred to arbitration and at the arbitration proceedings the third respondent denied that the applicant was an employee and that accordingly the second respondent did not have jurisdiction to consider the matter.

[13] At the arbitration proceedings both parties handed in a bundle of documents and agreed that they were what they purported to be. Only the applicant gave evidence. At the conclusion of her evidence the third respondent’s representative indicated that, in light of the evidence of the documents produced and that of the applicant, both in chief and in cross examination, he would submit in argument that the applicant had not established that she was an employee. Both parties then presented their argument to the first respondent.

The award

[4] Transcript Bundle of documents pages 194 to 204.
[5] Transcript Bundle of documents pages 205 to 208.

[14] In his award the first respondent, having considered the argument and the evidence in his analysis, concluded that the test to be applied was that of the dominant impression of the contract. The first respondent was also mindful of the provisions of section 200A (1)[6] of the Labour Relations Act (LRA)[7]. The first respondent sets out that although the applicant earned more than the threshold set out in subsection (2)[8], he regarded the factors listed in subsection (1) as a guide for determining whether the applicant was an employee or an independent contractor.

[15] The first respondent was also mindful of the fact that the third respondent led no evidence at the arbitration but relied on the documentation provided and the evidence given by the applicant both in chief and under cross-examination. Applying an "objective assessment" to the "totality of the circumstances in this case" the first respondent concluded that the applicant had not established that she was an employee.

[16] The first respondent found that the terms and conditions applicable to the applicant's employment on the two fixed term contracts were no longer part of the subsequent conditions. He was not persuaded by her claim that she regarded the new conditions as that of an employee and not as an independent contractor.

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[6] **200A. Presumption as to who is employee**

(1) Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

(a) the manner in which the person works is subject to the control or direction of another person;

(b) the person's hours of work are subject to the control or direction of another person;

(c) in the case of a person who works for an organisation, the person forms part of that organisation;

(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;

(e) the person is economically dependent on the other person for whom he or she works or renders services;

(f) the person is provided with tools of trade or work equipment by the other person; or

(g) the person only works for or renders services to one person.

[7] 66 of 1995, as amended.

[8] (2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3) of the *Basic Conditions of Employment Act*.

[17] The first respondent recorded that the applicant had confirmed that she worked flexi hours, submitted invoices, had not been taxed and would invoice the third respondent for the hours worked even at home. This, the first respondent concluded, was not consistent with the working conditions of an employee.

[18] The first respondent, correctly in my view, dismissed the applicant's contentions that being invited to and attending Christmas parties and being provided with parking as constituting objective grounds indicating employment as opposed to being a service provider.

Evaluation

[19] In matters of this nature the test on review is not that as spelt out in section 145 of the LRA. The test is whether on the evidence and material placed before the first respondent, is his decision correct?[9]

[20] It is pertinent to record that at the commencement of cross examination of the applicant she emphatically stated that she regarded herself as a service provider.[10]

[21] The first respondent quite correctly found that the terms and conditions that prevailed when she was an employee were not the terms and conditions that prevailed in the subsequent contract where the applicant was registered as a service provider. These differences pertinently included that when employed in accordance with the fixed term contracts the applicant's salary was paid to her net less income tax (PAYE), UIF contributions, provident fund contributions and that her benefits included the use of the third respondents discount buying card.

[22] After commencing what the applicant herself described as "absolutely" a service provider agreement there is nothing in the evidence or documentation that suggests that the parties to that agreement had changed the independent

[9] SA Rugby Players Association and Others v SA Rugby (Pty) Ltd & others (2008) 29 ILJ 2218 (LAC)
[10] supra

contractor contract to one of an employment contract. To have done so would have required an express agreement to that effect with the necessary changes to *inter alia* the treatment of income tax and the benefits of the Basic Conditions of Employment Act[11] (BCEA).

[23] As is dealt with in the pleadings and the record, the applicant is clearly a well-educated experienced consultant. She has previous experience of having worked for the third respondent both as an employee and a consultant. It was her evidence that she had worked as a consultant or service provider to the third respondent for some years prior to the two fixed term contracts before resuming her consultancy role.

[24] To suggest, as she would have had the first respondent believe, she was uncertain of her situation is beyond comprehension. It was common cause that the applicant at no stage sought clarity from the third respondent.

[25] It defies all credible belief that someone of the applicant's seniority, experience and education would not have addressed this issue during the contract if she was uncertain as to her status. The applicant conceded that from the commencement of her consultancy not only was she was no longer enjoying the benefits of the BCEA, such as paid leave, sick leave etc. that she had enjoyed when an employee; but also that the third respondent was not deducting PAYE from the payments made to her on the strength of her invoices. Despite this the applicant made no enquiry. It is highly improbable that the applicant at any stage prior to the termination of her contract regarded herself as an employee.

[26] The fact that the applicant happily accepted payment of her invoices in full with no deductions for tax or any other benefit suggests that the applicant did not regard herself as an employee. In this regard the applicant merely said that her tax consultant advised her on dealing with this but provided no proof that she was paying income tax on what she would have had the first

[11] 75 of 1997.

respondent believe was a salary. In the matter of *Callanan v Tee-Kee Borehole Casings (Pty) Ltd & another*[12] the court said the following:

> "Having said that, I must also point out that the applicant cannot have his proverbial cake and eat it. He cannot say that he was not the respondent's employee as a machinist for purposes of taxation (or for wishing to avoid the pension scheme of the industrial council), but simultaneously claim that he should be regarded as an employee for the purposes of the Labour Relations Act."

[27] The test in determining whether the applicant was an employee or an independent contractor requires the court to consider in all the circumstances what the parties intended and what the legal relationship was between the parties. The dominant impression test, whilst it has been criticised is still the basis for a determination. On the evidence and the documents placed before the first respondent the clear "dominant impression" was one of an independent contractor agreement that accorded in practice and agreement in all respects with what the parties intended the relationship to be.

[28] That the applicant's evidence was but a pale pastiche of the factors listed in section 200A(1) is a further indication that the issue of employment was only raised as an afterthought when her service provider contract was terminated in an attempt to seek compensation. For the duration of the service provider contract the applicant provided services to the third respondent both at the third respondents premises and at home. It is apparent from the record and documents that the applicant herself determined the number of hours she worked in attending to the projects the third respondent required her to complete. The variation in the number of hours invoiced and the apparent erratic infrequency of the invoices does not suggest in any way that the applicant was being paid a monthly salary.

[12] (1992) 13 ILJ 1544 (IC)

[29] The work the applicant did for the third respondent was, according to her invoices, on particular projects. This does not suggest that the applicant was an employee "subject to the control" of the third respondent.

[30] She did not apply for leave when not performing services to the third respondent but as matter of courtesy would advise the third respondent when she was not available. The hours the applicant worked were neither confined to being performed at the third respondent's premises nor was there any suggestion that the third respondent controlled the hours the applicant invoiced.

[31] In this matter the realities of the relationship were simply that the parties expressly agreed to enter into a service provider arrangement with a clear understanding as to the nature of the agreement. Pursuant to that arrangement the applicant rendered services to the third respondent in compliance with the agreement, invoicing the third respondent only for the work done. The only logical conclusion is that the applicant only worked those hours that she was required to attend to the projects to which the third respondent wanted the applicant to attend to.

[32] There was no evidence to suggest that at the commencement of the contract the parties were unclear as to the nature of the contract and the relationship between the parties. To the contrary the applicant's evidence was that she was "absolutely certain as to the nature of the relationship" viz. service provider.

[33] In the circumstances and for the reasons set out above I am not persuaded that the award of the first respondent is reviewable.

Costs

[34] As for costs the applicant's counsel suggested that costs should only be awarded if the applicant was successful. The third respondent argued that costs should follow the result. Even though costs do not usually follow the

result in Labour matters[13], I am satisfied, taking into account the requirements of law and fairness and the conduct of the parties that the applicant should be ordered to pay the third respondent's costs.

Order

[35] In the premise, the following order is made:

1. The applicant's application is dismissed with costs.

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D. H. Gush

Judge of the Labour Court of South Africa

[13] Zungu v Premier of the Province of KwaZulu-Natal and Others (2018) 39 ILJ 523 (CC)

Appearances:

For the applicant: Adv. A Makka

Instructed by: Schindlers attorneys

For the respondent: M Maeso of Shepstone and Wylie