LOM Business Solutions t/a Set LK Transcribers

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: JA16/2006

2008-03-20

In the matter between
STATE INFORMATION TECHNOLOGY AGENCY

(SITA) (PTY) LIMITED **Appellant**

and

CCMA & OTHERS **Respondent**

J U D G M E N T

DAVIS JA:

[1] This is an appeal against the judgment and an order with Cele AJ, handed down in the court *a quo* on 7 March 2006, pursuant to an application which was brought by appellant in terms of Section 145 of the Labour Relations Act of 1995, to review and set aside second respondent's award in the arbitration proceedings which were held under the auspices of first respondent pertaining to an allegation of an unfair dismissal of the third respondent.

[2] The second respondent had issued an award that the appellant and

a third party Inventus Products CC, were jointly and severally liable to pay compensation to the third respondent, as both entities were found to be employers of the third respondent. The court *a quo* reviewed that award and ordered that only the appellant was liable to payment of the compensation which was awarded.

[3] In the notice of appeal by the appellant, the grounds which are raised are that the court *a quo* erred in making a finding of the fact that the third respondent was appellant's employee and not that of Inventus CC (referred to sometimes as "Investus CC"). There were further grounds that the court had erred in correcting second respondent's award to reflect that the third respondent was the appellant's employee and not that of Inventus CC. Further, he had erred in correcting the award, such that Inventus CC was absolved from joint in several liability of appellant to compensate the third respondent. A further ground was raised that the court had erred in finding that the contract of employment between third respondent and Inventus CC was not a genuine contract but a façade, a stratagem, employed by appellant to circumvent the legal probation against such an employment relationship of coming to be between the appellant and third respondent. Further, the court had erred in effectively finding that the second respondent's award was wrong in finding Inventus CC was a temporary employment service in terms

of Section 198 of the Labour Relations Act.

[4] Stripped to its essence, the dispute turned on the nature of the contract and who was the employer in such a case. I shall return to this implication later in the judgment.

[5] In his judgment, Cele AJ, set out the essential facts very usefully and because I invited counsel for the appellant to point out mistakes to this court in relation to the summary which he conceded was accurate, I shall therefore employ it for the purposes of this judgment.

> *"The third respondent worked for the South African National Defence Force …. He was then retrenched and was given a severance package by the SANDF. In terms of the severance package and in terms of the regulations and laws applicable, he could not therefore be thereafter lawfully employed by the South African National Defence Force. The applicant then first approached the third respondent with regard to possible tendering of employment service. The third respondent and the applicant appeared to have clearly understood between themselves, that any employment between the two of them would not be lawful".*

[6] In short, the problem confronting appellant and third respondent was this: appellant was desirous of using the services of third

respondent. Pursuant to third respondent's retrenchment from the South African National Defence Force as well as regulations and laws which were applicable thereto, it was not possible for appellant to so employ the third respondent directly. Accordingly, the arrangement was conceived whereby Inventus CC would employ the third respondent and in terms of a contract between the former and the appellant, third respondent would provide all the necessary services to the appellant. Indeed, in the contract which was entered into between the appellant and Inventus CC, it was clear that the purpose and nature of the contract was for a range of services to be supplied exclusively by the third respondent to the appellant.

[7] Further indications of the nature of the relationship between Inventus CC and the third respondent, can be found in the evidence of Mr Kritzinger, the sole member of the CC who testified that in effect he was no more than a conduit facilitating payment to the third respondent pursuant to the services that third respondent had provided to the appellant. Furthermore, in a letter of 9 March 2002, generated on an Inventus Products CC letterhead:

> "I regret to inform you that SITA has informed us of the termination of the assignment pertaining to your services with effect 31 March 2002. Their reasons as I understand it, is that the SADNF

> has limited funding for the older systems that has to be phased out and certain cuts need to be made on the part of SITA. This is in line with the situation as discussed with them and in line with the contractual arrangements between SITA and Inventus that leads to this unfortunate state of affairs. This termination does not mean that you also disappear from our books, you still remain as "an employee" of Inventus even though it is without remuneration".

[8] On a letter of 29 February 2002, generated on a SITA letterhead, (that is appellant's letterhead) the following appears"

> "Please be informed that A Van Zyl's contract end on 31 March 2002 and will not be renewed with SITA".

The facts which gave rise to this dispute were evident from the correspondence to which I have referred. As at 31 March 2002, third respondent's services were no longer required by appellant. Third respondent therefore contended that indeed he had been unfairly dismissed.

In terms of Section 186(1)(b) of the Act, dismissal includes the following ground – "an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the

employer offered to renew on less favourable terms, or did not renew it." There was a considerable debate about whether there was any legitimate expectation or reasonable expectation as the phrase is employed in Section 186(1)(b), on behalf of third respondent which would sustain the argument that his was not but a temporary contract for a short period but was a contract in which, given the nature of the relationship, there was a reasonable expectation of continuous renewal.

[9] Having set out this question, it is important to return to the nature of the appeal. That issue was not before this court. The sole issue before this court in terms of the notice of appeal was: what was the nature of the contract, that is, who was the employer? The issue as to whether in fact there was a reasonable expectation was essential to the determination of second respondent, which was not really canvassed before the court *a quo* and was not a subject to this appeal.

[10] I turn therefore to deal with the question, as to who the employer was pursuant to the facts as set out in this case. The major obstacle facing appellant concerned the judgment of this court in *Denel (Pty) Limited v Gerber*, 2005 (26) ILJ 1256 (LAC), in which this court adopted a "reality test" to a situation of where a company or a closed corporation is interposed between an employer and an employee. The court took the view that, even where there was an agreement where one legal entity such as a company or close corporation and the alleged employer for the provision of services, it was open to the court to find that the person who effectively was the owner of the company or a close corporation was an employee

> of the other company, with which his or her company or close corporation had such an agreement. The mere fact that use is made of a legal entity such as a company or close corporation to provide services, was no bar to the conclusion by the court that a particular individual who was contracted to a company or close corporation, or who owned the company or close corporation in terms of which he was obligated to provide services to the alleged employer, was an employee of the company, which was contractually entitled to receive such services.

In short, the court in Denel *supra,* approached the vexed question of the employment relationship on the basis of the substance of the arrangements between the parties as opposed to the legal form so adopted. That particular judgment has been the subject of legal analysis. See in particular André van Niekerk, 2005 (26) ILJ 1094, who in turn refers to a most comprehensive and thoughtful analysis by Paul Benjamin in the 2004 (25) ILJ 787. Benjamin's contention is that the Denel judgment is congruent with Section 213 of the Labour Relations Act which *inter alia* defines an employee as any other person who in any manner assists in carrying on or conducting the business of an employer. Benjamin, (whose article was written before the decision in Denel), notes that the issue of the employment relationship has become crucial to labour law partly because of the concept of outsourcing and because, in many cases, a traditional employer/employee relationship no longer operates in

the labour market. He refers in this connection to international standards developed by the ILO and, in particular, to recent conventions which "show a conscious policy to extend their application to workers not employed in convention employment relationships" at 801.

[11] Benjamin then makes a further useful point in relation to the determination of this question:

> "A starting point is the distinguished personal dependence from economic dependence. A genuinely self-employed person is not economically dependent on their employer because he or her retains the capacity to contract with others. Economic dependence therefore relates to the entrepreneurial position of the person in the marketplace. An important indicator that the person is not dependent economically is that he or she is entitled to offer skills or services to persons other than his or her employer. The fact that a person required by contract, who only provide services for a single client, is a very strong indication of economic dependence. Likewise, depending upon an employer for the supply of work is a significant indicator of economic dependence" at 803.

[12] For this reason, when 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 organisation with the employer; and
3. The extent to which the employee was economically dependent upon the employer.

[13] These three tests are congruent with the principles in the Denel judgment. Mr Langane on behalf of the appellant very bravely urged this court in fact to ignore lay aspects of the Denel case. I must refuse the invitation; not only is it a recent judgment, a considered and carefully analysed judgment by Zondo JP, but its jurisprudence has been embraced, in its essence by distinguished South African legal commentators.

[14] Applying the three tests to the facts of this case, it is clear that the third respondent offered his services alone to appellant via the conduit of Inventus. Agreed, Inventus might have made some money out of the transaction. Third respondent was not always clear in his evidence as to who indeed his employer might have been. But Inventus exercised no control. Applying the 'reality' test, there can be no doubt that the substance of the relationship was one between third respondent and appellant. Third respondent was officially part of appellant's organisation. Inventus Products CC was merely a *deus ex machina* to facilitate the desire of appellant to utilise the services of third respondent which, absent Inventus, it would not have been able to achieve because of the legal problems to which I have made reference earlier. The economic dependence was placed upon appellant.

[15] A further piece of evidence which supports this contention is to be found in the correspondence to which I have made reference which manifested, the clear view of Inventus Products CC, that it was not the

employer, that the employer was appellant and that Inventus merely facilitated the transaction.

[16] Mr Langane suggested that there was no difference between the so called 'Kelly Girl' who is employed by Kelly Girls and sent to various clients to provide typing and other secretarial services and this case. But, employing the Benjamin concept of economic dependence, both from the perusal of the contract between Inventus Products CC and appellant, and the correspondence which generated and the evidence of Mr Kritzinger, it is clear that the economic dependent relationship was between the appellant and third respondent.

In the light of these conclusions, it is clear that Section 198 of the Act which applies to temporary employees is inapplicable, given the finding that the real employer was appellant.

[17] One final point: Mr Langane referred (arguably) correctly, to the situation that third respondent had not come to court with clean hands, in that he was party, to what Mr Langane correctly called an avoidance scheme, the avoidance being of the applicable regulations in order that third respondent should continue to be employed by the appellant. But in the Denel case to which I have already made reference, the court was faced with, arguably, a more egregious form of lack of clean hands, in that it was clear that the employee in that case had deliberately interposed her own close corporation between the employer and herself to circumvent the

Income Tax Act 58 of 1962. Accordingly, in that case, Zondo JP ordered that, although the court was of the view that the employment relationship was between the individual employee and Denel, before any relief could be claimed, the individual employee had to ensure that her tax affairs had been put in order.

[18] The important point, is that the absence of clean hands did not prevent the court from coming to the conclusion that the employment relationship was between Denel and the respondent.

That is the only issue upon which this court was called to decide. Cele AJ concluded that:

> "The Denel decision was directly applicable to present case, clearly a form of the relationship that was between the applicant and third respondent, was that of an employer/employee relationship and in the substance of the relationship in the form that they decide to be on, was merely to facilitate that substantive relationship had existed between them and therefore I do not find that the second respondent was correct in arriving at a decision that the applicant was an employee of the third respondent."

[19] In this he was correct. In short, he adopted the approach that the only employer was the appellant not Inventus, that the second respondent had misdirected himself to that extent and accordingly found that the only employer was appellant and directed that the compensation R123 246,64 should be paid by the appellant.

[20] There was some debate about costs. There was no representation by third respondent in the proceedings before the court *a quo*, and accordingly no costs order was made. It appeared to me that in fact the issue of costs should be based on the fact that insofar as the order Cele AJ is concerned, nothing should change. However, because the third respondent has been successful, we would require that the third respondent be entitled to its costs in relation to the appeal. For this reason therefore, **the appeal is dismissed with costs**.

TLALETSI & LEEUW JJA: Concurs.

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Date of Judgment: 20 March 2008

APPEARANCES:

For the Appellant: Advocate K Lengane

For the Respondents: Mr M Scheepers