REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Reportable

Case no: JA 81/10

In the matter between:

James Phera **Appellant**

and

The Education Labour Relations Council **First Respondent**

Lesley Ramulifo N.O. **Second Respondent**

Gauteng Department of Education **Third Respondent**

The MEC for Education: Gauteng **Fourth Respondent**

The Metropolitan Raucall School **Fifth Respondent**

Heard: 01 March 2012

Decided: 22 June 2012

Summary: Appeal- jurisdiction of Bargaining Council test- whether objectively speaking, the facts placed before the commissioner established that the commissioner had jurisdiction to entertain dispute.

Employment relationship- employee assuming duties without the written permission of the Department of Education contrary to the application- such assumption of duties not establishing an employment relationship per se.

JUDGEMENT

Tlaletsi JA

Introduction

[1] The appellant in this matter is appealing against the judgment and order of the Labour Court (per Nyathela AJ) in which his review application against an award issued by the second respondent ("the commissioner") acting under auspices of the first respondent ("the Bargaining Council") was dismissed with costs[1]. The appeal is with leave of the court below.

Factual Background

[2] For a better understanding of the issues in this appeal, a factual background is apposite. The following facts are common cause. On 24 July 2005, the fifth respondent, which is a school in Gauteng Province falling under the authority of the third respondent, the Gauteng Department of Education ("the school") advertised a post for a temporary educator for English first language for grades 9 and 10. The period of employment was to be 15 August 2005 to 31 December 2005. The heading of the advertisement read 'Department of Education Appointment'.

[3] The appellant applied and was on 11 August 2005 interviewed for the advertised post by the school's Headmaster and the Head of the English Department. Subsequent to the interview the appellant was advised that his interview was successful. The appellant was given an "APPLICATION FOR A TEMPORARY APPOINTMENT AS EDUCATOR" form for completion. He completed the forms and submitted them to the school on 15 August 2005. On the form, where he appended his signature, the following was written thereunder:

> 'URGENT: EDUCATORS ARE NOT ALLOWED TO ASSUME DUTY WITHOUT THE WRITTEN PERMISSION OF THE DISTRICT MANAGER.'

[1] The judgment of the Labour Court is reported as: *Phera v Education Labour Relations Council and Others* (2010) 31 ILJ 992 (LC).

[4] It is common cause that the appellant commenced teaching at the school on 22 August 2005. At this time, the appellant had not received the written permission of the District Manager to do so. According to the respondents, the assumption of duties by the appellant was subject to the approval of the recommendation by the school. The respondents contended further that at all material times, the appellant was aware that his appointment was subject to the approval of the third respondent. The appellant has responded to these averments with a bare denial in the replying affidavit. He did not state his version.

[5] The third respondent declined to approve the appointment of the appellant. On 26 August 2005, the school's Headmaster informed the appellant that the third respondent had declined to approve his appointment to the position of temporary educator. The reason provided for the decline was that the appellant was previously employed by the third respondent and was dismissed. He was declined appointment as a result of being "*blacklisted*". At the time, the appellant was informed of the third respondent's decision, he had worked for a period of five days.

[6] The appellant was aggrieved by this state of affairs and referred a dispute to the first respondent. In the "*ELRG Referral Form E1*" the appellant indicated that the dispute referred was 'unfair labour practice in terms of schedule 7(2)(1)(b) of the LRA'. He summarised the facts of the dispute as '*efusal to appoint*' and referred to a letter dated 09 September 2005 that was written to the Headmaster of the school by the appellant. The relief sought by the appellant in the referral form was *appointment and Compensation and Delisting (Blacklisting)*' sic.

[7] Conciliation was unsuccessfully and the dispute was subsequently enrolled for arbitration. At the arbitration, the third respondent raised a preliminary issue in respect of the first respondent's jurisdiction to arbitrate the dispute. It was contended that no employment relationship existed between the appellant and the third respondent. The commissioner, who arbitrated the dispute, requested the parties to submit written heads of argument on the point *in limine. T*he parties obliged. Neither party requested an opportunity to testify nor tendered oral evidence. In fact, they informed the commissioner that they

would not be calling witnesses and that the matter should be determined on the papers filed and the parties' arguments.

[8] In his detailed heads of argument, the appellant, contended *inter alia*, that an employment relationship existed between him and the third respondent. He submitted that as an applicant for employment is deemed or regarded as an employee within the contemplation of the Labour Relations Act 66 of 1995 ("the Act") and that he taught for six days at the school.

[9] The commissioner in his ruling held that an "unfair labour practice" can only occur between an employer and an employee and as such there must be an employment relationship in existence. He held further that on the facts placed before him 'it is clear that there was never any existence of an employer and employee relationship. The respondent never appointed the applicant as its employee. The commissioner consequently ruled:

> '(1) that the Education Labour Relations Council has no jurisdiction to entertain this matter as there is no issue of unfair labour practice since the [appellant] was never an employee of the respondent;
>
> (2) the [appellant] can either approach the CCMA or the Labour Court for alternative relief;
>
> (3) there is no order as to costs.'

Proceedings in the Labour Court

[10] The appellant was aggrieved by the ruling of the commissioner and instituted review proceedings in the Labour Court seeking orders to the effect that the award be set aside and the matter be referred back to the Bargaining Council for arbitration *de novo* by a commissioner other than the second respondent. The grounds upon which the award was attacked were that the commissioner had not applied his mind to the facts on hand in that he failed to take into account that:

a) at all material times the school management team was acting as an agent for the third respondent in interviewing and employing an educator for the position as advertised by the third respondent;

b) there was a concrete offer of employment in terms of the abovementioned advert;

c) the appellant accepted the employment on the terms offered and signed the necessary documentation to that effect;

d) the appellant commenced employment in terms of the advertisement and offer of employment;

e) he remained in employment until he was forced by the second respondent to cease his employment;

f) the commissioner was to decide upon the nature of the dispute, being the fairness or otherwise of the third respondent's refusal to appoint the appellant. The reasons for the dispute, which does not constitute the dispute, was incorrectly made an issue;

g) the Employment of Educators Act 76 of 1998 makes no provision for the blacklisting of educators on the department's "*persal-system*".

The appellant contended that the commissioner erred in finding that the Bargaining Council had no jurisdiction to entertain this dispute in that the award does not show any rational connection between the decision reached and the material which was properly placed before him. The commissioner was further accused of having committed an irregularity in executing his duties under the LRA.

[11] Before the hearing of the review application the appellant amended his papers, and added the school as the fifth respondent in the review application. The Labour Court *inter alia*, made the following remarks and findings:

11.1 the question whether a person is an employee or not is a jurisdictional issue. The commissioner acted correctly by dealing with the jurisdiction issue which had been raised before it;

11.2 the Labour Court had to determine whether the decision reached by the commissioner is one which a reasonable decision maker could not reach given the material before him at the time;

11.3 the appellant signed the Notice of Appointment form which clearly stated that he should not commence employment until he obtained written permission from the District Manager. The appellant was therefore fully aware that his employment would be conditional on the third respondent granting him written permission to commence teaching. Since third respondent did not grant appellant permission, the conditional employment terminated due to the non-fulfillment of the condition and the appellant can therefore not be regarded as an employee;

11.4 the facts of this case are distinguishable from the cases of *Wyeth SA (Pty) Ltd v Manqele and Others*,[2] *Discovery Health Limited v CCMA and Others,*[3] *and Kylie v CCMA and Others*,[4] in that in all the above cases, the offer of employment was not conditional unlike in this case.

The application for review was consequently dismissed with costs.

The appeal

[12] The grounds of appeal as contained in the notice of appeal upon which the appellant is challenging the judgment of the Court below may be summarised as hereunder. The Labour Court erred:

12.1 in dismissing the review application and failing to find that there was an employment relationship between the appellant and the third to fifth respondents;

12.2 in disregarding the *dicta* laid down in the judgments referred to at paragraph 11.3 that an employment relationship is not solely dependent on the construction of a contract recognised as valid and enforceable in terms of common law;

[2] (2005) 26 ILJ 749 (LAC).
[3] [2008] 7 BLLR 633 (LC).
[4] [2008] 9 BLLR 870 (LC).

12.3 in finding that this matter is distinguishable from the facts and circumstances in *Wyeth SA v Manqele and Others*, (supra) and *Discovery Health* Ltd, (*supra*) in that employment in these cases was not conditional;

12.4 in failing to consider the appellant's further grounds for review such as:

12.4.1 by permitting the appellant to begin work the third to fifth respondents waived any condition that may have been necessary for the appellant to obtain the district manager's permission to commence rendering services and/or stopping the third to fifth respondents from raising the suspensive condition;

12.4.2 in terms of section 6(3) of the Employment Equity Act 76, of 1998, prior to its amendment in January 2006 as illustrated in *Head, Western Cape Education Department and Others v Governing Body, Point High School and Others,*[5] the Court held that the Governing Body's recommendation was almost invariably implemented by the Head of Department, (i.e. of the Gauteng Department of Education in *casu*), if such recommendation was made in good faith and without the governing body being subjected to undue influence. The same principle should apply to this case.

12.5 in failing to consider or attach sufficient weight to the definition of an employee as contemplated in section 213 of the Act which *inter alia* includes the rendering of services on a basis other than that recognised as employment by the common law.

[13] There is no doubt that the commissioner acted correctly by investigating whether he had jurisdiction to determine the parties' dispute. It was incumbent on the appellant to place the facts upon which he relied for the contention that first respondent had jurisdiction. Put differently, the question was and still is whether objectively speaking, the facts placed before the commissioner established that the commissioner had jurisdiction to entertain dispute. A

[5] 2008 (5) SA 18 (SCA) at para 4.

finding by the commissioner that the first respondent does not have jurisdiction when objectively speaking it had, would be incorrect. The question is not whether the decision of the commissioner is one that a reasonable decision maker could not reach or whether the decision does not fall within the band of the decisions that a reasonable decision maker could reach. It is either there is jurisdiction or there is no jurisdiction.[6]

[14] Having stated that, the question that the Labour Court should have considered when reviewing the commissioner's award, was whether the material that was placed before the commissioner established that the Bargaining Council had jurisdiction to entertain the dispute. The starting point is the nature of the dispute. The appellant's complaint was that the third respondent refused to appoint him, thereby committing an unfair labour practice. The following facts play an important role in answering the question that was before the Labour Court. In the letter addressed to the Headmaster attached to the referral form (ELRC Referral Form E1), the appellant stated that he was advised that the third respondent did not approve his appointment or 'make my appointment as a Teacher because I was dismissed as such blacklisted by the GDE'. The appellant contended further that he made it clear to the Headmaster that he did not accept that the third respondent's decision was 'fair and lawful'.

[15] Furthermore, the appellant averred in the founding affidavit in support of the application for review, that the commissioner was to decide upon the nature of the dispute, which was according to the appellant, being the fairness or otherwise of the third respondent's refusal to appoint him. In appellant's own words, his complaint was not an unfair dismissal dispute but the refusal by the third respondent to appoint him.

[16] In addition to the above facts, the advertisement indicated in no uncertain terms that the post advertised was for appointment by the third respondent. Further, the document that the appellant completed after the interview, informed him that it was an application for appointment and that he could not assume duties before he received a written permission of the District Manager of the third respondent. It is therefore in my view, not surprising, objectively

[6] *SA Rugby Players' Association (SARPA) and Others v SA Rugby (Pty) Ltd and Others, SA Rugby (Pty) Ltd v SARPU and Another* [2008] 9 BLLR 845 (LAC) at paras 39 - 40.

speaking, that the appellant did not regard himself having been appointed to the position of educator by the third respondent. Having been a teacher, he was in a position to understand that the appointment had to be made by the third respondent. His assumption of duties without the written permission of the third respondent could not have made him an employee of the third respondent. Furthermore, his rendering of services to the school for five days under these circumstances could not make him an employee of the third respondent. This aspect distinguishes this case from facts and decisions in the *Discovery Health Limited* v *CCMA* and *Others; and Kylie* v *CCMA and Others* (*supra*), as well as the other cases referred to on behalf of the appellant. It was neither the respondent's case, nor the commissioner's finding, that an employment relationship is solely dependent on the construction of a contract recognised as valid and enforceable in terms of the common law.

[17] It is abundantly clear from the record that most of the grounds of appeal raise issues that neither served before the commissioner nor the Labour Court. These are the alternative arguments raised on behalf of the appellant to the effect that the conduct of the fifth respondent in allowing the appellant to commence teaching constituted a waiver and the respondents were as such estopped from relying on the suspensive condition as a defence. The simple answer is that there was no contract; therefore there was no suspensive condition.

[18] The appellant did not plead or place before the second respondent facts to support the contention that the fifth respondent was authorised by the third respondent to request, invite or even authorise appellant to commence rendering services before the third respondent had approved his appointment. Neither did he place evidence to suggest that the fifth respondent was entitled to waive and if so entitled, consciously waived the third respondent's requirement to issue written permission before the appellant commenced rendering services. There is also no evidence to support the contention that the third respondent waived its right to make the appointment to the advertised post. The same can be said about the section 6(3) of the Employment of Educators Act, as applicable in 2005. There was no case

made out to the second respondent or in the review application that the third respondent was obliged to comply with the recommendation of the fifth respondent to appoint the appellant. This aspect can therefore not now be relied upon to review the award of the second respondent.

[19] It was contended on behalf of the appellant that the commissioner should have referred the matter to oral evidence for him to be able to determine the true nature of the dispute. I find no merit in this contention. The commissioner cannot force the parties to lead evidence when they inform him that they were not going to lead oral evidence but rely solely on the material placed before him. To compel the parties to present oral evidence would expose the commissioner to accusations of misconduct, misdirection or having exceeded his powers.

[20] On a prospectus of the relevant facts as pleaded by the parties, I am satisfied that the second respondent was correct in finding that there was no employment relationship between the appellant and the third respondent. The fifth respondent, who allowed the appellant to render services without the permission of the third respondent, was only joined at the review application stage and no specific order was sought against it. It is for this reason that the commissioner made no finding about the liability or otherwise of the fifth respondent. This Court cannot at this stage pronounce itself on this issue as well.

[21] I am therefore not persuaded that the Labour Court erred in dismissing the application for review brought by the appellant. The appeal should therefore fail. It would be in accordance with the requirements of the law and fairness that costs should follow the result.

Order

1. The appeal is dismissed with costs.

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TLALETSI JA

Judge of the Labour Appeal Court

Landman AJA and Ndlovu JA concur in the judgment of Tlaletsi JA.

Appearances:

For the Appellant: Mr I. I. Mahomed of Eversheds

For the Respondent: Advocate MS Baloyi

Instructed by: State Attorney, Johannesburg