REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JA 42/10

In the matter between:

SHELL SA ENERGY (PTY) LTD	**Appellant**
and	
NATIONAL BARGAINING COUNCIL FOR CHEMICAL INDUSTRY ("NBCCI")	**First Respondent**
CHRIS SILIZI MBILENI N.O.	**Second Respondent**
V MASEKO N.O.	**Third Respondent**
ELMUATASIM IBRAHIM AHMED ALI	**Fourth Respondent**

CORAM: **TLALETSI JA, MOLEMELA, AJA *et* MURPHY, AJA**

Heard: **15 March 2012**

Delivered: **12 December 2012**

JUDGMENT

MOLEMELA AJA

Introduction

[1] This is an unopposed appeal brought with leave of this court against the judgment of the Labour Court (Moshoana J) in a review application that was brought by the appellant to that Court to have a ruling reviewed and set aside. The first respondent is the National Bargaining Council for the Chemical Industry. The second respondent is a panellist who issued the ruling in question. This ruling was issued under the auspices of the first respondent. The third respondent is also a panellist who, under the auspices of the first respondent, subsequently issued a certificate of outcome declaring that the dispute could not be resolved through conciliation of the matter. The review, which was brought in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995, was directed at the second respondent's ruling in terms of which he found that there was an employer-employee relationship between the appellant and the fourth respondent.

Background

[2] The facts that gave rise to the dispute were the following: The fourth respondent is a Sudanese national. On or about 8 March 2004 and, while in the employment of Shell Sudan, he was assigned to the appellant. Shell Sudan, like the appellant, is a subsidiary of Royal Dutch Shell PLC (RDS). In terms of the Human Resources Policies and Practices of RDS, employees of its subsidiaries are, worldwide, allowed to be assigned to subsidiaries in other countries where it (RDS) has operations, including South Africa. The assignment was for a period of four years. The appellant paid the fourth respondent on the Expatriate Basic Administrative Salary (EBAS) system, which was a completely separate remuneration structure from the one applied to the appellant's employees. In terms of EBAS, pension and retirement funds were held by Shell Sudan.

[3] While the fourth Respondent was on assignment in South Africa, he was promoted to the position of Engineering Manager for the Shell Oil Products South Africa. During 2007-2008, RDS embarked on a re-organisation process of its operations and subsidiaries in its Africa business. During August 2008 and as a consequence of the restructuring process by RDS, the appellant sent a letter to the fourth respondent in which he was advised that Shell Sudan had been sold to Oil Libya with effect from 01 December 2008. In the same letter, the fourth respondent was also given notice to start planning his repatriation to Sudan before the effective date of the sale. The appellant's understanding at that stage was that the sale of Shell Sudan to Oil Libya resulted in the fourth respondent no longer having a relationship with RDS, "the parent company", thus adversely affecting his assignment to South Africa.

[4] On or about 9 November 2008 Shell Sudan handed a letter to the fourth respondent in terms of which he was advised that his services were terminated with immediate effect due to the sale of the business to Oil Libya. The fourth respondent received a severance package from Shell Sudan in terms of Sudanese laws, collective agreement with the recognised union and his employment contract. The fourth respondent did not challenge his dismissal in terms of the dispute resolution mechanisms in Sudan. He returned to South Africa and referred an unfair dismissal dispute against the appellant to the first respondent.

[5] The dispute was set down for conciliation on 19 January 2009. It would seem that the proceedings were not recorded, as no such record was provided to the court a quo. The appellant in its affidavit filed with the court a quo recited what happened at those proceedings and the fourth respondent did not take issue therewith. The summary of the proceedings captured in this judgment was gleaned from the appellant's affidavit. At the commencement of the conciliation proceedings, the appellant raised a point *in limine* in terms of which the jurisdiction of the first respondent was disputed on the basis that there was no employer-employee relationship between the appellant and the fourth respondent. The fourth respondent

objected to the presence of the appellant's legal representative at the proceedings.

[6] The fourth respondent's legal representative submitted (i) that the question of whether or not the fourth respondent had cited the correct employer had to be determined before conciliation could take place; (ii) that the second respondent may need to hear oral evidence in order to resolve any material disputes of fact regarding the true identity of the employer; (iii) that the parties had the right to legal representation as the resolution of the dispute relating to the employer-employee relationship did not form part of the conciliation process. The second respondent then ruled that the appellant's legal representative should leave the hearing and that an employee of the appellant should make submissions on behalf of the appellant. Oral arguments were presented by that employee and the fourth respondent. During these oral arguments, both parties referred to some documents which were subsequently provided to the second respondent after the hearing. No oral evidence was led by either the appellant or the fourth respondent.

Review application at the court *a quo*

[7] The appellant's review was based on the following inter-related grounds: (i) that the second respondent improperly refused to allow the applicant legal representation to allow him to argue the *in limine* jurisdictional point; (ii)that the second respondent failed to invite both parties to present submissions on whether or not legal representation was warranted or not; (iii) that the second respondent's finding that the fourth respondent was an employee of the applicant was not supported by properly admitted evidence; (iv) that the second respondent had failed to realise that there was a material dispute of fact as to whether the fourth respondent was an employee of fact of the appellant as defined in section 213 of the LRA. (v) that the second respondent failed to direct the parties to adduce oral evidence when disputes of fact pertaining to the status of the fourth respondent emerged, thus committing an irregularity that denied the appellant a fair hearing; (vi) that the second respondent misconstrued the

submissions made to him and failed to allow the parties to introduce into evidence all relevant documentation which would enable him to make a proper determination; (vii) that the second respondent failed to realise that the repatriation of the fourth respondent to Shell Sudan did not constitute a dismissal and that his services were terminated by Oil Sudan and not by the appellant; (viii) that the second respondent failed to decide the point *in limine* on the basis of applicable legal principles.

[8] The court *a quo* concluded that the proceedings in which the appellant had raised the point *in limine* were conciliation proceedings and that since a conciliator had no discretion to allow legal representation at conciliation proceedings, the appellant was, accordingly, not entitled to legal representation during the proceedings in question. The court *a quo* expressed the view that the appellant ought to have raised the jurisdictional point by bringing a written application as contemplated in the provisions of rule 31(2) of the Dispute Resolution Procedures of the first respondent, which would have guaranteed it legal representation in the matter.

[9] The court *a quo* also further expressed the view that there was in any event no absolute right to legal representation at proceedings heard by the first respondent. As authority for this view the court *a quo* placed reliance on the case of *Netherbum Engineering CC t/a Netherbum Ceramics v Mudau NO and Others* (2009) 4 BLLR 299 (LAC). On the issue of the second respondent's conclusion that there was an employer-employee relationship between the appellant and the respondent without recourse to oral evidence, the court *a quo* found that the second respondent was well within his rights to do so, as Rule 31(10) of the first respondent's above-mentioned procedures allowed the first respondent to determine an application raising a jurisdictional point "in any manner it deems fit". The court *a quo* accordingly found that the second respondent had correctly found that the appellant was the fourth respondent's employer. The court *a quo* further found that the fact that the second respondent had erroneously found that the onus regarding the establishment of the status of the fourth

respondent lay with the appellant was an error of law and, accordingly, was not reviewable.

The appeal

[10] The main issue in the appeal is the court *a quo*'s finding that the proceedings before the second respondent, notwithstanding the jurisdictional objection that was raised, constituted a conciliation hearing thus entitling the second respondent to disallow legal representation and to engage in a fact-finding exercise, instead of allowing the presentation of evidence to establish the existence of the employer-employee relationship.

Evaluation

Were the proceedings which gave rise to the second respondent's ruling conciliation proceedings?

[11] In the case of *Pinetown Town Council v President of the Industrial Court* and Others 1984(3) SA 173 (N), it was stated as follows:

> 'Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, it cannot give itself jurisdiction by incorrectly finding that the conditions for the exercise of jurisdiction are satisfied. The conditions precedent to jurisdiction are known as "jurisdictional facts" (see *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6; [1969e 2 AC 147 (HL) at 208 per Lord Wilberforce) which must objectively exist before the tribunal has power to act; consequently a determination on the jurisdictional facts is always reviewable by the Courts because in principle it is no part of the exercise of the jurisdiction but logically prior to it. (See also *Theron en Andere v Ring van Wellington van die NG Sendingkerk in SA en Andere* 1976 (2) SA 1 (at 15).'

[12] The principle laid down in that case has been followed in a plethora of cases in the Labour Court. In *Avroy Schlain Cosmetics (Pty) Ltd v Kok and Another* (1998) 19 ILJ 336 (LC) the court had the following to say at p346:

> 'The CCMA or any tribunal for that matter can, on a preliminary basis, subject to subsequent review by a court, decide on its jurisdiction i.e. it

> should be the very first enquiry which the CCMA will have to make before it proceeds to determine whether the dismissal of an employee was fair or unfair.'

See also the case of See *Flexware (Pty) Ltd v CCMA and Others* (1998) 19 ILJ 1149; *EOH Abantu (Pty) Ltd v CCMA and Another* (2008) 29 ILJ 2588 (LC) and the cases referred to therein.

[13] It is evident from the authorities mentioned in the preceding paragraphs that a point *in limine* raised at conciliation proceedings disputing the existence of an employer-employee relationship necessitates a decision on the issue before the dispute is conciliated. In effect, the determination of this issue of necessity precedes the conciliation process. That is indeed the correct interpretation of the LRA.

[14] A reading of the second respondent's ruling reveals that he had this correct understanding in mind when he outlined the issue to be decided as follows:

> 'The issue to be decided is whether or not Mr Elmuatasim Ibrahim Ahmed Ali was an employee of Shell SA Energy. If it is established that he was not an employee, whether or not the Council has jurisdiction to hear the matter/dispute.'

Clearly, the second respondent was alive to the fact that the proceedings he presided over were not conciliation proceedings but rather entailed the determination a jurisdictional point pertaining to whether the fourth respondent was the employee of the appellant or not, as the appellant contended that the fourth respondent was not employed and dismissed by it but by Shell Sudan. The court a quo thus erred in concluding that those proceedings were conciliation proceedings and that the second respondent had conducted a fact-finding exercise as part of the conciliation process as contemplated in section 135(3) of the Labour Relations Act 66 of 1995 ("LRA").

Should the leading of evidence have been allowed before the second respondent made his ruling?

[15] Having concluded that the second respondent had a proper grasp of the nature of the proceedings before him, the next question to be answered is whether he acted correctly in deciding the matter without the benefit of oral evidence. As stated before, the appellant had sought to lead oral evidence to prove that no employment relationship existed between it and the respondent. The second respondent refused to allow such evidence. It was clear from the submissions made by the appellant's legal representative to the second respondent that there was a dispute of fact as to whether the fourth respondent was employed by the appellant or Shell Sudan. In reaching his decision, the second respondent chose to rely solely on the documents that were handed up to him, which included a letter of appointment issued by the appellant. The second respondent seems to have placed heavy reliance on this letter of appointment. It is evident from the appellant's affidavit, filed with the court *a quo*, that some of the documents handed up to the second respondent were incomplete, as they referred to other documents that were not handed in.

[16] The court *a quo*'s take on the second respondent's failure to legal representation and the presentation of oral evidence is apparent from the following passages of the court *a quo's* judgment, which read thus:

> 'The applicant [appellant] is not contending for a moment that the fourth respondent is an independent contractor. It simply says it is a wrong party. Such issue, in my view, is simple and quick to resolve. If an employee produces a letter of appointment and the other party does not allege fraud, then the issue is resolved. In the matter before me that simple issue arose. The issue became more semantic than a real dispute of fact as argued by the applicant [appellant]. The applicant [appellant] says it *assigned* him for 4 years and the fourth respondent says it was *appointed* for four years. The applicant [appellant] further says the *assignment* was *terminated* when Shell Sudan was sold and the fourth respondent says he was *dismissed*. Interestingly, the New Shorter Oxford English Dictionary defines assign to mean appoint or designate a person to an office or duty. It defines appoin**t** to mean amongst others assign or grant authoritatively. Therefore there was nothing complex to have deserved legal representation…

> That being so, it is in my view, inappropriate to tie a panellist to oral evidence in order to conduct without prejudice proceedings… Even in this court, where the dispute of fact is not genuine, it is resolved by having regard to admitted facts. That being so, why should a panellist be bogged down to oral evidence in the face of admitted letters of appointment? ... I conclude that oral evidence was not necessary. There was no genuine dispute of fact. Regard being to the approach adopted in Flexware, there may be cases deserving of being referred for oral evidence. The one before me is certainly not one of those, given the limited dispute that arose… As I have pointed out earlier, the dispute was not about the nature of the relationship per se, but who the liable party was. In determining that dispute, the issue was to identify the correct party…Any person faced with the question whether another is an employee, he or she must have regard to the definition of employee in section 213 of the LRA. In this matter, the only issue to have been determined was- who works for another person. The contention of the applicant being that it was not another person. The person is Shell Sudan. The fourth respondent was only assigned to it. In resolving such a simple issue, the second respondent had regard to the letters of appointment and the advertisement. Those letters were presented by the applicant for that matter. Having regard to the applicant's contentions, it cannot be said that there was a material dispute of fact which would have necessitated leading of oral evidence. …I fail to understand how a letter of appointment signed by a duly authorised person cannot serve as proof of employment. The applicant [appellant] labels the letter a letter of assignment. From the letter, it is clear that the applicant considered itself to be the assignor and the fourth respondent to be the assignee. As it may be said 'the difference is the same'.

[17] It is evident from the extract of the court a quo' judgment that it endorsed the second respondent's approach of deciding the point *in limine* in question without resorting to evidence even though the appellant had requested for same to be led. The court a quo was clearly of the view that the jurisdictional point raised did not warrant the presentation of evidence. The court a quo, like the second respondent, placed heavy reliance on the letter of appointment apparently issued by the appellant. Nothing much

was said about the fact that the letter of dismissal was issued by Shell Sudan and not by the appellant, as well as the fact that the fourth received had subsequently received a severance package from Shell Sudan.

[18] I am of the view that such an approach is incorrect. I align myself with the views expressed In the case of *Strautmann v Silver Meadows Trading 99 (Pty) Ltd t/a Mugg and Bean Suncoast and Others* (2009) 30 ILJ 2968 (LC), where the court had the following to say:

> '…The primary argument presented by the applicant's representative was that evidence should be heard in relation to the points *in limine* being argued, and that for reasons unknown, the second respondent made a ruling based only on the respective representatives' submissions. The material properly before a commissioner on which the commissioner can base a decision is ordinarily limited to evidence under oath (whether this be introduced *viva voce* or by affidavit) or evidence introduced by agreement between the parties. The fact that there was no proper evidentiary basis established before the second respondent on which to make a ruling in relation to the points *in limine* was not a function of the applicant's failure to adduce sufficient evidence so much as the second respondent's failure to require that evidence to be led.'

[19] The issue pertaining to whether evidence should be allowed in order to decide a jurisdictional point regarding the existence (or otherwise) of an employment relationship was also canvassed in the case of *Denel (Pty) Ltd v Gerber* [2005] 9 BLLR 849 (LAC) ("*Denel* judgment"). The court in that matter had to decide whether the claimant was the cited respondent's employee or whether the claimant was engaged as an independent contractor. The court gave a detailed analysis of local and foreign authorities on this aspect. Having carefully considered and analysed such authorities, the court's views on the matter were aptly expressed as follows at para19-23:

> '[19] **When a court, or, other tribunal is called upon to decide whether a person is another's employee or not, it is enjoined to determine the true and real position.** Accordingly, it ought not to decide such a matter exclusively on the basis of what the

parties have chosen to say in their agreement for it might be convenient to both parties to leave out of the agreement some important and material matter or not to reflect the true position.

[20] If a court or other tribunal were to be precluded from looking at matters outside of the parties' agreement, there would be a serious danger that it could be precluded from determining the true position or the true relationship between the parties and end up making a finding that the parties wish it to make as to the position when in fact the true position is different. That cannot, in my view, be allowed in a case where the duty of the court or tribunal is to determine that which is objectively the position. Indeed, were a court or tribunal faced with such a question to decide it in accordance only with the contents of the agreement between them, then, in a case such as this one, where the decision whether a person was or was not another one's employee goes to the jurisdiction of the court, the parties would in effect be able by their agreement to confer jurisdiction on a court or tribunal which it otherwise does not have or to take away from a court or tribunal jurisdiction that it otherwise has over them. That would be completely untenable and can simply be not allowed because **whether or not a court or other tribunal has jurisdiction in a particular matter is, generally speaking, a matter that must be determined objectively and not be based on the say-so of any party or, indeed, of all parties to a dispute**.

[21] Furthermore, it seems to me that not to allow such evidence may lead to the decision of the court being based on form rather than substance – something that for decades the courts not only in this country but in many other jurisdictions as well have striven to avoid. In fact this Court has previously approved a statement by the old Labour Appeal Court to the effect that the parties' own perception of their relationship and the manner in which the contract is carried out in practice may, in areas not covered by the strict terms of the contract, assist in determining the relationship. (See *SABC v McKenzie*1 (1999) 20 *ILJ* 585 (LAC) at 591E–F at

paragraph [10] approving *Borcherds v CW Pearce & J Sheward t/a Lubrite Distributors* (1993) 14 *ILJ* 1262 (LAC) at 1277H–I). In *McKenzie*'s case this Court also said at 591G–H (paragraph 10):

> 'In seeking to discover the true relationship between the parties, the court must have regard to the realities of the relationship and not regard itself as bound by what they have chosen to call it (*Golberg v Durban City Council* 1970 (3) SA 325 (N) at 331 B–C).

As Brassey *The Nature of Employment* points out at 921, the label is of no assistance if it was chosen to disguise the real relationship between the parties, 'but when they are bona fide it surely sheds light on what they intended." I agree with the first part of Brassey's view and refrain from expressing a view on the second part of Brassey's view . . . Indeed, it seems that in the reported cases where the same issue has arisen, oral evidence was always led on whether there was an employment relationship even when there was a contract between the "employer" and a close corporation or when there was a contract between the "employer" and the "employee" purporting to show the relationship to have been that of an independent contractor or to have been one between two legal entities.

[22] **Irrespective of, and quite apart from, what has been said above, it is, furthermore, clear from the authorities not only in this country but also in England and elsewhere that the law is that whether or not a person is or was an employee of another is a question that must be decided on the basis of the realities – on the basis of substance and not form or labels – at least not form or labels alone. In this regard it is important to bear in mind that an agreement between any two persons may represent form and not substance or may not reflect the realities of a relationship. Any oral or other evidence which may assist the court to conclude what the reality of the relationship is or was between such two persons is admissible and is not precluded by the parol evidence rule. In this regard it is noteworthy that in almost all reported cases**

that I have come across which relate to this question, oral evidence was led which related to how the parties interacted with each other and how they handled their relationship in practice.' (My emphasis).

[20] I am of the view that in the *Denel* judgment, the court's consideration of whether there was a need for *viva voce* evidence to be led when a jurisdictional point pertaining to the existence of an employer-employee relationship was raised was not confined only to instances where the question sought to be answered was whether the person rendering service was an employee as contemplated in section 213 of the LRA as opposed to being an independent contractor.

[21] My impression is that the approach laid down in that case would be equally applicable even where the issue to be determined was the correct identity of the employer, as was the case in the matter at hand, where the second respondent had to decide whether the fourth respondent's employer was the appellant or Shell Sudan. A party referring an unfair dismissal dispute must obviously be in the employ of the employer against whom such a dispute is referred. Expressed differently, there cannot be a dispute relating to unfair dismissal unless there is an employment relationship between the claimant and the respondent in question. I am of the view that even though the facts of the *Denel* judgment are not on all fours with the matter under consideration, there are enough similarities which suggest that the court in that matter also envisaged the circumstances of the present case.

[22] The similarities I am referring to are the following facts as summarised by the court in para 1 and 2 of the *Denel* judgment:

> '[1] The question for determination in this appeal is whether the respondent was an employee of the appellant as at the 12 June 1998 when she left the appellant pursuant to what she contends was a dismissal but what the appellant contends was not a dismissal as there was no employment relationship between them. **On the one hand the respondent contends that she was an**

employee of the appellant while, on the other, the appellant contends that she was not its employee but was an employee of a company called Multicare Holdings (Pty) Ltd ("Multicare") which was her company with which the appellant had an agreement to provide certain services which the respondent was providing to the appellant on behalf of that company.

[2] A dispute concerning the fairness of the alleged dismissal arose between the appellant and the respondent. The respondent referred the dispute to the Labour Court for adjudication after conciliation had failed. In the statement of claim the respondent alleged that she had been dismissed by the appellant and that such dismissal was unfair and sought reinstatement and compensation. In its response to the statement of claim, the appellant took the point that the Labour Court had no jurisdiction to adjudicate the dispute. **As a basis for this objection, the appellant denied the allegation by the respondent that she had been employed by it.** The appellant further alleged that it had a written contract with Multicare in terms of which that company had an obligation to render certain services to, or, perform certain work for, the appellant and the respondent was the person who performed such work or rendered such services to the appellant on behalf of that company.' (My emphasis).

[23] The view that the principle enunciated in the *Denel* judgment is equally applicable to the present circumstances is buttressed by the following remarks made in para 16 and 17 of that judgment:

'When a party to a dispute objects to the jurisdiction of the Labour Court, or of any other tribunal, for that matter, in a claim or dispute (eg unfair dismissal claim) under the Labour Relations Act (66 of 1995) ("the Act") on the basis that the claimant (or the person on whose behalf the claim is being pursued) **was not an employee of the respondent or was not employed by it or that there was no employment relationship between them at the relevant time,** what the court or the tribunal dealing with that objection is called upon to do is to determine whether the claimant or person on whose behalf the claim is being pursued was an

> employee within the meaning of that word as defined in section 213 of the LRA of the Act'.
>
> … On the above authorities it seems to me that the parol evidence rule does not preclude the leading of oral evidence where the purpose of leading such oral evidence is to show what the true relationship was between parties to a dispute or where the evidence tends to show or may tend to show what the true relationship was between the parties or where it may tend to show that the relationship between the two parties falls or fell within the ambit of the definition of the word "employee" in section 213 of the Act.' (**85197210465** My emphasis)

[24] The order made by the court in the case of *August Lapple (South Africa) v David Jarrett and Others* [2003] 12 BLLR 1194 (LC) and the cases discussed therein demonstrate just how complex the determination of the identity of the true employer can be, even where evidence has been adduced. On the basis of these authorities, as well as the *Denel* judgment, I am of the view that the question of whether there is an employer-employee relationship in the context of the present matter is one that can be properly determined by adducing *viva voce* evidence, unless both parties are agreed that such a determination can be made on the basis of documentary evidence only.

[25] As stated before, the fact that the fourth respondent received a letter of termination of employment from Shell Sudan and even accepted a severance package from it were aspects which begged for an explanation from the fourth respondent, but these were not considered by the second respondent at all. There was a clear dispute of fact which the second respondent chose to decide without the benefit of affidavits or oral evidence. See *Flexiware (Pty) Ltd v CCMA and Others* (*supra)*.

[26] Having considered all of the above, I am of the view that in refusing the appellant's request to lead *viva voce* evidence and instead being content to dispose of the matter on the basis of documents that were not properly admitted into evidence, the second respondent committed a material irregularity warranting the setting aside of his decision. Insofar as the court

a quo found otherwise, it erred. I am satisfied that the court *a quo* misdirected itself materially and that this misdirection alone warrants the setting aside of its order.

[27] In the light of this conclusion, it is not necessary to consider the issue relating to the onus of proof and the issue whether or not the second respondent's failure to allow legal representation was reasonable. Counsel for the appellant in any event conceded that those issues were ancillary.

[28] Considering the findings made above, the appeal stands to succeed. As the appeal was unopposed, the issue of costs does not arise. I would accordingly grant the following order:

Order

1. The appeal is upheld with costs.

2. The order of the court a quo is set aside and replaced with the following:

   "(i) The ruling issued by the second respondent under case number GPCHEM 180-08/09, dated 22 January 2009 is reviewed and set aside.

   (ii) The matter is referred back to the first respondent for a hearing de novo before a commissioner other than the second and third respondents.

   (iii) There is no order as to costs."

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MOLEMELA, AJA

Acting Judge of the Labour Appeal Court

TLALETSI, JA and MURPHY, AJA agreed with the judgment.

Appearances:

For the Appellant:	Mr P Maserumule (Maserumule Inc)
For the Fourth Respondent:	Unopposed