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EMPLOYMENT

THE RESTRICTIONS ON A COMMISSIONER TO DEAL WITH A DISPUTE NOT FORMALLY BEFORE HIM

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ISSUE

Whether the commissioner acted reasonably by applying section 200B of the Labour Relations Act 66 of 1995 ("**LRA**") to find that the appellants were to be permanently employed by the first respondent, Pick 'n Pay Retailers (Pty) Ltd ("**PnP**"), and not by the second respondent, Assist Bakery 115 CC ("**AB**"), in circumstances where the appellants never invoked, or expressed, reliance on the section.

SUMMARY

It would be unreasonable for a commissioner to rely upon a section of the LRA in circumstances where the section was never invoked by the party referring the dispute. In addition, section 200B of the LRA provides that "for the purposes of this Act and any other employment law, 'employer' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent and effect of the doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law." The purpose of this section is not to be used as a general provision for making persons / entities the employer of others.

FACTS

In the case of *Masoga and Another v Pick n Pay Retailers (Pty) Ltd and Others*[1] the Labour Appeal Court ("**LAC**") had to consider this issue.

Pick 'n Pay ("**PnP**") operates, among others, three manufacturing facilities separately from its retail stores. These manufacturing facilities produce goods specifically for PnP. One of these facilities is a bakery manufacturing plant. The bakery, from the outset, was operated on an outsourced basis.

PnP subsequently embarked on an empowerment initiative whereby previously disadvantaged persons could be trained to operate self-standing bakeries capable of operating independently of PnP ("**the empowerment scheme**"). As part of the empowerment scheme, PnP concluded a five year contract with Assist Bakeries ("**AB**") to produce certain products for PnP.

The basis of the empowerment scheme is that AB is required to operate as an independent business. PnP would empower the business with technical and management skills to enable it to run as a self-standing bakery. AB is a separate entity which, at the time of the review, employed 30 people, including Lethabo Masoga and Lebohang Maeleso ("**the employees**").

The employees were employed at AB on fixed-term contracts as bakery assistants. The fixed term contracts were entered into on 1 March 2015 and endured for 12 months. The contracts would therefore terminate on 1 March 2016. The terms of the two contracts were the same in all material respects and signed by the employees. In the agreements AB is described as "the employer."

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION ("CCMA")

During November 2015 the employees referred a dispute to the CCMA but cited both PnP and AB as the "other party" to the dispute. The nature of the dispute was characterised as a section 198A of the Labour Relations Act 66 of 1995 ("**LRA**") labour broker / temporary employment service provider ("**TES**") dispute. The employees indicated that PnP was the owner of the premises where they worked and that AB was a TES. The employees asked that they be deemed permanent employees of PnP.

In the notice of set down the CCMA informed the parties that the primary issue to be arbitrated was a "section 198B of the LRA – fixed-term contracts with employees earning below the threshold" dispute. A few days after receiving the notice of set down, AB offered the employees permanent employment contracts containing the same basic terms and conditions of employment as their fixed-term contracts and stating their salary per month. The employees were required to indicate their acceptance of the offer by signature.

Section 198(1) of the LRA defines a TES as "any person who, for reward, procures for and provides to a client other persons:

(a) who perform work for the client; and

(b) who are remunerated by the temporary employment service."

At the arbitration AB accepted that the employees were permanent employees of AB but PnP disputed that it was the employer and AB the TES as no proof of this had been provided.

The commissioner identified the issue in dispute to be the identity of the true employer and held that what had to be decided was whether PnP was the employees' employer and if so, whether the employees were entitled to "parity" within the meaning of section 198 of the LRA. There was uncontested evidence that the employees of AB performed their duties under the supervision and direction of PnP's management and that the employees' leave forms were submitted and approved by PnP's management. The commissioner held that these facts established the close association between PnP and AB and that the employment relationship was actually between PnP and the employees despite the contract entered into between AB and the employees.

The commissioner concluded that the contract was concluded to conceal the identity of the true employer thereby avoiding the application of the LRA. In this regard section 200B of the LRA became applicable. Section 200B was never mentioned by either of the parties during the proceedings. Section 200B provides for liability for employer's obligations and states that:

(1) "For the purposes of this Act and any other employment law, "employer" includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law.

(2) If more than one person is held to be the employer of an employee in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of this Act or any other employment law."

The commissioner held that PnP was a co-employer within the meaning of section 200B. PnP and AB were jointly and severally liable to effect parity of treatment between the employees and PnP's comparator permanent employees.

LABOUR COURT

Both PnP and AB disagreed with the CCMA award and brought separate applications to review and set aside the award. These applications were subsequently consolidated and heard together by the Labour Court.

There were two grounds of review, namely that the commissioner failed to identify the dispute and failed to understand the evidence.

The Labour Court upheld both grounds and held that the true dispute was about the interpretation and application of section 198B of the LRA relating to fixed-term contracts. It held that AB only contravened section 198B(5) as the fixed-term contracts had exceeded three months without any justifying reason. This was conceded by AB when they offered the employees permanent employment. The Labour Court held that the award should have stated that the employees were permanent employees of AB. By embarking on an additional enquiry the commissioner was found to have arbitrated the wrong dispute with a result that the award was a nullity.

It was held further that, in any event, the finding that an employment relationship existed between PnP and the employees was "without warning" and did not afford PnP an opportunity to lead evidence on this issue. This amounted to a gross irregularity. The invocation of section 200B was "misguided" and irregular. The commissioner's interpretation of the law and the award was incorrect. The court held further that serious reputational implications would come from a finding that a big corporation such as PnP contravened the law. It held that section 200B had "far-reaching implications and ought only to be invoked when all the requirements of it are met in full. A failure to do so constitutes a serious and material error of law on which the reasonableness test vitiates the award. The court found that the commissioner had erred in finding, without any proof, that the intention of the empowerment scheme was to defeat the purposes of section 200B.

LABOUR APPEAL COURT

The employees appealed the Labour Court's decision to the LAC. They argued that the LC was wrong and that the commissioner's decision was reasonable. They contended that there were two issues in dispute before the commissioner:

1. whether the employees ought to be regarded as permanent employees; and
2. whose permanent employees they were.

Because the first issue had been conceded by PnP and AB, the employees argued that the commissioner simply had to rely on section 200B to determine the dispute as this was the only way to determine whether PnP was the true employer.

The argument on behalf of PnP was that the dispute related to section 198A(3) of the LRA (TES) and/or section 198B of the LRA (fixed-term contracts) read with section 198D (general provisions applicable to sections 198A to 198C). They argued that the commissioner should have dismissed the matter since there was no merit in the dispute. Further, section 200B was not brought before the commissioner and he was thus not entitled to rely on it.

The LAC held that section 200B "does not postulate a general test for determining whether a particular person or entity is the true employer of a particular employee". The effect of this is that it "merely extends the liability that would ordinarily be that of the employer, [...] to another or others, who carry on as an associated or related activity or business by or through an employer." They are regarded as employers for the purposes of liability.

The LAC held that the labels attached to a dispute does not change its true nature. There was no proof that PnP was the employer of the employees or that AB was a TES. No evidence was provided to prove that the empowerment scheme was simulated or a sham or that the employees' contracts with AB were not *bona fide*. The LAC held that the first time section 200B was mentioned was in the commissioner's award. The parties had never been provided with an opportunity to address its applicability and ramifications. This, it was held, was grossly unfair and reviewable. The LAC dismissed the employees' appeal and upheld the Labour Court decision.

IMPORTANCE OF THE CASE

A commissioner cannot rely on a dispute not brought before him. Conversely, section 200B of LRA cannot be invoked without the parties raising it. Section 200B is not a general test to make certain persons or entities the employer of others. A "close association" between two or more parties does not necessarily imply simulation and regard should be given to the proper context of the relationship.

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1. [2019] ZALAC 59 (12 September 2019).



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