IN THE INDUSTRIAL COURT OF

ESWATINI JUDGMENT

Case No. 272/2020

In the matter between:

NKOSINGIPHILE MASUKU Applicant

And

AM RECRUITMENT SERVICES (PTY) LTD 1st Respondent

ANDILE DLAMINI N.O 2nd Respondent

ESWATINI MOBILE LIMITED 3rd Respondent

Neutral citation: Nkosingiphile Masuku v AM Recruitment Services (Pty) Ltd and 2 Others [2021] [272/2020] SZIC 54 (06 August 2021)

Coram: **S. NSIBANDE J.P.**

(Sitting with N.R. Manana and M.P. Dlamini Nominated Members of the Court)

Date Heard: 08 De.cember 2020

Date Delivered: 06 August 2021

JUDGMENT

[11 The applicant approached the Court on notice motion under a certificate of urgency on 14th October 2020 seeking an order in the following terms:-

"1. That the usual forms *and setvice relating to the institution of proceedings be dispensed with and that this matter be heard* as a *matter of urgency;*

2. That the Applicant's non-compliance with the Rules relating to the above said forms *and setvice be condoned;*

3. Pending finalisation of this application that a *rule nisi do and* is *hereby issued calling upon the first respondent to show* cause, *on* a *date to be determined by the above Honourable Court, why final orders in the following terms should not be granted, namely;*

3.1 An Order declaring that the First Respondent respondents is *not an employer to the applicant and therefore* has *no locus standi and/or authority to prefer charges and convene* a *disciplinary hearing against the Applicant.*

3.2 An Order declaring the Applicant's suspension by the First Respondent unlawful;

3.3 An Order declaring that the Third Respondent is *the Applicant's employer entitled to discipline the Applicant;*

3.4 An Order interdicting the First and Second Respondents from proceeding with the disciplinary hearing against the Applicant pending the finalisation of this application;

4. That, pending the final determination of the Order's *sought in paragraph 3 above, that the Order in Paragraph 3.4 above be and* is *hereby granted* as *an interim order with immediate effect;*

5. Costs *of suit.*

6. Further and/or alternative relief as *this above Honourable Court* may *deem fit."*

[2] The matter eventually came for argument before us on 8th December 2020. The 1st Respondent's Counsel abandoned the point *in limine* that had been raised in respect of the urgency of the matter and the parties argued the merits of the application.

[3] The applicant, a female Swazi of Manzini alleges that she was employed by the third respondent on 2nd October 2019 and that her recruitment and placement was done by the first respondent. She alleges that first respondent is a recruitment agent and that as such she was recruited

and interviewed for a position that existed at third respondent by the respondent.

[4] She pleads that all times material to her employment she was supervised and controlled by the third respondent, was governed by the workplace rules, policies and disciplinary code of the third respondent and reported to the third respondent about her daily duties and work performance. She further pleads that she work the third respondent's wore uniform and that her salary came from the third respondent.

[5] After, thieves broke into her workplace at Ngwane Park and stole property estimated to be valued at E27 000 on 8th September 2020, applicant was suspended from work on 9th September 2020. She alleges that she was suspended by the first respondent which is not her employer. Subsequently she was charged and called to a disciplinary hearing by the first respondent. She was charged with gross negligence and failure to follow company procedures leading to the incident of the break in at the third respondent's store at Ngwane Park on the 8th September, 2020. She pleads that it is the third respondent's company procedures that she is accused of failing to follow and not those of the first respondent.

[6] The respondents deny that the applicant is employed by the third respondent. They and that she is employed by the first respondent. In its answering affidavit, the first respondent sets out that it has a supply of service level agreement with the third respondent and that the employment of the applicant is related to that agreement. In terms of the agreement the first respondent provides human resource services and contact centre and experience centre management services to the third respondent.

[7] According to the first respondent it first employed the applicant sometime in October 2017, on a fixed term contract. She has been on a series of fixed term contracts since then. The third respondent did not file a substantive affidavit but was content to file a supporting affidavit confirming the evidence of the first respondent in so far as it related to it. It alluded to the supply of service level agreement between itself and the first respondent and further, denied that an employer - employee relationship existed between it and the applicant.

[8] In her replying affidavit the applicant denies that she is employed by the first respondent and alleges that the third respondent is her

employer. While she does not specifically acknowledge the employment contracts as set out by the first respondent, the applicant states that the written employment contract is a simulated contract creating an incorrect impression that first respondent is her employer when in fact the true employer is the third respondent.

[9] In her submissions the applicant, the applicant requests the court to decide who her real employer is between the first and third respondent. She contends that the real employer is the third respondent. She contends that the first respondent is a labour and recruitment agent and not her employer. Mr. Simelane for the applicant invited the court to look beyond the employment contract between the applicant and the first respondent and to apply the "reality" test as applied in the matter of **State Information Technology Agency (SITA) (PTY) LTD v CCMA and Others - Case JA 16/2006.** In terms of the test the court must work with three primary criteria in determining the question of an employment relationship -

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 on the employer.

[1OJ The applicant submitted that she was supervised by employees of the third respondent; that she formed an integral part of the organisation, the third respondent; and that she was economically dependent on the third respondent - that although she received her salary from the first respondent, the money in fact was paid monthly to the first respondent by the third respondent. It was her submission therefore that third respondent was the real employer.

[11] Following that the court asked to be addressed on the effects of **section 110** of the **Employment Act 1980,** the applicant submitted that the section creates a clear demarcation of who the real employer is between the supplier of workers and the receiver of workers and that the one who receives workers from n agent is the employer.

[12] Section 110 reads thus - ***"Private* employment *agency means the business (whether or not it is carried on for profit or whether or not it is carried on in conjunction with any other business) of providing services or information for the purpose of finding***

persons employment in Swaziland or of supplying employers in Swaziland or of supplying employers with persons for employment by them."

[13] The respondents' submission were that there is clearly a contract of employment between the applicant and the first respondent and that that being the case, there was no doubt that the first respondent was the applicant's employer. It was also submitted that the cases cited by the applicant's attorneys were distinguishable on the facts.

The **SITA case** (supra) is distinguishable in that the parties in the **SITA** case created a legal fiction in order to defeat the prohibition of re employment of the applicant.

The Denel (Pty) Ltd v Gerber 2005 (26) ILJ 1256 (LAC) was said to be distinguishable on the basis that it was based on the interpretation of **section 213** of the **Labour Relations Act (the LRA)** of South Africa which defines employee in a much broader sense than our legislation.in terms of **the LRA** an employee includes ***"any other person who in any manner assists in carrying on or conducting the business of an employer."*** Our **Industrial Relations Act 2000** defines **employee** as **"a *person, whether or not the person is an employee at common law, who works for pay or other***

remuneration under* a *contract of service or any other arrangement involving control by, or sustained dependence for the provision of work on another person."

[14] It was submitted that, in terms of our legislation it was necessary that there be a contract of service between employer and employee and that there be remuneration paid to the employee by the employer. It was submitted that a contract of employment exists between the applicant and the first respondent and that it is the first respondent that pays the applicant's salary. Over and above that the first respondent is responsible for the deduction and paying over of statutory deductions due from the applicant's salary.

[15] The respondents further distinguished the case of **Unifoods (Pty) Ltd v Mark Dlamini and Six Others (5612018) [2019] SZSC 12 (08/05/2019)** on the basis that neither of the two supposed employers had a written contract with the employees and secondly the labour broker had at some point disappeared from the equation leaving the employees to continue working for the appellant who continued to pat them their monthly salaries. In *casu,* the applicant has always been paid her salary by the first respondent and has no contract with third

respondent nor has her salary ever been paid by the third respondent. It was the respondents' submission therefore that the applicant could not rely on the principles enunciated in any of the cases cited on her behalf and that having demanded payment of her salary from first respondent, after having launched this application, the applicant could not be successful in her application.

[16] With regard to **Section 110** of the **Employment Act 1980,** the respondents submitted that the court had to consider the contract of employment between the applicant and the first respondent and not look beyond it; that once it is established that the contract is clear and not ambiguous in any way then the court had to give effect thereto and not seek to interpret it in any way.

[17] The first respondent referred the Court to the matter of **Derek Charles McMillan and Pieter Jacobus Van Der Merwe v Usutu Pulp Company t/a Sappi Usutu Industrial Court Case No. 187/2006** and submitted that the Industrial Court had considered that there was a written contract between the 2nd applicant and the respondent therein which contained all the essentials of a contract in coming to the conclusion that he was an employee of the respondent. The Court also

took into account the fact that he was subject to the direct authority control and discipline of the Respondent and that it was the Respondent that paid him a salary.

It was submitted, by Mr Gumedze on behalf of the first respondent that the Court should consider that, although applicant works at third respondent's premises and is supervised by the third respondent's managers and reasons third respondent's uniform, there is no written contract of employment between her and the third respondent. Further that the third respondent does not exercise any disciplinary authority over her.

Finally, it was submitted that the applicant was aware that it was the first respondent that paid her salary hence when she made demand for the payment of her salary, while this matter was before Court, she wrote to the first respondent and did not involve the third respondent at all. In terms of the letter dated 2nd November 2020, the applicant advised the first respondent that she has received half her salary without any reasons of the facture to pay her full salary. She demands full payment of her October 2020 salary by 4th November 2020, failing which her attorneys threatened to move an urgent application for the payment of her full salary. She does not demand any payment from third respondent nor does she copy in the third respondent in the

correspondence. It was the first respondent's submission that applicant could only have done so because she was aware that first respondent is her employer. It was first respondent's prayer that the matter be dismissed with costs, with the Court finding that the first not the third respondent is the applicant's employer.

[18] In reply and in respect of the letter demanding payment of salary, applicant submitted that although first respondent paid her salary, it was not hidden that the third respondent paid first respondent the salary to enable it to pay the applicant and that therefore nothing turned on that letter of demand.

[19] It is common cause that the first respondent and applicant entered into a contract of employment that commenced on 2nd October 2017 and terminated on 31st December 2017, in terms of the letter of offer dated 10th October 2017. In terms of that letter, the first respondent offered

and applicant accepted, to be placed as an experienced service centre agent at Swazi Mobile service centre, Ngwane Park Branch. It is also common cause that the contract was renewed on the same terms and conditions on a number of occasions and that at the time

of her

suspension the applicant's contract had been extended as previously done.

[20] The applicant, in her application, ignores her contract with first respondent completely. In her founding affidavit she does not mention the contract at all. Instead she invites the court to find that the third respondent is her employer and not the first respondent. She points out that certain factors point towards the third respondent being her employer.

[211 The applicant's submissions and arguments ignore the age old principle of sanctity of contract. Sanctity of contract guarantees certainty in contract law. Courts interfere with contractual provisions agreed upon between parties only in exceptional circumstances. The general requirements for a legally enforceable contract are good faith, freedom of contract, sanctity of contract and private of contract. The motion that agreements voluntarily entered into must be honoured is an old age principle that has found recognition in our law.

[221 The applicant can not simply enter into a contract with the first respondent in terms of which she agrees to be employed by the first

respondent and be placed at the third respondent and then simply renege from that because it is convenient for her to be employed by the third respondent. The *pacta sunt sen;anda* principle states that obligations created in terms of an agreement must be honoured; therefore parties who enter into contractual agreements with the relevant intention are obliged to respect that agreement. In the matter of **Pieteus & Co. v Solomon 1911 AD at 121** the court had this is to say:-

"When a *man makes an offer in plain unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed and accepted by him bona fide in that sense, then there is concluded* a *contract. Any unexpressed resen;ations hidden in the mind of the promisor are in such circumstances irrelevant. He can not be heard to say that he meant his promise to be subject to* a *condition which he omitted to mention, and of which the other party was unaware."*

[23] In our view, the question of who applicant's employer does not arise in the circumstances. The cases cites by the applicant are distinguishable. In the **Unifoods (Pty) Limited** matter, there were no written contracts between the intermediary and the employees or

between the employees and the client (the appellant in the matter). The appellant (Unifoods) denied employing the workers and pointed at the labour broken as their employer. It was precisely because of the dispute as to who was the employer that extenuous evidence had to be examined to prove who the employer was.

In *casu,* the position is clear. There is a contract of employment between the applicant and the first respondent that clearly places the applicant in the employ of the first respondent.

[24] The South African cases cited by the applicant are not only distinguishable on the facts of each case but they may well not be relevant to our situation. Irrelevant because we do not have legislation governing labour broking in Eswatini whereas South Africa recognised the concept of a labour broken since 1983 when it was introduced to the **Labour Relations Act 28 of 1956.** Various amendments have been made to the act as well as other legislative interventions which have sought to share liability for complacence with specific labour laws between the labour broken and its client. From our reading of the legislative interventions, it would appear that the labour broker, now called the Temporary Employment Services, is recognised as the employer of the employees. In the matter of **Numsa v Assign**

Services and Others it was held that there is no transfer of employees between the labour broker and the clients. Instead there is "rather a change in the statutory attribution of responsibility as employer within the same triangular employment relationship "to the client. Further that the triangular relationship (between the labour broker, the employee and the clients deemed to be the employer for as long as the commercial contract between the client and the labour broken remains in place.

[25] It is for the above reasons that we say that the South African cases cited herein by the applicant are irrelevant. Our law has not evolved in the manner that the South African law has done and besides, the applicant has not challenged the legality of her contract with the first respondent.

As for the manner in which the cases are distinguishable, we are in agreement with the respondents in *toto***.** The **SITA** case (supra) is distinguishable on the basis that the parties created, intentionally, a legal fiction of employment in order to defeat certain legislature prohibitions on re-employment. Most importantly, in these matters the question of who the employer was arose. In the matter currently before Court, that question does not arise in the face of a contract of

employment that exists between first respondent and the applicant. The private and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. In the circumstances, it is difficulty for this Court to ignore the contract that exists between first respondent and the applicant and first respondent and this Court is duty bond to find that the applicant is bound by same, in the absence of any proof that the contract was/is illegal.

[26) Having raised the issue of **section 110 of the Employment Act 1980,** it would seem to us the business of the first respondent is different from that envisaged in the section. The first respondent provides services for clients through its own employees and does not supply employers with persons for employment by then. We do not find that the first respondent's business is in conflict with section 110.

[27) In all the circumstances of this matter the application for a declaration must fail.

We make the following Order -

27.1 The application is dismissed.

27.2 There is no order as to costs.

The Members Agree.

S. NSIBANDE
JUDGE PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr. Simelane (H.M. Simelane & Co.)

For 1st Respondent: Mr. B. Gamedze (Musa Sibandze Attorneys)

For 3rd Respondent: Ms. Mzileni (S.V. Mdladla & Associates)