IN THE LABOUR COURT OF SOUTH AFRICA

Case no: D 1280/19

Reportable

In the matter between:

ADCORP WORKFORCE SOLUTIONS (PTY) LTD	**Applicant**
and	
CCMA	**First Respondent**
PILLEMER, B N.O.	**Second Respondent**
NUMSA OBO AS DLAMINI & 40 OTHERS	**Third Respondent**
SACKS PACKAGING (PTY) LTD	**Fourth Respondent**

Application heard: 17 February 2021 (via Zoom)

Delivered: This judgement was handed down electronically by circulation to the parties' legal representatives by email. The date and time for the hand down is deemed to have been at 12 noon on 13 August 2021.

JUDGMENT

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WHITCHER J

[1] This is an application to review an award in terms of s145, alternatively, s158(1)(g) of the Labour Relations Act 66 of 1995. The review application is opposed only by the third respondent.

[2] The common-cause facts are as follows. The applicant provided temporary employment services to the fourth respondent. Among those employees working at the fourth respondent for the applicant were the forty-one (41) individual employees on whose behalf their union, NUMSA, acts as the third respondent.

[3] At some point in 2019, the third respondent invoked Section 198A(3)(i) of the LRA, seeking that the individual respondents be declared employees of the fourth respondent, the Applicant's client.

[4] The applicant and the third respondent agreed that the deeming provision in Section 198A(3)(i) operated and concluded a settlement agreement in which the employees were "deemed indefinite employees of the fourth respondent…" and regulating other aspects of the ongoing relationship.

[5] The parties agreed that the question as to whether they should wear the overalls of the applicant (their erstwhile employer) would be determined by the arbitrator.

[6] On 29 August 2019, the arbitrator issued a directive (essentially an award) in favour of the third respondent and its members that they should not be required to wear the uniforms of the labour broker in these circumstances.

ANALYSIS OF EVIDENCE AND ARGUMENT

[7] The applicant argued that the award is reviewable on the basis that the arbitrator lacked jurisdiction to hear the matter. The applicant gave three grounds for this. First, the applicant understood the arbitration about uniforms,

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(conducted after settlement of the referred dispute about the whom the employer was deemed to be), to have occurred under s198A(5) of the LRA. It took the point that such a dispute had never been referred to conciliation and/or arbitration. Second, the applicant further argued that the specifics of the uniforms supplied did not constitute an existing term and/or condition of employment and was thus essentially an interest dispute. Third, it argued that even if the matter was properly construed as a s198A(5) rights dispute, the arbitrator did not have the jurisdiction to grant substantive relief. The arbitrator could only, if one followed case law, issue a directive as to whether or not the employees are being treated on the whole less favourably.

[8] These are all interesting questions to which the third respondent replies with equally interesting and vigorous argument. In my view, I do not need to decide these points to resolve this matter. The third respondent's statement of the jurisdictional issues contains the seeds of the destruction of its own argument. This is on a basis that the applicant did not explicitly raise.

[9] Working with the third respondent's own characterization of its case at arbitration, its case was the following:

(a) the purpose of the deeming provision in Section 198A, as stated in *Assign Services* , is "to ensure that the deemed employees are fully integrated into the enterprise as employees of the client";
(b) the fourth respondent is thus not entitled to identify the deemed employees in its workplace as those of the labour broker (the applicant) by requiring them to wear its uniform; and
(c) such dispute was clearly one "arising from the interpretation or application" of Section 198A as contemplated by Section 198D and the arbitrator clearly had jurisdiction to determine the issue as agreed.

[10] I disagree that the arbitrator had jurisdiction over a case brought on this basis. Once a settlement agreement was concluded between the applicant and the third respondent to the effect that employees were deemed indefinite employees of

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the fourth respondent, any further reliance on section 198D to determine any remaining actual dispute between the parties was misplaced. Section 198D (1) reads:

> 'Any dispute arising from the interpretation or application of sections 198A, 198B and 198C may be referred to the Commission or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration.'

[11] *In casu*, Section 198A had been applied. The forty-one employees were, as a matter of law, backed up a settlement agreement, now fully-fledged employees of the fourth respondent. There is no retreating from this legal fact to claim that the clothes they (still) had to wear after becoming permanent employees somehow meant that their transition to permanency was incomplete and had to be adjudicated under section 198D. Any unhappiness about their livery should have been channelled via processes that employees of the fourth respondent would ordinarily utilise when they were unhappy about their uniform, followed by external dispute resolution if necessary, which would necessarily include conciliation of such a dispute.

[12] With the settlement agreement before her confirming that the applicant was no longer the employer, the arbitrator ought to have known that she lacked the power to entertain further complaints about ancillary matters under the auspices of section 198D. The settlement agreement itself could not vest the CCMA with that power. Whether the employees were being denied equal treatment in respect of the uniforms or not, section 198D is not concerned with the problems of already permanent employees[1]. It was accordingly not competent for the commissioner to award any relief in terms of section 198D of the LRA.

[1] See *Passenger Rail Agency of South Africa v Commission for Conciliation, Mediation and Arbitration and Others*, [2020] 1 BLLR 49 (LC) [paras 52 – 56].

In passing, although section 198D may well only be fit for declarations, nevertheless, theoretically speaking, a prospective new employer's stated refusal, ahead of time, to provide appropriate 'integration' of new employees into the business by way of uniforms, could be raised as a dispute of interpretation and application of section 198A(3)(i) of the LRA. However, such a dispute would need to be raised in the absence of a settlement agreement recording that the employees are now permanent employees of the new employer.

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[13] It is trite that wrongly assuming jurisdiction over a matter is reviewable. Consequently, the award falls to be set aside.

Order

1. The CCMA lacked jurisdiction to arbitrate the dispute
2. The ruling (regarding the uniforms) is reviewed and set aside.
3. There is no order as to costs.

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Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT:	Kirchmanns Inc (Mr M C Kirchmann)
THIRD RESPONDENT:	Advocate P Schumann, instructed by Brett Purdon Attorneys

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