THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number : 392/06
Reportable

In the matter between :

ER24 HOLDINGS — APPELLANT

and

SMITH NO — 1ST RESPONDENT
COMPENSATION COMMISSIONER — 2ND RESPONDENT

CORAM : SCOTT, CAMERON, CLOETE, MAYA JJA *et* THERON AJA

HEARD : 4 MAY 2007

DELIVERED : 18 MAY 2007

Summary: Compensation for Occupational Injuries and Diseases Act, 130 of 1993: remuneration 'in kind' as contemplated in the definition of 'employee' means the provision of something that has an objectively ascertainable value which can serve as the basis for the assessment of an employer in terms of s 83 and for the calculation of compensation payable in terms of Chapter VI read with Schedule 4 of the Act.

Neutral citation: This judgment may be referred to as *ER24 Holdings v Smith NO* [2007] SCA 55 (RSA).

JUDGMENT

CLOETE JA/

CLOETE JA

[1] On 10 August 2003 Ms Romy Staracek ('Romy') was a passenger in a vehicle driven by Ms Natasha Swanepoel ('Natasha'). The vehicle was involved in an accident caused by the negligence of Natasha and Romy was seriously injured. At the time of the accident Natasha was acting in the course and scope of her employment as a shift leader with Emergency Room Company (Pty) Ltd, trading as ER24, which operates an emergency service. Romy was a volunteer worker undergoing vocational experience that was essential to enable her to qualify ultimately as a paramedic, and she and Natasha were on their way to an accident scene.

[2] Adv Irvin Smith was appointed as curator *ad litem* to Romy. In that capacity he sued ER24 for damages in excess of R7 million allegedly suffered by Romy in consequence of the accident. ER24 delivered two special pleas in answer to the claim. In the first, ER24 alleged that Romy was an 'employee' as defined in the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 ('the Act'); that the damages claimed by her were in respect of an 'occupational injury'; and that in terms of s 35 of the Act, no action lay against it for the recovery of the damages claimed. Section 35(1) of the Act provides:

'(1) No action shall lie by an employee . . . for the recovery of damages in respect of any occupational injury . . . resulting in the disablement . . . of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement . . .'.

In s 1 of the Act, 'occupational injury' is defined as 'a personal injury sustained as a result of an accident' and 'accident' is defined as 'an accident arising out of and in the course of an employee's employment and resulting in a personal injury . . . of the employee'. In the second special plea, ER24 pleaded that it had concluded a contract with Romy in terms of which its liability for the injuries suffered by Romy was excluded; and in the alternative, that the contract fell to be rectified so as to exclude such liability. ER24 also joined the Compensation Commissioner as a third party. In those proceedings it sought an order declaring that Romy was an 'employee' as

defined in the Act and that the claim brought on her behalf accordingly lay against the Compensation Commissioner in terms of s 35 of the Act. The court *a quo* (Bashall AJ) dismissed both special pleas and the relief sought by ER24 against the Compensation Commissioner, but granted leave to appeal to this court.

[3] The essential question raised by the first special plea and the third party notice is whether Romy was an 'employee' as defined in s 1 of the Act, the relevant part of which reads as follows:

'"employee" means a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind …'.

[4] The court *a quo* found that Romy had executed a contract with ER24, the first paragraph of which provided that she

'will not be regarded as an employee and is not entitled to any statutory protection, remuneration or fringe benefits.'

If Romy is entitled to benefits under the Act, the exclusion of 'statutory protection' cannot apply to such benefits inasmuch as s 33 of the Act provides:

'Any provision of an agreement existing at the commencement of this Act or concluded thereafter in terms of which an employee . . . relinquishes or purports to relinquish any right to benefits in terms of this Act, shall be void.'

[5] Some of the witnesses called to give evidence expressed the opinion that Romy was not an employee and reference was made to correspondence from the office of the Compensation Commissioner which was to the same effect. These opinions are irrelevant. The question whether Romy was an employee as defined in the Act, is a question for the court.

[6] The definition of 'employee' covers remuneration 'in cash or in kind'. It was not submitted ─ in my view, correctly ─ that a person who has entered into or works under any of the three categories contract mentioned in the definition, would qualify as an employee if that person received no remuneration. The evidence established

that Romy was not paid. It was however submitted on behalf of ER24 that it remunerated Romy in kind by allowing her to travel in its vehicles, to be exposed to actual accident scenes and to obtain vocational guidance and experience from its more experienced personnel, all with the view to enabling her to gain the necessary experience to qualify as a paramedic. I cannot agree with this argument.

[7] Remuneration 'in kind' to my mind means the provision of something that has an objectively ascertainable value which can serve as the basis for the assessment of an employer in terms of s 83 and for the calculation of compensation payable in terms of Chapter VI read with Schedule 4, of the Act. Section 83(1) provides:

'Subject to the provisions of this section, an employer shall be assessed or provisionally assessed by the Director-General according to a tariff of assessment calculated on the basis of such percentage of the annual earnings of his, her or its employees as the Director-General with due regard to the requirements of the compensation fund for the year of assessment may deem necessary.'

Schedule 4 deals with the manner of calculating compensation and in each case (save in regard to funeral costs) the benefit is calculated having regard to the 'monthly earnings' of the employee. Thus, for example, the compensation for temporary total disablement payable in terms of s 47(1)(a) of the Act is periodical payments representing 75 percent of an employee's monthly earnings at the time of the accident (subject to a maximum); and the compensation payable in terms of s 49(1) for permanent disablement of 30 percent, is a lump sum being 15 times the monthly earnings of the employee at the time of the accident (subject to a minimum and a maximum).

[8] If the argument on behalf of ER24 were correct, some monetary value would have to be placed on the experience gained by employees for the purpose of determining the employees' annual earnings; and such experience would have to be taken into account in determining the 'monthly earnings' of an employee for the purposes of calculating the compensation payable – because there can be no distinction in principle between a person such as Romy and an employee of ER24 properly so called who is paid a monthly salary. Both tasks are for practical purposes impossible and neither is in my view required by the Act.

[9] Nor does s 51, referred to in argument, assist ER24. That section provides:

'(1) If as a result of an accident an employee sustains permanent disablement and at the time of the accident ─

(a) was an apprentice or in the process of being trained in any trade, occupation or profession; or

(b) was under 26 years of age,

the Director-General shall determine the earnings of such employee in accordance with subsection (2) for the purpose of the calculation of compensation in terms of section 49.

(2)(a) In the case of an employee referred to in subsection (1)(a), his earnings shall be calculated on the basis of the earnings to which a recently qualified person or a person in the same occupation, trade or profession with five years more experience than the employee would have been entitled at the time of the accident, whichever calculation is more favourable to the employee.

(b) In the case of an employee referred to in subsection (1)(b), his earnings shall be calculated on the basis of the earnings to which a person of 26 years of age would normally have been entitled if at the time of the accident he had been performing the same work as the employee or a person in the same occupation, trade or profession with five years more experience than the employee, whichever calculation is more favourable to the employee.'

The purpose of this section is to benefit a person who is *ex hypothesi* an employee (one in training or under 26 years of age) by providing for an increased benefit. This section does not assist in determining whether a person being trained or under 26 years of age, is an employee.

[10] I therefore conclude that as Romy was not remunerated, whether in cash or in kind, she was not an employee for the purposes of the Act. It follows that the first special plea and the relief sought by ER24 against the Compensation Commissioner were correctly dismissed by the court *a quo*.

[11] The principal contention by ER24 in its second special plea was that it had contracted out of liability to Romy. The contention was based on the following clause in the contract which the court *a quo* found that Romy had signed:

'[Romy] indemnifies ER24 of any claim in respect of any loss, damage or injury howsoever caused which may be sustained during the course of assisting with the operational requirements of the Company.'

Scott JA in *Durban's Water Wonderland (Pty) Ltd v Botha and Another*[1] stated the approach to be followed in construing such an exemption clause as follows:

'If the language of a disclaimer or exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the *proferens*. (See *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 804C.) But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be "fanciful" or "remote" (cf *Canada Steamship Lions Ltd v Regem* [1952] 1 All ER 305 (PC) at 301C-D).'

[12] It was conceded on behalf of ER24 that the clause is ambiguous inasmuch as it is not clear whether Romy indemnified ER24 for injuries caused to a third party or to herself. It is only in the latter case that the clause could provide a defence to ER24. The clause is, however, fairly susceptible to the former interpretation; apart from anything else, if ER24 wished to exclude liability on its part to Romy, why, it may be asked, would it limit such exclusion to loss, damage or injury sustained during the course of her assisting with the operational requirements of the company? Such a qualification makes far more sense if what is intended to be excluded is loss, damage or injury caused by Romy to a third party while she was assisting in the operational requirements of the company. The concession on behalf of ER24 was accordingly well made. The ambiguity is fatal and the *contra proferentem* rule must be applied against ER24.

[13] ER24 pleaded in the alternative in its second special plea that the exclusion clause should be rectified so as to exclude any liability on its part to Romy. Counsel representing ER24 did not abandon the point, although he did not press it in argument either ─ and rightly so. It is trite that a party relying on rectification has to show that the contract as rectified reflects the common continuing intention of the parties thereto. Although the author of the contract who was employed by ER24 gave evidence as to what he intended the clause to mean, there was no evidence

[1] 1999 (1) SA 982 (SCA) at 989G-I; see also *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA).

from which Romy's intention could legitimately be inferred. It follows that ER24's second special plea cannot succeed either.

[14] The appeal is dismissed. ER24 is ordered to pay the costs of the curator *ad litem* and the Compensation Commissioner including, in each case, the costs of two counsel.

_____
T D CLOETE
JUDGE OF APPEAL

Concur: Scott JA
Cameron JA
Maya JA
Theron AJA