IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

LAC CASE NO: JA 38/08

In the matter between

SANLAM LIFE INSURANCE LIMITED	**APPELLANT**
And	
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**FIRST RESPONDENT**
COMMISSIONER T DUBE	**SECOND RESPONDENT**
CLAUDINE DE VILLIERS	**THIRD RESPONDENT**

JUDGMENT

JAPPIE JA

[1] Leave to appeal having been granted by the Labour Court, this is an appeal against a judgment of that court refusing an application for the review and setting aside of a ruling by a commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA) that the CCMA had the requisite jurisdiction to proceed with a conciliation and arbitration of an unfair dismissal dispute referred to it by the third respondent.

[2] On or about the 1st August 1989 the third respondent, Claudine De Villiers entered into a contract with the appellant, Sanlam Life Insurance Limited, in terms of which the appellant employed her as a financial adviser. On

the 1st February 2001 a further contract was concluded between her and the appellant in terms of which she then assumed the position of an independent financial adviser.

[3] In the latter half of 2005 the appellant detected certain instances of unacceptable conduct on the part of the third respondent. The appellant regarded such conduct as a breach of the contract between it and the third respondent. In terms of *The Guidelines on Management Practices for Sanlam Financial Advisers (Independent Contractors*) which were applicable between the appellant and the third respondent and formed part of the contract, the appellant sought the advice of an independent legal advisory body namely, TOKISO. The advice obtained recommended that the appellant terminate the contract as between itself and the third respondent. On the 19th December 2005 the appellant terminated the contract with the third respondent.

[4] The third respondent referred an unfair dismissal dispute to the CCMA for conciliation and if need be arbitration in terms of section 191 (i) (a) (ii) of the Labour Relations Act 66 of 1955 (the LRA). The CCMA assigned the dispute to Mr T. Dube, the second respondent, as a commissioner to conciliate and, if need be, arbitrate.

[5] The appellant contended that the third respondent was not an employee but an independent contractor, and that, for that reason, the CCMA did not have jurisdiction to conciliate the dispute. In the present matter the dispute was referred by the third respondent to the CCMA for conciliation in terms of section 191(1) of the LRA. That section reads as follows:

"**191 Dispute about unfair dismissal and unfair labour practice**

1(a) If there is a *dispute* about the fairness of a dismissal, or a *dispute* about an unfair labour practice, the dismissed *employee* or the *employee* alleging the unfair labour practice may refer the *dispute* in writing to –

(i) a council, if the parties to the dispute fall within the registered scope of that council; or

(ii) the Commission if no council has jurisdiction.

(b) A referral in terms of paragraph (a) must be made within –

(i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence. "

[6] It can be seen from a reading of section 191(1) of the LRA that the dispute being referred to the CCMA under section 191(1) should be a dispute about the fairness of a dismissal of an employee. Accordingly, there must have been an employment relationship between the parties for the CCMA to have jurisdiction under sec 191.

[7] The argument of the appellant is that the CCMA is a creature of statute and, therefore, it has jurisdiction only over those disputes referred to it in terms of the LRA. Should the CCMA attempt to resolve any other dispute, that is, disputes not within its jurisdiction, it would act *ultra vires*.

[8] Neither the appellant nor the third respondent led any evidence in the CCMA on its jurisdiction and both parties elected to confine themselves to written submissions regarding the nature of the contractual relationship between them.

[9] The commissioner came to the conclusion that the third respondent was indeed an employee of the appellant and issued a ruling that reads:

"*There was an employment relationship and therefore, the CCMA had jurisdiction to proceed with the conciliation and arbitration of the dispute.*""

[10] In coming to the aforesaid conclusion, the commissioner relied on what is termed the *dominant impression test*. He reasoned that, as the third respondent was entitled to share in the benefits of the appellant's Group Provident Fund and was obliged to attend the business unit meetings of the appellant and further had to report to the developmental manager of

the appellant, the impression was that there was an employee and employer relationship between the third respondent and the appellant.

[11] The appellant took the view that the commissioner had erred and sought to review and set aside the commissioner's jurisdictional ruling.

[12] In the application for review before the Labour Court the appellant relied on the following grounds:

1. It is common cause that the third respondent had an income which exceeded the ministerial determination referred to in section 6(3) of the Basic Conditions of Employment Act (BCEA). Therefore, the commissioner had erred in applying the provisions of section 200 A (i) of the LRA which creates a rebuttable presumption that a person is an employee of another if certain factors are proved.

2. Having concluded that the third respondent was subject to the control of the appellant in so far as the appellant determined what product the third respondent had to sell and determined the nature of the service she could give to other insurers, relying on the *control test,* the commissioner further concluded that the existence of an employee and employer relationship had been proved. It was argued that, in doing so, the commissioner had erred as he had failed to contextualise the

aforementioned factors. It was argued that whatever control the appellant had over the third respondent was merely to protect the appellant's commercial interest and was not of such a nature that he controlled the third respondent's production capacity. It was argued that the means of control exercised by the appellant over the third respondent was, therefore, a neutral factor.

3. It was also submitted that moreover the commissioner had completely ignored the provisions of the written contract which governed the relationship between the parties. It was argued that the commissioner had further failed to consider and/or follow the decisions of the Labour Court, Labour Appeal Court and the Supreme Court of Appeal which specifically addressed the legal principles applicable to the determination of the status of the contract between advisors such as the third respondent and institutions such as the appellant which conduct business in the life insurance industry.

[13] The Labour Court came to the following conclusion:

> "The Commissioner in my view has reasoned himself through to a conclusion which I am unable to find is not justifiable, having regard to the evidential material placed before him. As this is a review, and not an appeal, I am not called upon to determine whether the Commissioner was right or wrong in the conclusion he

arrived at. I am of the view that the applicant herein is in effect urging upon me to approach this matter as an appeal and it seeks from this Court a conclusion that the Commissioner was wrong in having concluded that there was an employment relationship between the parties herein. That of course is not the proper approach in review proceedings."

[14] Further in the judgment, the Labour Court stated:

"Clearly the commissioners ruling herein was in response to the point *in limine*. Accordingly, I am further of the view that the ruling of the Commissioner was an interlocutory one and not final . I am of the view that once the Commissioner has heard evidence during an arbitration, the Commissioner would be at liberty to make his or her own ruling, including a conclusion that there was no employment relationship between the parties."

[15] The application for review was dismissed and the appellant was ordered to pay the third respondent's costs. The appellant sought and was granted leave to appeal. Before us the appeal was unopposed and only the appellant, represented by Mr Gamble SC, presented argument.

[16] By approaching the matter in the way it did, the Labour Court, in my view erred. In *S A Rugby Players' Association and Others v S A Rugby (Pty) Ltd and Others; S A Rugby (Pty) Ltd v S A Rugby Players Union & Another (2008) 29 ILJ 2218 (LAC)* at paragraph 40 this Court said:

> "The CCMA is a creature of statute and not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In *Benicon Earthworks and Mining Services (Edms) Bpk v Jacobs NO & Others (1994) 15 ILJ* 801 (LAC) at 804 C-D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor of the current Act. The Court held that the validity of the proceedings before the Industrial Court is not dependant upon any finding which the Industrial Court may make with regard to jurisdictional facts but upon their objective existence. The Court further held that any conclusion to which the Industrial Court arrived on the issue has no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. …"

[17] It was, therefore, incumbent upon the Labour Court to deal with the issue whether or not there had been an employment relationship between the appellant and the third respondent and, therefore, whether the CCMA had the requisite jurisdiction to deal with the dispute. The issue of jurisdiction is dependent on the answer to this question. In my view the Labour Court erred in holding that the issue of jurisdiction was an interlocutory point which the commissioner could revisit and on which he could perhaps later come to a different conclusion. The Labour Court was called upon to decide *de novo* whether there was an employer/employee relationship between the parties. It was not called upon to decide whether the commissioner's findings were justifiable or rational.

[18] It was argued before this Court that, in coming to the conclusion that the CCMA had the requisite jurisdiction to conciliate the dispute, the commissioner committed material errors of law and that the Labour Court, accordingly, had to review and set aside the commissioner's ruling.

[19] The commissioner had relied on the presumption set out in section 200 A of the LRA. This section reads as follows:-

"200 A presumption as to who is an employee

i) Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

a) The manner in which the person works is subject to the control or direction of another person;
b) The person's hours of work are subject to the control or direction of another person;
c) In the case of a person who works for an organisation, the person forms part of that organisation;
d) The person has worked for that other person for an average of at least 40 hours per month over the last three months;
e) The person is economically dependent on the other person for whom he or she works or renders services;
f) The person is provided with the tools of trade or work equipment by the other person; or
g) The person only works or renders services to one person."

[20] In his ruling the commissioner specifically referred to the factor contained in section 200 A (i) (a) of the LRA. The commissioner further stated:-

> "I am persuaded that the applicant's work was subject to the control or direction of another person, in that the respondent determined what products the applicant had to sell and the nature of service to be given to other insurers. The applicant whilst being allowed to sell other products, only with the respondent's permission or authority, remained within the control of the respondent company. In applying the control test it is apparent that the respondent had control on the nature of work and direction of work. The respondent could also decide when the applicant could take leave."

[21] It is apparent that the commissioner based his conclusion squarely on the presumption contained in sub-section 200 A (i) of the LRA. The presumption created in sub-section 200 A (i) is dependent on what is set out in sub-section (2) of the section which reads as follows:

> "(2) Sub-section (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6 (3) of the *Basic Conditions of Employment Act*."

[22] It is common cause that at the time the third respondent referred the dispute to the CCMA her annual income was approximately R115 572.00. This amount is in excess of R89 455.00 which is the amount referred to in

section 6 (3) of the BCEA. Accordingly, the presumption did not apply to the third respondent. In my view in relying on the presumption set out in section 200 A of the LRA the commissioner erred.

[23] The commissioner further emphasized that the *dominant impression test* was applicable to the issue before him. He points out that the third respondent was entitled to the benefits like the group provident fund. Moreover, he said that she was obliged to attend the business unit meetings of the appellant and report to the developmental manager of the respondent. These factors, the commissioner reasoned, created an impression that the third respondent was an employee of the appellant. The Commissioner then refers to the case of *Omgevallekommissaris v Onderlinge Verskerings Genoot Skap AVBOB 1976 (4) SA 446* (A) in which it was held that the question of control is an important but not necessarily determinative of the existence of an employee and employer relationship. The commissioner pointed out that he had to look at the whole gamut of indications in order to determine if a dominant impression had been created by all the relevant factors to point to an employment relationship. No single factor is determinative on its own. All the factors must be weighed collectively as to arrive at the dominant or main impression. The commissioner, having stated the aforesaid, failed to take into account the important factor of the terms of the contract which governs the relationship between the appellant and the third respondent.

In *Niselow v Liberty Life Association of Africa Limited 1998 (4) SA 163(SCA) at 166* a it is stated:

> "It was not contended that the written agreement between the parties contained a simulated transaction, that it had been amended or that it was vague or ambiguous. The legal **relationship between the parties must therefore be gathered from the terms of the written agreement**."

[24] The terms of the written agreement between the parties were before the commissioner. It is common cause that the agreement allowed for the following:-

- The third respondent would be paid on a commission basis based on products she managed to sell. The appellant was entitled to reverse payment paid to the third respondent in the event of the sale of the product being terminated.
- Any disputes relating to payment of commission were to be subject to the jurisdiction of the Magistrate's Court.
- The contract did not provide for working hours.
- The contract was terminable for any reason upon 24 hours notice by either party.
- The contract did not make any provision for leave.
- The contract allowed the third respondent to employ other persons to assist her and would be responsible for their remuneration .

- The third respondent was entitled to claim expenses – such as office rental, stationary, personal computers and telephone from the South African Revenue Services as rebates moreover she could also be registered as a VAT vendor with the South African Revenue Services.

[25] In my view, except for the clause relating to the termination to the contract, the aforesaid terms as outlined in the contract are terms that one does not typically encounter in an employment contract. For example, the third respondent was allowed to employ other persons to assist her and would be responsible for their remuneration. Moreover, the third respondent could, if she so desired, be registered as a VAT vendor with the South African Revenue Services. These factors, in my view, suggests that the third respondent acted independently in the manner in which she rendered her service to the appellant.

[26] In the *Niselow* case, the Appellate Division held that advisors who render service in circumstances similar to those of the third respondent were not employees of the company to which such services were rendered.

[27] The appellant has in argument, further referred to cases in which the CCMA followed the *Niselow* decision and has come to the conclusion that advisors such as the third respondent were not employees. It seems to

me that, had the commissioner applied his mind to the terms of the contract and to earlier rulings in similar cases before the CCMA, he would not have arrived at the conclusion that the third respondent was an employee of the appellant. In consequence, I conclude that the third respondent was not an employee of the appellant but was an independent contractor. The result hereof is that the CCMA did not have jurisdiction, to entertain the dispute referred to it by the third respondent.

[28] As the appeal was unopposed, the issue of costs does not arise. In the result I make the following order:

1. The appeal is upheld.
2. The decision of the Labour Court is set aside and, for it, is substituted with the following order:
    a) The review application is granted.
    b) No order as to costs is made.
    c) The ruling of the commissioner is set aside and is replaced with the following ruling:

> "It is hereby declared that the applicant was not an employee of the respondent and, therefore the CCMA does not have jurisdiction to conciliate the unfair dismissal dispute referred to it by the applicant".

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JAPPIE JA

I agree.

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ZONDO JP

I agree.

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LEEUW JA

COUNSEL FOR THE APPELLANT: ADV. P GAMBLE SC

INSTRUCTED BY: MASERUMULE INC. ATTORNEYS

COUNSEL FOR THE RESPONDENT: NO APPEARANCE

DATE OF JUDGMENT: 18 September 2009