REPORTABLE **CASE NO. LC 17/2006**

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

MILTON IGNATIUS ENGELBRECHT	**1ST APPLICANT**
GERSON DOESEB	**2ND APPLICANT**
RUDOLF MORKEL	**3RD APPLICANT**
ARTHUR VAN WYK	**4TH APPLICANT**
WILLMIEN LOOTS	**5TH APPLICANT**
IVAN RICKETS	**6TH APPLICANT**

versus

MANFRED HENNES (MESSENGER OF COURT WINDHOEK)	**RESPONDENT**

CORAM: FRANK, A.J.

Heard on: 2007.03.16

Delivered on: 2007.04.13

JUDGMENT

FRANK, A.J.: The respondent in this matter is the duly appointed messenger of the Magistrates Court for the district of Windhoek. The applicants are deputy-messengers of the Magistrates Court appointed as such pursuant to sec 14(2)(b) of the Magistrates Court Act, Act 32 of 1944.

The issue between the parties is whether the deputy-messengers (deputies) are employees of the messenger or not. The deputies maintain they are whereas the messenger denies this and avers they are either his agents or independent contractors.

This being an application and there being no request to refer any of the disputes between the parties to evidence the matter must be dealt with on the basis of the rule stated in *Plascon-Evans Paints Ltd v Van Riebeecks Paints (Pty) Ltd* 1984 (3) SA 623 (A). In addition to this it must be borne in mind that the deputies bear the onus on a balance of probabilities to establish that they are employees of the messenger. (*Paxton v Namib Road Desert Truck (Pty) Ltd* 1996 NR 109 at 110 E-F)

As will become apparent from what is stated below the contracts between the parties are such that it contain certain elements that are usually found in agreements of employment and certain elements that are usually found in agreements of agency or where independent contracts are utilised. It thus becomes necessary to examine every feature of the relationship between the parties to determine whether the dominant impression is

such that the relationship can be described as an employer-employee relationship. In examining this relationship and in eventually classifying it as one of employment or not it must be borne in mind that the contract between the parties must be borne in mind that the contracts between the parties cannot be judged in isolation but must be assessed in the social context it was concluded having regard to the relevant legislation.

The fact that it is not always easy to differentiate between contracts of employment and contracts which also provides for services to be rendered such as those of agency and independent contractors is not a recent phenomenon and as far back as 1945 De Beer, J. expressed himself as follows where a distinction had to be made between an agreement of employment and one of agency:

> *"…all past attempts to compose a concise definition of the terms servant or agent have failed so lamentably as to curb even the most impetuous; at the most it seems possible in fairly general terms to enumerate the more usual incidents and salient characteristics which by their presence or absence in any given instance may serve as an element to determine the relations of the parties".*
>
> (*Cloete and Cloete v R* 1945 OPD 204 at 205)

In looking at the relationship between the parties the following *indiciae* are relevant; namely, *"the nature of the task, the freedom of action, the magnitude of the contract amount, the manner of payment, the power of dismissal, the circumstances under which the payment of the reward may be withheld, control, supervision, subjection to the orders of another..."* (*Colonial Mutual Lite Assurance Society Ltd v MacDonald* 1931 AD 412 at 426). Some of these factors have been restated and refined more recently but the factors mentioned are all still relevant in my view. (Paxton case above at 113B-114E and 115C-116C, and *Tuck v SA Broadcasting Corporation* (1985) ILJ (vol 6) – 570 at 578D-581A)

A useful summary as a starting point when analysing the relationship as to what a contract of employment must contain to qualify as such is provided by Wallis in Labour and Employment Law as follows:

> *"A contract of employment must disclose the following features. A natural person must have agreed to render services to another in return for a fiexed or determinable remuneration. In terms of the agreement the employee must to some extent be subject to the control and direction of the employers. Such control need not extend to a right to direct in*

detail the manner in which the employee performs his or her duties, provided the employee has the right to give directions in relation to at least some aspects of the performance of these duties. In any disputed case the greater the degree of control that is present the more likely that the contract is one of employment. Notwithstanding the importance of the question of control it is always necessary to examine every feature of the relationship in order to determine whether the contract is one of employment. Invariably in such a situation the contract will have features of both a contract of employment and some other type of contract and in those circumstances it is the dominant impression of the contract having weighed all it's characteristics which determines in which category it will be placed."

(Wallis: Labour and Employment Law 2-9)

Whereas the question of the exercise of control is no longer the determining factor but one of the factors to be considered the total absence of control would in my view be fatal to any claim to being an employee. In the Paxton case, above O'Linn J states the following in this regard:

"Although the exercise of control has been watered down to 'being an important yardstick for testing "but not decisive', it seems to me that it remains a very important yardstick and perhaps even an indispensable

one when deciding who is an 'employee' in the context of the provisions of the Namibian Labour Act".

(Paxton case, above at 119 E-F)

Whereas it may be a matter of "extreme delicacy" to decide if the extent of the control in a particular case is such, considered in the context of the other factors mentioned, as to constitute an employment contract the total absence of control is wholly inimical to the concept of employment and would in my view clearly indicate that one is not dealing with an employment relationship. Insofar as there is a suggestion in the passage quoted by O'Linn and in other cases, (eg. Hannah v Government of the Republic of Namibia 2000 NR 45 LC at 50 E) that even in the total absence of control one may still be dealing with an employee/employer relationship I cannot agree for the reason mentioned above. To paraphrase O'Linn, J. some element of control is indispensable for any employment relationship. This issue is in my view dispositively summarised in the Colonial Mutual Assurance Society case above as follows:

"But while it may sometimes be a matter of extreme delicacy to decide whether the control reserved to the employer under the contract is of such a kind as to constitute the employer the master of the workman,

one thing appears to me to be beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract; is other words unless the master not only has the right to prescribe to the workman what work has to be done but also the manner in which that work has to be done."

(Colonial Mutual Lite Assurance Society case, above at 439-435)

With the above principles in mind I now turn to the agreements between the parties. These agreements contain the terms of the contract between the parties and although the conduct of the parties subsequent to entering into the agreements may be of relevance to see in which manner the parties interpreted the agreements the agreements are the prime source to establish the relationship between the parties. (Paxton case, supra at 114 D-E)

The deputies attached an unsigned document which they alleged contained the terms and conditions of their engagement with the messenger. This document can broadly be divided in two sections, namely a section which clearly contains clauses relevant to their appointment and a further section which on the

face thereof appears to be specific instructions by the sheriff as to how certain specific matters would and should be dealt with. The messenger denied that the said document contained the deputies' contracts and annexed signed agreements by all the deputies save one evidencing their agreements with him. These signed agreements are not disputed in reply as they are according to the deputies "substantially the same" as the one they attached. In view of the approach I have to take in this matter I can only consider the agreements attached by the messenger. As pointed out the one deputy didn't sign the agreement. Counsel for the deputies however accepted that this one agreement even if not in writing would on a tacit basis be the same as those of the others and when considering the issue I could assume that all the deputies' agreements were in similar terms. As all the written agreements are in similar terms it is only necessary to examine the terms and conditions of one of them.

The agreements are all under the headnote of the messenger. In terms of Section 19 of the Magistrates Court Act deputies can only be appointed with the approval of the magistrate. This approval once given lasts according to some old authority until

expressly revoked by the magistrate who initially granted the approval or his/her successor in title (*Bezuidenhout v Lipschitz &* 1916 TPD 212). Counsel for the messenger submits this special way of dealing with deputies are somehow a factor indicating they are not employees. I do not agree. It is clear from the agreements that the parties are the deputies and the messengers. The prior consent of the magistrate does not make him or her a party to the agreement. The magistrate only approves of the potential candidate who then enters into an agreement with the messenger. The fact that the magistrate or his/her successor may in due course revoke the approval does not detract from the fact that the messenger may in the meantime terminate the agreement for whatever good reason. The magistrate may have some overall statutory powers which (in view of the Constitution) will have to be exercised reasonably and fairly but he has, in general, nothing to do with the day to day operations of the messenger and the deputies which is a question of agreement between themselves. The role of the magistrate in the appointment of the deputies are in my view a neutral factor and nothing turns on this in deciding the nature of the contract.

What is of relevance in my view as far sec. 19 of the Magistrate's Court Act is concerned is the fact that sec. 19(2)(b) expressly provided that where a messenger appoints a deputy the messenger *"shall be responsible"* for said deputy. On this basis the deputy cannot be an independent subcontractor other than an agent otherwise the messenger will not be responsible for the actions of the deputy. This means the deputy must either be an employee or an agent. This in turn brings me to the difficult factual question as to what the deputies are in the present matter. I say this is a difficult question as the duties of agents and employees (servants) may overlap and a servant is also the agent of his master in certain circumstances.

> *"An agent may well be a servant in the true sense of the word or he may be an independent contractor and to that extent the reference to the control of the employer may be relevant to ascertain the nature of his employment, but as to the general distinction between servant and agent the question of control can only be a rough test in that it is no doubt true that an agent more often acts in the absence of the person he represents while a servant usually acts in the presence or under the supervision of his master. The true distinction is surely that an agent is employed, and has authority, to make contracts between his employer and third parties whereas a servant is employed to carry out his*

> *masters orders. The agent is known by his authority; the servant by his employment. It may of course happen that a servant, for some purposes, is vested with the authority to contract, he is then po hac vice an agent. A servant is generally for some purposes his mater's agent, the extent of the agency depending on the duties or position of the servant. Conversely some agents, without ceasing to be agents, since they have authority to contract, are subject to the control of their principals and so are servants."*
>
> (De Villiers and Macintosh; the Law of Agency in South Africa; 3rd ed, 17)

At the top of the agreement the deputy's name is inserted after the printed heading, *"Name of Agent"*. Thereafter the agreement starts of with the heading *"Conditions of Employment"*. Condition 1.2 of the agreement appoint the deputy *"as an agent (…) for the messenger of Court"*. Right at the end of the document in the last paragraph before the signature of the deputy the latter acknowledges that *"I understand the contents and accept all conditions of employment as set out above"*. These contradictory indications are not helpful either way and it is clear the parties themselves do not know whether they are servants or agents and regard will thus have to be had to the other terms and conditions

contained in the agreement. In addition *"to employ"* may in certain contexts mean no more than to engage.

The deputies must provide their own transport and carry the costs thereof and are paid by way of commission based on fees they earn by serving legal process. From this commission certain costs relating to office expenses (presumably made available by the messenger) are deducted. This is indicative of a true agency agreement in that the deputies' commission is based on the fees they raise for service of process and not in respect of work done irrespective of income earned. (Dennis Edwards & Co v Lloyd 1919 TPD 291 at 298-299 and Ongevalle Kommisaris v Onderlinge Versekeringsgenootskap AVBOB 1976 (4) SA 446 (A) at 463 A-B) Furthermore the fact that the deputies must use their own transport for which costs they are responsible is also indicative of an agency agreement rather than an employment agreement. (*Imperial Cold Storage v Yeo* 1927 CPD 432 and *Cohen's Bakery v R* referred to in *R v Feun* 1954 (1) SA 58 (T) at 61, in which cases the fact that an ice-cream vendor and a baker was provided with the means to sell their wares without any close supervision was held to be employees because of the fact that the whole of the capital outlay was provided by the

employers). The fact that the deputies are paid by way of commission is a less weighty factor than the fact that they must provide their own transport as payment by way of commission is not unusual even when one is dealing with employees. (Feun case supra at 62 G)

The agreement makes provision for an annual bonus payable at the discretion of the messenger based on productivity. The provision for a discretionary bonus is something that is usually unique to employment contracts. In a true agency agreement where the agent is on as equal bargaining position with his principal such terms are not the norm. Provision may be made in such agency agreements for an additional percentage of commission should production be above certain levels or for the payment of an amount as additional commission (bonus) based on a predetermined agreed formula should production exceed certain levels but to leave such additional payment to the discretion of the principal is not the norm. It is however common practise in employment relationships where the production is not necessarily directly linked to the work done by the employee.

As far as provision for leave is concerned the agreement provides that this is not the concern of the messenger but is entirely up to the deputy if and when he wants to take leave during which period no remuneration will be payable. The leave period must however be approved by the messenger. This provision is as ambivalent as the agreement as a whole. The fact that no remuneration is payable when deputies are on leave is indicative of a relationship other than employment. The fact however that they must obtain approval to go on leave is indicative of the kind of control one would expect in an employment context as agents would normally be allowed to appoint their own employees to act for them when they take leave and hence the question of leave is not usually addressed in a proper agency agreement. (Ongevalle Kommisaris case, supra at 462 A-F and the *State v AMCA Services (Pty) Ltd* 1962 (4) SA 537 (A) at 542 A-C and FPS Ltd v Trident Construction (Pty) Ltd 1989 (3) SA 537 (A) at 542 F-G)

The deputies are enjoined to act in terms of the Magistrates Court Act. This factor in my view is neither here nor there. The Act prescribes the manner in which legal process must be served but does not deal with how one must arrange one's affairs so as to see to it that it is done expeditiously. This is left to the

individuals concerned. And it is in this area that the question of control and supervision or the lack thereof comes into the picture. The fact itself however that what the deputies are to do is prescribed in the said Act cannot be used as an indication to determine whether or not the deputies are employees of the messenger or not.

Deputies must regard themselves *"as on duty for 24 hours per day..."* This stipulation is more in line with an employment relationship than with an agency relationship. Agents in general are not at the disposal of their principals to this extent and are also generally able to do other work apart from their agency work which the deputies would very unlikely be able to do having regard to this requirement. (Ongevalle Kommissaris case, supra AMCA case supra and PFS case supra at 592 G-H).

In terms of the agreement a control office is envisaged where it appears some, if not all, of the administration are done. This office can issue instructions which much be adhered to strictly as a failure to so adhere can lead to *"disciplinary actions"* and even *"dismissal"*. The reference to *"disciplinary actions"* is reiterated in clause 7 of the agreement which in totality deals

with this aspect and consists of 9 subclauses stipulating various kinds of unacceptable behaviour prompting sanctions escalating from oral warning to written warning to dismissal.

This terminology, of course, is completely alien to an agency agreement and is clearly indicative of an employment relationship. In an agency agreement provision will be made for notice periods to terminate the agreement or to material branches entitling the innocent party to terminate the agreement. In fact no provision is made for termination in the agreement which is a further indication of an employment relationship which will run indefinitely unless terminated by a dismissal (I leave aside the question of termination by death and by the magistrate which would follow ex lege) The sting of these indiciae relating to discipline is somewhat softened by the fact that the disciplinary matters mentioned such as falsification of documents and being intoxicated while on duty would also justify a termination of an agency agreement and does not relate to operational issues. Nevertheless the nomenclature are of such a nature as one would normally find in an employment relationship and not in an agency agreement.

As far as offences not warranting dismissal are concerned the punishment is left to the "discretion of management" which is also indicative of an employment relationship as agents would act in terms of their mandate and would not be subject to management.

The deputies must report every week day between 08:00 and 09:00 *"to sign returns of service, check for documents stayed and bring in completed work"*. This aspect, taken in isolation is not necessarily indicative of either an employment agreement or agency agreement because such requirement could fit in with an agency agreement where it would not be unusual to ask an agent to account on a regular basis. The frequency of the accounting however is indicative of a tighter than normal control or supervision of the agent so that this indicator leans over in favour of an employment relationship. This ties up with the fact that the deputies are paid a monthly cellphone allowance which the messenger say is done so that he can stay in contact with them. This allowance is not stipulated for in the agreement but is common cause and can be appropriately dealt with at this juncture. This suggests that the once daily contact referred to is not enough and also adumbrates a further element of control

which would be an indication contrary to an agency relationship but more in tune with an employment relationship.

It goes without saying that when the deputies started their work pursuant to the agreements they concluded with the messenger that they knew that it would not be on the basis of the usual employment relationship as they agreed to the manner of their remuneration, the use of their own vehicles at their own costs and that they would not be entitled to leave or sick pay. This must be taken as an indicator that the normal employer-employee relationship was not contemplated but something else. They could of course not know the extent of the supervision and control that would be exercised by the messenger and this aspect I deal with later below. I do not think it can be said that they knew they would be agents in the usual sense of the word. They knew that they had unusual terms of engagement which would be some hybrid between agent and employee.

I now turn to deal with certain facts (on the basis as set out in the Plascon Evans case, supra) that appears from the papers and which have a bearing on the question in dispute or which it was submitted has such a bearing. None of the deputies belong to a

pension fund or medical aid arranged for or created by the messenger. While it is correct that membership of such funds would have been indicative of an employment relationship (FPS case, above at 542J-543B) the converse does not follow in my view. This is so because the *"benefit"* of membership of such funds by employees is a fairly recent development which is mostly offered by bigger entities. Small businesses and individual employers rarely offers such benefits. The fact that the deputies do not belong to such funds is in my way a neutral factor which does not in any way indicate the nature of their relationship with the messenger.

The messenger deducts payments from the commission payable to the deputies for payment in terms of the Income Tax Act and payments pursuant to the Social Security Commission Act. As far as the deduction in respect of the Income Tax is concerned nothing turns on this in my view as the definition in respect of whom such deductions must be made is in such wide terms that deductions would have to be made by a principal in respect of commission payments to his agent in any event. The deductions in respect of the Social Security payments are however in my view an indication of an employment relationship. The

messenger says in view of the definition of *"employee"* in the Social Security Commission Act he felt it prudent to make such deductions. This however indicates that he at least contemplated the possibility of the deputies being employees. Here it must be born in mind that the definition of *"employee"* in the Social Security Commission Act is closely aligned with the definition of *'employee'* in the Labour Act.

The question of supervision and control that I mentioned in passing now needs consideration in more detail. On behalf of the respondent it was emphasized that the deputies get no fixed remuneration and get paid for the results of their work and that as deputies in the nature of their work they deliver a product in the form of completed services. The question of the input or involvement of the messenger in the day to day activities as the deputies go about on their business was not dealt with at all by the messenger nor was it dealt with in any detail by applicants. Applicants do however aver that the deputies are at the *"beck and call"* of the messenger and that the latters *"exercises continuous and close control over the applicants in respect of the performance of their duties"*. As far as the bold allegation of being at his *"beck and call"* the messenger denies this. As pointed out

above the deputies must obey lawful instructions which the messenger states are *"inspired by the Act and the Rules of the Magistrate Court. As far as the allegation of 'continuous and close control"* over the deputies are concerned there is a statement by the messenger that this has already been dealt with, presumably with reference to the general conditions of service and in his response to the allegation that the deputies were at his the *"beck and call"*. The allegations by the messenger strikes at the heart of what would normally be the difference between an agent and an employee, namely the extent of the control over the manner in which the deputies perform their duties as opposed to the results they produce. This aspect was spelt out by De Villiers, CJ in the Colonial Mutual Life Assurance case at 435 as follows:

> *"A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done."*

The fact that the deputies must act in terms of the Magistrates Court Act and Rules does not necessarily mean they are employees nor is it necessarily an indicator that are not (Mhlongo and Another NO v Minister of Police 1978 (2) SA 551 (A) at 567 H

& J and 568 B). This aspect however made it imperative for the deputies to have set out in more detail to what extent and for what purposes they were at the *"beck and call"* of the messenger and how exactly there was *"continuous and close control"* over them. Without such detail and given the denial by the messenger which I must accept for the purpose of this judgment as there was no request for a referral to evidence the supervision and control was such as to only ensure compliance with statutory duties and not in respect of personal services rendered, the extent of which remains unknown. Whereas there are clearly some elements of control as pointed out above this control is more about checking that the deputies get their work and do it rather than in respect of the manner in which it is done. This they are each allocated an area within the magisterial district of Windhoek and no decision needs to be taken as to who must do which areas during any day, week or whatever period. Apart from checking on what they have done and presumably inform them when an urgent matter is at hand there is no supervision or control as far as their daily activities are concerned. What is done is to check the returns so as to see they comply with the law.

Counsel for applicants submitted that the matter should be determined in favour of the deputies and placed great reliance on the Australian High Court decision in *Gary John Holis v Vabu (Pty) Ltd* [2001] HCA 44 which involved bicycle couriers and where the Australian High Court found that the couriers were indeed employees of Vabu.

I interpose here to point out that the difficulty in deciding a matter such as the present also appears from the Hollis case where the District Court of New South Wales, the New South Wales Court of Appeal (with one dissenting judge) and the New South Wales Court of Appeal in a taxation matter held that the couriers were not employees but the High Court held that they were. Furthermore as pointed out in the judgment the Court of Appeal in New Zealand came to a different conclusion in respect of couriers operating under different circumstances emphasising the fact that in each case the relationship must be analysed properly before coming to a conclusion (par 58 of the judgment)

In my view the Hollis case should also be read with *R v Feun*, supra and the two old South African cases referred to in the

Feun case at 61 C-G namely *Imperial Cold Storage v Yeo and Cohen's Bakery v R*. I now turn to deal with these cases.

> *"In Imperial Cold Storage v Yeo, 1927 C.P.D. 432, the Court was called upon to consider the position of an ice-cream vendor on facts which show some points of similarity to those in the present case. The manufacturer of the ice-cream supplied the vendor with a motor van, a bell, a tray and a cap having upon it the name of the manufacturer, and every morning it issued to him a supply of ice-cream which he had to sell at prices fixed by the company. The vendor had to return the unsold ice-cream and the articles of equipment not later than 11 p.m. every night and he was paid a commission of 12½ per cent upon the proceeds of the sales. The company gave him no directions as to what route he should take with the van or at what times or places he should sell the ice-cream. A collision having occurred between the van and a bicycle the Court held that the vendor was not an independent contractor but the servant of the company, which was liable in damages as a result of the collision.*
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> *In Cohen's Bakery v R (T.P.D. 31/3/41, not reported) the Court considered the position of a baker's vanman who was furnished with a horse-drawn van belonging to his employer, maintained by his employer, and driven by a native paid and housed by the employer. The vanman drew a supply of bread each morning for which he was debited at the rate of four shillings and sixpence per dozen loaves and*

which he was to sell at five shillings per dozen loaves. The unsold bread was returned each day. He served a round of customers who were unknown to the employer, and who had been taken over by him from his predecessor on the round. In addition to the sixpence per dozen loaves which he was entitled to keep as remuneration, he received what was described as a free gift of one loaf of bread per day, plus a cash allowance in lieu of a second loaf, his predecessor having been entitled to two loaves per day. The Court held that he was not an independent contractor but an employee in terms of a wage determination for the bakery trade.

In the present case there is evidence that the ice-cream vendors were allowed a considerable degree of freedom in the manner in which they carried out their duties. For instance on cold days, which were not favourable for the sale of ice-cream, they were entitled to stay away without reference to the company. Within their own areas they used their own discretion as to where they stationed themselves with their vehicles. They took time off for their meals when business was slack or when it suited themselves for other reasons. Some of the witnesses said that they were entitled to time off for their own purposes at their own discretion, subject to their notifying the company when they would not be at work. On the other hand some of them told the Court that except on cold days they were not entitled to stay away from work without leave. Two of the witnesses said that if they sold out their stocks of ice-cream it was their duty to telephone the company so that a fresh supply could be sent out to them, and one gave evidence that he

had been rebuked by the appellant when found reading a newspaper when he should have been selling his ice-cream.

I appears to me that the comparative freedom allowed to the vendors as to the manner in which they sold their wares is explicable by the nature of the commodity being sold and the business being carried on. The demand for ice-cream naturally varies according to the weather and the time of day, and the policy of the company was to seek out the customer and carry the commodity to him when he needed it and wherever he might be. In the circumstances it was natural to allow the vendors considerable discretion as to their movements within the areas assigned to them and as to their use of their time during the working day; and the absence of detailed control as to the method in which the goods were actually sold would be due to the impossibility of close control throughout the extensive area covered by the selling organisation. The evidence reveals a considerable degree of control by the company over the manner in which the vendors were to carry out their duties, while the uncontrolled field appears to me to be comparatively unimportant, and due rather to the nature of the business than to any intention of the parties that the vendors were to be independent agents rather than servants.

It is, moreover, a consideration of some importance that the whole of the capital outlay involved in the operations of the vendors was furnished by the company. It supplied the transport and the stock-in-trade, and paid for the necessary hawkers' licences, and its profit depended upon

the diligence of the vendors in making use of what was put in their charge. In these circumstances it seems unlikely that the company would have contemplated the surrender of the right to tell the vendors how they were to conduct their operations. For example, assuming that it came to the notice of the company that there was to be a public meeting or a gathering of school children at a certain point within the area allotted to one of its vendors, is it conceivable that the company would not have been entitled to instruct the vendor in question to station himself at that point in order to take advantage of the opportunity for lucrative business? Had this hypothetical question been put to the vendors who gave evidence, it does not appear to me that any of them could conceivably have replied that the company was not entitled to give him such an instruction.

The fact that the vendors received commission and not daily or weekly wages is in my view quite unimportant, as a salesman paid by commission only may well be a servant.

Taking into account all the features of the case which were revealed in the evidence I have come to the conclusion that the vendors were not independent agents, but were employees in terms of the regulations, and that there is no substance in the first ground of appeal"

(*R v Feun* 1954 (1) SA 58 at 61C-62G)

As is evident from the above quotation the aspects in the Feun case that was important in the finding that the vendors were employees were the *"considerable degree of control by the*

company over the manner in which the vendors were to carry out their duties" coupled with the fact that *"the whole of the capital outlay involved"* was furnished by the company. In the present case the opposite is the position, i.e. there is no evidence that the type of control covered the manner in which the deputies are to carry out their duties and the capital outlay (vehicles) are for the expense of the deputies.

In the Imperial Cold Storage the capital outlay was also provided by the manufacturers in addition to which the vendor had to wear clothing identifying him with the manufacturers. The Court held he was an employee. Whereas there is a dress code clause in the agreement between the parties the deputies do not wear apparel signifying that they are deputies but are only enjoined to be *"neatly dressed"*. Thus on both the scores mentioned in this case the deputies cannot be said to be employees.

In the Cohen's Bakery case the vanman had no capital outlay and was in fact driven by a driver in the employ of the baker. Once again non of this applies to the present matter.

In the Hollis case the plaintiff was struck by a bicycle driven by a person wearing a uniform issued to him by Vabu. Hollis instituted an action for damages against Vabu based on the negligence of the cyclist. The Court had to decide whether the relationship between the cyclist (courier) and Vabu was such as to create vicarious liability.

As mentioned the courier was wearing a uniform at the time issued to him by Vabu and on which there were gold lettering on the back and front identifying him with Vabu. Vabu *"assumed all responsibility as to direction, training (if any), discipline and attire of it's bicycle couriers, …Vabu provided it's bicycle couriers with numerous items of equipment, which remained Vabu's property and which included the only means of communication between Vabu and it's bicycle couriers; the bicycle couriers were required to wear Vabu's livery at all times, partly due to Vabu's desire to advertise it's services; and that requirements such as insurance and deductions from pay therefore were imposed by Vabu on bicycle couriers without opportunity for negotiation"* (Hollis case, supra par 5, of the judgment).

The High Court of Australia mentioned the factors which influenced it to come to the conclusion that the courier were employees of Vabu.

Firstly it was reasoned that the capital investment expected from the bicycle couriers were not such as to regard these couriers, in practise, as running their own businesses. (Par 47 of the judgment). The Court however did point out that *"A different conclusion might, for example, be appropriate where the investment in capital equipment was more significant, and greater skill and training was required to operate it"*. In fact it must be born in mind that the case was expressly limited to bicycle couriers and did not deal with vehicle or motorcycle couriers. This much is apparent in the reference to the *"taxation"* case referred to above on the same issue in par 16 of the judgment as well as the reference in par. 22 of the judgment which reads as follows:

> *"It is significant to note that one of the considerations mentioned by Meagher JA in the taxation decision as indicating that the couriers were independent contractors was that they bore the "very considerable" expense of providing, maintaining and insuring their own vehicles. It is apparent that Meagher JA was there concerned with expense in relation*

> *to motor vehicles and motorcycles. The purchase and maintenance of a bicycle could hardly be termed a "very considerable" expense. It may be that, in the taxation decision, a case that was, as his Honour put it, "hardly without difficulty", a different result might properly have been reached respecting Vabu's bicycle couriers from that which obtained respecting its other couriers. However, it is unnecessary to express any conclusion on this matter. It is sufficient to say that this case concerns liability arising from the activity of a bicycle courier, not a motor vehicle or motorbike courier. For the reasons that follow, the relationship between Vabu and its bicycle couriers in the present case is properly to be characterised as one of employment."*

For the deputies to provide their own vehicles and operate them at their own costs does indeed involve a substantial or significant capital investment on their part and cannot be compared with the investment in a bicycle.

Secondly it was found that it was intuitively unsound to regard the courier as running his own enterprise taking into account that he would not be able to do it as a free-lancer, could not generate *"goodwill"* and did not provide skilled labour. This is a finding in my view that cannot be transposed without qualification to the matter under consideration. Although no special skills are required to became a deputy I assume one

would at least have to be able to ascertain the requirements for service from the Magistrates' Court Act and Rules. Furthermore even the messenger will not be able to generate goodwill in the normal business sense as would Vabu from it's couriers. Furthermore no one can act as a free-lancer in competition with the messenger as the Magistrates Court Act doesn't allow for this. It is thus not intuitively unsound for the deputies to be agents of the messenger.

Thirdly the evidence showed that *"the couriers had little control over the manner of performing their work"*. It is recorded that the couriers *"were assigned in a work roster according to the order in which they signed on"* when they reported for the day. This is contrary to what happens in the present matter where a deputy is responsible for a certain area which does not depend on when he reports and as already mentioned on the papers it cannot be said that the messenger had any control over the manner in which they worked.

Fourthly the fact that the courier wore a uniform identifying him with Vabu was held to be an indication that he was an employee

of Vabu. As already mentioned this factor is not present in this matter.

Fifthly the Court took into consideration the question of deterrence in the context of vicarious liability which in my view is not of relevance in the present matter.

Sixthly the fact that Vabu superintended the finances of the couriers was considered in the context of scrutinizing claims by the couriers mentioning that the couriers were not in a position to really negotiate remuneration and noting that damage to Vabu's property had to be made good and that Vabu made certain insurance payments that were deducted from the couriers' remuneration. The Court mentioned that the payment *"per delivery"* was natural given the tasks of the couriers. Once again not all of the factors can be transposed to the position of the deputies. This Court was simply left in the dark as to what extent the deputies would be able to negotiate their remuneration. The finances are not scrutinised to weed out errors such as *"wasting time"*, *"wrong address"* or *"excess weight"* as was the case in Vabu. *"Excess weight"* clearly has no relevance to the duties of the deputies but *"wasting time"* and

"wrong address" would be at their own cost as it would result in not optimally performing the service for which they are remunerated. The deputies do not have property of the messenger that they can damage. The payments deducted from their remuneration and the fact that payment by commission is not that uncommon where one is dealing with an employment agreement I've already dealt with.

Seventhly it was pointed out as a corollary the third point that I mentioned above that the right to control the couriers were not incidental or collateral but that there was considerable scope for actual control. *"Vabu retained control of the allocation and direction of the various deliveries. The couriers had little latitude. Their work was allocated by Vabu's fleet controller. They were to deliver goods in the manner in which Vabu directed."* At the risk of repeating myself the deputies operate in an exact opposite manner. They get all the work in respect of a pre-determined area and then go about their work in terms of the Magistrates Court Act and Rules without any input from the messenger. Their work is thus not allocated on a daily basis. They perform in a pre-allocated area. They *"deliver"* their services in a manner and sequence they choose and in terms of the mentioned Act and

Rules. The manner in which they perform or deliver is thus not directed by the messenger.

In my view the considerations in the Hollis case is instructive but fits in more with the submissions made on behalf of the messenger than the deputies as does the Feun case and the old cases referred to herein.

As mentioned and discussed above the agreement between the parties is such that it contains elements of both an agency agreement and an employment agreement. As none of the factors of the relationship between the parties which I analysed above was either in itself or cumulatively of such a nature so as to swing the dominant impression one way or the other the impression remains an uncertain one. In essence the factors indicating an agency agreement rather than an employment agreement together with the lack of detail as to the control and supervision by the respondent serves to keep the probabilities equal as to whether the relationship was one of agency or one of employment. In these circumstances the party who bears the onus fails. Unfortunately for the applicants they bear the onus and have thus failed to discharge it.

This being a labour matter neither of the legal representatives sought a costs order and rightly so in my view.

In the result the application is dismissed.

FRANK, A.J.

ON BEHALF OF THE APPLICANTS	**Mr R Heathcote**
Instructed by:	**Van der Merwe-Greeff**
ON BEHALF OF THE RESPONDENT	**Mr S Namandje**
Instructed by:	**Sisa Namandje & Co**