••••••••IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C201/2000

In the matter between:

BUILDING BARGAINING COUNCIL NORTH

AND WEST BOLAND Applicant

and

SARAH H CHRISTIE First Respondent

CHRISTOFFEL STEYN DE LANGE Second Respondent

JUDGMENT

WAGLAY J:

[1] The Second Respondent in this matter, a sole trader, carries on business as a building contractor. His business falls within the sphere of Applicant's scope of operation. Although the Applicant was not a member of any employers' organisation that was party to the collective agreement of the Applicant, the agreement would be binding upon him if it was extended to non-parties by the Minister of Labour in terms of Sections 31 and 32(2) of the Labour Relations Act ("*the Act*").

[2] On 15 May 1998 the Agreement referred to above was published in the Government Gazette No 18897 and extended by the Minister to non-parties, thus binding the Second Respondent to the agreement. At the time of the extension of the agreement to non-parties, the Second Respondent had a number of persons in his employ, including SLAMAT and FORTUIN. They were employed by him from 1992 and 1996 respectively.

[3] In the course of 1999 the Second Respondent joined the Consolidated Association of Employers of the Southern Africa Region (CAESAR) and soon thereafter concluded new contracts with his employees to regulate their relationship. These contracts, which were in writing and headed "*Onafhanklike Kontrakteur*" (Independent Contractor) set out a new relationship between the Second Respondent and his employees - the new relationship was that the Second Respondent was now a client of those who were his employees and those who were his employees were now all separate independent contractors.

[4] Once the Second Respondent concluded the contracts aforesaid with his "*erstwhile*" employees, he applied to the Applicant to be exempted from the provisions of the Applicant's Agreement and also did not comply with at least clause 13 of the said Agreement, which required him to buy benefit stamps for his employees.

[5] Because of the Second Respondent's failure / refusal to buy the benefit stamps, the Applicant initiated a complaint which ripened into a dispute that went to arbitration. The dispute was that the Second Respondent was in breach of clause 13 of the Collective Agreement (referred to in paragraph 2 above). The Second Respondent denied the

breach, stating that he was not required to buy benefit stamps because he did not have any person in his employ, he merely contracted out his work to a number of independent contractors.

[6] The First Respondent, the Arbitrator, found that the Second Respondent was not in breach of clause 13 of the Agreement on the grounds that the persons for whom Applicant sought Second Respondent to purchase the benefit stamps (SLAMAT and FORTUIN) were not employees but independent contractors.

[7] The Applicant now seeks to review and set aside the decision of the First Respondent on the grounds that:

(i) the decision of the First Respondent is not justifiable in relation to the reasons given for it;

(ii) the First Respondent's application and interpretation of the relevant law to determine the dispute was clearly wrong in that, instead of applying the dominant impression test to establish what was the real relationship between the Second Respondent and SLAMAT and FORTUIN, she focussed on the fact that since the parties knew at the time of signing the contract that it was to create a relationship of an independent contractor and a client, the relationship was not one of employer and employee.

[8] The approach of the First Respondent was that if a person elects to enter into a contract that places him outside the labour legislation he/she is bound by that election. Relying on

the matter of Briggs (*infra*) the First Respondent looked at the circumstances surrounding the entering into the contract between the Second Respondent and SLAMAT and FORTUIN and stated the following:

"*24. Parties must be kept to their bargain; see CMS Support Services (Pty) Ltd v Briggs (1998) 19 ILJ 271 (LAC). If a person elects to enter in to a contact which takes them out of the world of employment they are bound by that election. There are public policy consideration which may place limits on that election but the* [Applicant] *did not place these before me.*"

[9] Other than public policy consideration, there is also the issue that before a contract is held to be binding between the parties it must be evident that the contract was entered into freely and voluntarily with both parties being aware of the duties and obligations to which they have agreed. The evidence presented in this respect pointed not only to a lack of any genuine desire, at least on the part of the employees of the Second Respondent, FORTUIN and SLAMAT, to enter into the agreement but also that the threat of dismissal hung over them if they did not agree thereto. This is so because:

- the Second Respondent and his advisor, an official from an organisation known as KOFESA, approached the employees with the proposal to convert their relationship to one of independent contractors, SLAMAT, one of the employees, states that he was reluctant to accept the proposal but felt he had no option than to accept it because he "*feared that if he did not* [sign] *he would be dismissed.*" The employees were also told that if they did not agree to "*become*" independent contractors, that a retrenchment exercise would commence.

- while it is clear, as the First Respondent found, that "*there was some explanation of the terms of the new arrangements*". What is unclear is what was explained and what was understood by the employees. The First Respondent in fact goes on to concede that "*the workers may not have understood the complexity of the contract and that they may not have understood all its terms ...*" (page 10, paragraph 19).

[10] Reliance on the Briggs matter I am satisfied was not helpful in this case. In that matter CMS Support Services (CMS) offered to employ Briggs as an employee but she chose not to opt for that relationship and instead proposed that CMS contract with the close corporation which she had formed to provide the services she was required to render. Briggs specifically did not enter into any contract with CMS, her company - the close corporation - did and therefore quite correctly the Court did not have to look at the terms and conditions that regulated her relationship with CMS because there was in fact, as the Court found, no contract between her and CMS but a contact between her close corporation- a separate legal entity to Briggs -and the CMS .

[11] The case before the first respondent was different. The social and economic status of the employee was such that they did not have any bargaining power at all. The above notwithstanding there was a contract between the employees and the Second Respondent. In the circumstances, disregarding the question of the validity of the contract, the contract that existed between the parties was an employment contract. Once there is an employment contract it is not sufficient for the Court, the CCMA or any other

body that is empowered to determine whether or not the employment contract created an employer - employee relationship, to simply look at the label attached to the contract or what may have been discussed at the time the contract was concluded. To make the determination as to the type of employment contact the body required to do so must look at the nature of the relationship that exists between the parties. This can only be established by looking at and interpreting the terms of the contract or, more particularly, what is the dominant impression that is left, having regard to rights, duties and obligations that bind the parties to each other.

[12] Although the First Respondent referred to the dominant impression test, her fleeting application of that test without any contextual order rendered its application irrelevant. In applying the dominant impression test, what must be looked at is the relationship between the parties in its totality as no single factor can be determinative of the nature of the relationship (see **Dempsey v Home & Property, (1995) 16 ILJ (LAC)**).

[13] Had the First Respondent accepted that there was a contract of employment between the Second Respondent and the employees and then went on to apply the dominant impression test to ascertain whether the contract of employment was one of employer / employee or that of an independent contractor, then I have little doubt, based on the evidence before her, that she would have found that the relationship between the First Respondent and SLAMAT and FORTUIN was that of an employer and employee. This conclusion is based upon the following:

- SLAMAT and FORTUIN's income was not negotiated, nor were they paid by result, by percentage or commission. They were paid weekly, in the amount and in the same manner that they were paid before they signed the "*independent contractor*" contract;

- Nothing at all had changed in their (SLAMAT and FORTUIN) working relationship with the Second Respondent after they "*became*" independent contractors - the Second Respondent still exercised the same degree of control as before.

- SLAMAT and FORTUIN were primarily dependant upon the Second Respondent for their income and it was Second Respondent who generated the pro forma invoices every week. (Although the agreement was that after some unspecified period SLAMAT and FORTUIN would be required to draw their own invoice, this had not happened and no evidence was presented to show when this was to happen).

- Although both SLAMAT and FORTUIN stated that they were told that they were not obligated to report for work every day and that they would not be disciplined if they did not report for work, neither had in fact stayed away from work during their regular working hours. Evidence was that they presented themselves for work in the same manner as they had done in the past. The contract however provided that SLAMAT and FORTUIN <u>had</u> to be available to render service and that if they failed to do so, Second Respondent was entitled to inflict the equivalent of disciplinary measures against them.

[14] With regard to the exercise of control, the undisputed evidence was that nothing had changed in the working relationship between the parties after they signed the contract. The First Respondent, however, found that the exercise of control was not a determining factor. SLAMAT had stated that whenever he did work for the Second Respondent or if he did work for any other persons who were not his employers, the work was always subject to the control of the person to whom he rendered a service. The First Respondent concluded on the basis of this statement by SLAMAT that he (SLAMAT) was conceding that "*it was in the nature of the work and, presumably the inequality of power between the service provider and the customer*". This conclusion is not entirely inappropriate in the context of the arbitration but in terms of establishing the nature of their relationship, the relevant and appropriate evidence was how the specific control exercised by the Second Respondent had, or had not, changed.

[15] With regard to dependence, the First Respondent noted that the fact that the "*contractors*" could take on additional work also pointed to an independent contractor relationship. This cannot be supported by the evidence presented to her. The facts were that:

- the "*contractors*" were dependent upon the Second Respondent;

- the "*contractor*" was required to obtain permission from the Second Respondent to perform work outside the work the contractors performed for the Second Respondent;

- the additional work performed by SLAMAT was in fact performed outside the working hours, ie. after hours or over weekends when he did not do any work for the Second Respondent. The situation is no different from any ordinary employee doing extra work outside his working hours for persons other than his employer for a fee.

The fact of doing additional work for persons other than your employer does not mean that the relationship between the employer and the person performing the additional work for others is that of an independent contractor and not an employer / employee relationship.

[16] Once it is established that there is an employment contract between the parties, the approach adopted by the Courts is to determine the true nature of that contract to establish whether a person is an employee working for an employer or an independent contractor and this it does by applying the dominant impression test. The fact, therefore, that the parties themselves may have at the time of concluding the contract intended it to be either an independent contract or employer / employee would be quite irrelevant. Also it is of no consequence what the parties may choose to call the contract concluded between them if the nature of the relationship does not change.(See also Callahan V Tee-Kee Barehold Caseing (Pty) Ltd, (1992) 13 ILJ 1533 (IC)) .

[17] A matter similar to the present was that of Building Bargaining Council (Southern and Eastern Cape) v Melmons Cabinets CC & Another, [2001] 3 BLLR 329 (LC). In that matter the Court, applying the dominant impression test to establish the relationship that existed

between the parties where the parties had also concluded, like in this matter, what appeared to be an "*independent contractor*" contract. The Court found that the "*contractors*" activities formed an integral part of the "*employer*'s" organisation, the "*contractor*" carried out the same functions as he did previously, he was financially dependent on the "*employer*" and subject to limitation in taking on additional work (exactly the same position as obtains in the present matter) and thus concluded that the relationship between the parties was one of an employer and employee.

[18] While I accept that parties are free to conclude agreements to regulate their commercial relationship, this freedom implies that both parties are in a position to exercise a choice. When it comes to employment contracts, society recognises that persons seeking employment are vulnerable and it is for this reason that legislation exists to protect the marginalised and vulnerable members of our society. Collective agreements are an important protection for employees - a deliberate intrusion by legislature in the common law freedom to contract. In 1999 in the discussions surrounding amendment to the Labour Relations Act and the Basic Conditions of Employment Act it was noted that the amendments were arrived at, *inter alia*, to address the "*unintended consequences of the legislation*" - one of these being the loophole in the Act which allowed for re-arrangement of employment agreements to bypass legislation, like the conversion of employer / employee contracts to that of independent contracts. In the matter before me, the Second Respondent was trying to do just that: convert workers into independent contractors as a way of evading the terms and obligations placed upon him as an employer by the Bargaining Council Agreement, and did this by simply getting workers to sign a piece of

paper introducing invoicing and independence which neither of his employees fully understood or appreciated, or chose on their own.

[19] For all of the above reasons I am satisfied that the award handed down by the First Respondent was neither justifiable nor reasonable in relation to the evidence presented to her. The dispute focused upon the conversion of workers into independent contractors and it was therefore inappropriate to look at whether the parties knew that they were agreeing to the conversion and to conclude because they were at agreement that there was a valid "*independent contractor*" agreement. As stated earlier, she should have properly applied the dominant impression test to establish the true nature of the relationship. By failing to do this she failed in fact to properly determine the principle issue before her.

[20] As the award only dealt with the issue of jurisdiction, I am not in a position to deal with the breach which the Second Respondent was said to have committed - this matter may therefore be re-set down for the hearing of the merits of the dispute.

[21] In the result the review succeeds and the award of the First Respondent dated 9 February 2000 - case no. BNW.AA 0055/1999 is hereby set aside.

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WAGLAY J

Appearance:

DC Le Roux of Maritz Murray & Fourie Inc - Worcester

25 October 2000

7 September 2001