IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

Case no: C268/2009

In the matter between:

EMMANUEL OLUSEGUN FOLAMI	Applicant
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
JOESHO THEE	Second Respondent
THE SALVATION ARMY TERRITORIAL HEADQUARTERS	Third Respondent

JUDGMENT

TIP AJ:

1. In this review application, which comes before me on an unopposed basis, the applicant seeks to review and have set aside a written jurisdictional ruling ("the ruling") of the second respondent ("the Commissioner") dated 5 April 2009. The application is brought in terms of sections 145 and 158(1)(g) of the Labour Relations Act 66 of 1995 ("the LRA").

2. The Commissioner made the said ruling on a point *in limine* taken by the third respondent to the effect that the CCMA had no jurisdiction to hear the matter because, it contended, the applicant was not an "employee" as

defined in section 213 of the LRA and section 1 of the Basic Conditions of Employment Act ("the BCEA") and that consequently no employment relationship existed. This point was upheld by the Commissioner.

3. The applicant's case is that the Commissioner committed a gross irregularity, being a fundamental error of law, and also failed to apply his mind to the facts which pointed to the existence of an employment relationship and failed to consider evidence supporting these facts.

4. At the stage of the hearing of this matter and upon a perusal of the helpful heads of argument prepared by Ms Bailly, who appeared for the applicant, it was my *prima facie* view that the applicant should be successful. Closer examination of the record and further consideration of the issues has however yielded a different conclusion.

The jurisdiction test

5. The first question concerns the nature of the test for jurisdictional review. This was considered by the LAC in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 ILJ 2218 (LAC) at paras [39] to [41]. In effect the Court's approach was that the jurisdiction test is not the same as the *Sidumo* test (*Sidumo & Another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC)). Rather, the test in a jurisdictional review is whether, objectively speaking, the facts would give the CCMA jurisdiction to entertain the dispute. The relevant passage is in these terms:

> *"The question before the court a quo was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the contrary"*.

See also *MEC, Department of Health, Eastern Cape v Odendaal & others* (2009) 30 ILJ 2093 (LC) at 2098.

6. These authorities suggest that the only issue that hence needs to be determined in this case is whether the applicant, based on the facts and objectively speaking, is an employee and whether the CCMA would accordingly have jurisdiction.

7. Where the facts lend themselves to a limited enquiry of that kind, the test thus enunciated is relatively straightforward in its application and the notion of 'objective' can be given its ordinary meaning. But, not all jurisdiction issues fall tidily into the 'objective' category. The case before me demonstrates this. Whether or not the applicant in this matter falls to be classified as an employee does not follow upon a simple objective determination. Instead, it requires an evaluation in an ultimately holistic fashion of a number of elements. To my mind, that involves the exercise of a substantial degree of subjective assessment and the application of a value judgment. Correspondingly, a decision about what the facts are that must be scrutinised through the jurisdiction lens falls to be tested in significant measure against the criteria of justifiability and reasonableness.

The factual circumstances

8. As a preliminary observation, this Court was faced with considerable difficulty in dealing with the transcript of the proceedings in the CCMA, in that the applicant's evidence is extensively punctuated with the inscription 'indistinct'. This is so frequently the case that it is more often than not impossible to grasp the content of his evidence. The transcribers have noted that the applicant's accent was the reason for this. However, there is no indication that any effort was made by the applicant to cure as many of those deficiencies as possible. To the contrary, it is in my view plain that nothing of that sort was attempted. It is trite that it is an applicant's duty to ensure that a proper record is placed before a reviewing court.

The failure to do so may even lead to such court dismissing a review application on that ground alone. I am not inclined to be that drastic in this matter. At the same time, it must be said that the obscurity for me of large parts of the record inclines me towards accepting the Commissioner's recital of the evidence, he having had the advantage of listening to it. I should add that I am of course confined to a review of the Commissioner's determination in relation to the material ventilated at the hearing before him. That does not include new evidence raised in the affidavits filed in support of the present application.

9. With those *caveats* I turn to the basic facts and the legal questions that arise. The third respondent is the Salvation Army for the Western Cape. In about November 2002, it required the services of a bookkeeper and announced this one Sunday to its member congregants. The applicant was a member. He applied and after a consequential interview process was appointed by an official of the third respondent as its bookkeeper.

10. At the time of this appointment it was agreed that the applicant would provide and perform bookkeeping services to the third respondent and that, in return, the applicant would pay a discounted R300.00 per month for board and lodging at one of the third respondent's hostels, as opposed to the usual rate of R900.00 per month which was then applicable.

11. At the time of his appointment, the applicant was not a resident of the third respondent but thereafter, in January 2003, he took up accommodation at the third respondent.

12. It was agreed between both parties that the balance of R600.00, which the applicant was not required to pay towards his accommodation, would be treated as a *quid pro quo* for his bookkeeping services.

13. The arrangement thus concluded remained in place for a period of six years from 2 November 2002 until 4 December 2008 when it was summarily terminated.

14. The argument before the Commissioner revolved around the provisions of section 200A of the LRA (mirrored in section 83A of the BCEA), which present a set of seven circumstances and a presumption that if any one or more of them is present, that person will be deemed to be an employee unless the contrary is proved. The relevant part of the section reads as follows:

> " *(1) 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 tools of the trade or work equipment by the other person; or*
>
> *(g) the person only works for or renders services to one person.*"

15. The Commissioner considered most of these factual presumptions but not all of them. At the end of that process he found that not one of them applied and that the applicant had not discharged the onus of proving that he was an employee. It is necessary to examine each of them in turn:

16. *Sub-paragraph (a)*: The Commissioner was of the view that the applicant was not subject to the control or direction of the third respondent. It is indeed clear that he worked on his own. Although he was required to complete his balancing and reconciliation work by the seventh of every month, this does not in my view amount to control in the sense contemplated in the section. Likewise, the mere fact that he had to be given access to the working area when he came to do this work does not constitute control.

17. *Sub-paragraph (b)*: The Commissioner correctly found on the evidence that the applicant was free to work as and when he elected to do so.

18. *Sub-paragraph (c)*: There is nothing to suggest that the applicant was part of the organisational structure of the Salvation Army. Apart from the fact that he had a monthly deadline, he was not part of any reporting arrangement, whether up or down. The question may be posed thus: did the applicant occupy a post or render a service? Plainly the latter. That conclusion is consistent with what the LAC described as 'the reality test' in *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC) at paras [96] to [98]:

"*[96] I have already referred to some of the English cases which have adopted the same approach on this issue as the approach adopted in Callanan and Briggs. However, there are also cases which support the same approach that I have adopted in the present matter. In particular I am in full agreement with the approach adopted in Young & Woods and think that that is the correct approach. That case has been discussed sufficiently above and requires no further discussion. Indeed, the same approach was adopted in the case of Catamaran which has also been discussed above. In my judgment that approach, which for convenience, I call the reality approach, takes account of all relevant factors as well as the public interest and ensures that parties have no licence to take themselves out of the scope of such important legislation as the Act and the Basic Conditions of Employment Act 1997.*

"*[97] In McKenzie's case, referred to above, this court began to move in the right direction when it held that the realities of the relationship should be considered as opposed to the approach adopted in Briggs which was to the effect that whether or not a person was an employee of another was*

effectively determined by the election made by the parties at the relevant time. The approach adopted by this court in McKenzie is in line with the approach I have adopted in this matter.

[98] In Niselow v Liberty Life Association of Africa Ltd (1998) 19 ILJ 752 (SCA) it was said at 753H: I

> *'An independent contractor undertakes the performance of certain specified work or the production of a certain result. An employee at common law, on the other hand, undertakes to render personal services to an employer. In the former case it is the product of or the result of the labour which is the object of contract and in the latter case the labour as such is the object (see Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A) at 61B). Put differently, an employee is a person who makes over his or her capacity to produce to another, an independent contractor, by contrast, is a person whose commitment is to the production of a given result by his or her labour (per Brassey ''The Nature of Employment'' (1990) 11 ILJ 889 at 899).'* "

The latter passage is particularly significant in the context of this case which is clearly concerned with the production of a given result and decidedly not the making over of the capacity to produce. The applicant had a set monthly task and quite how he delivered the result was up to him. He received no cash remuneration and none of the other usual incidents of employment.

19. *Sub-paragraph (d)*: Conflicting evidence was placed before the Commissioner. Captain Golding testified for the third respondent that she was the assistant administrator. She had done the work that the applicant performed and stated that it would not take more than three hours per month. The applicant disputed this, contending that it took over fifty hours every month. The Commissioner was unimpressed with his evidence and viewed it as an attempt by the applicant to get across the forty hour criterion in the section. I am not satisfied that I should interfere with his conclusion. As I have already observed, the Commissioner had the advantage of hearing the evidence and seeing the witnesses, whereas I do not have so much as a clear record. I should add that there is no

inherent probability that the applicant would have spent fifty hours or more every month on this work. His was not a particularly elaborate task. He captured financial transaction data on a computer and generated a monthly balanced and reconciled cash book. It would require a very substantial transaction volume to warrant the length of time claimed by him.

20. *Sub-paragraph (e)*: Captain Golding expressed the view that the applicant was not economically dependent on the Salvation Army because he received no cash payment. That in itself is of course not a conclusive answer. Accommodation at a reduced rate amounts to payment in kind. But that, too, does not decide the question. In this context, an important fact is that the applicant was employed as a safety observer with Dorbyl on the Cape Town docks. That was his sole source of cash revenue and it was a position that was at least major time, if not full time. Moreover, as stated in item 18 of the Code: "*economic dependence will generally be present if the applicant depends upon the person for whom they work for the supply of work*". That is not the position here. The Code further states: "*an important indicator that a person is genuinely self-employed is that he or she retains the capacity to contract with others to work or provide services.*" That the applicant retained such capacity is clear. See further the approach endorsed by the LAC in *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 2234 (LAC) at para [11]. It is plainly a common cause fact that the benefit of a rent reduction was in no way related to the number of hours spent by the applicant in the preparation of his monthly product.

21. *Sub-paragraph (f)*: The applicant did his work on the Salvation Army's computer and used its stationery. On the face of it, that would bring him within the range of this presumption. The Commissioner did not directly deal with this aspect, but I am in any event not persuaded that this is

sufficient to disturb his conclusion that the applicant was not an employee. The remaining factors are a good deal more compelling in respect of that conclusion. For instance, of greater weight than the mere fact that the third respondent's computer was used is the fact that it was thus used to produce a given result and not in the making over of the capacity to produce.

22. *Sub-paragraph (g)*: As outlined above, the applicant does not fall into this category. The reverse is true, in that his principal employment lies with a person other than the third respondent.

23. It is hence my view that the Commissioner's conclusion that section 200A of the LRA did not serve to bring the applicant within the compass of "employee" is neither subjectively nor objectively reviewable. At the same time, regard must be had to the statutory definition of "employee", insofar as section 200A deals with a presumptive and not a conclusive framework. The definitions in both the LRA and the BCEA are as follows:

" (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer."

24. Also common to these statutes is the definition of remuneration:

" any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for another person, including the State, …."

25. These provisions may be read together. Although their import is broader than the content of section 200A of the LRA, that content and its interpretation informs the manner in which the definition provisions should be understood and applied.

26. In the present case it is so that the applicant did not have a contract of employment. That fact, as such, does not exclude him and, by the same token, the adjudication of who is an employee is not dependent upon common law principles. See for instance: *Discovery Health Ltd v Commission for Conciliation, Mediation & Arbitration & Others* 2008 (29) ILJ 1480 (LC) at paragraph [42]:

> *"To summarise: The protection against unfair labour practices established by s 23(1) of the Constitution is not dependent on a contract of employment. Protection extends potentially to other contracts, relationships and arrangements in terms of which a person performs work or provides personal services to another. The line between performing work "akin to employment" and the provision of services as part of a business is a matter regulated by the definition of "employee" in section 213 of the LRA"*.

27. This passage does not however advance the case of the applicant in this matter, since there is an analytical loop which ultimately returns to the question examined in this judgment as to whether or not he is to be treated as an employee or whether the Commissioner's decision that he is not should stand. It is my conclusion that it should.

28. Given that the third respondent did not engage in this litigation, the issue of costs does not arise.

Order

29. I accordingly make the following order:

1 The application is dismissed.

2 There is no order as to costs.

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K S TIP
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING:	29 January 2010
DATE OF JUDGMENT;	12 March 2010
FOR APPLICANT:	Adv C Bailly Instructed by Van Tonders Attorneys