

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

25 Sept

1998

HELD AT JOHANNESBURG

Case No: CA8/98

In the matter between

SOUTH AFRICAN BROADCASTING CORPORATION

Appellant

and

L E McKENZIE

Respondent

JUDGMENT

Introductory

[1] The respondent, Mr L E McKenzie, instituted action in the industrial court in terms of s 46(9) of the Labour Relations Act, 28 of 1956 ("the Act"). In the statement of claim he averred that he had been employed by the appellant, the South African Broadcasting Corporation ("SABC"), and that his services had been unfairly terminated. In its reply to McKenzie's statement of case, the SABC placed in issue that McKenzie had been its employee, averred that

he had produced and presented two radio programmes, “Talkabout” and “Traveller’s Check”, as an independent contractor, and denied that his services had been unfairly terminated.

[2] Mr P P de Klerk, a senior member of the industrial court, adjudicated upon the first issue, namely, whether or not McKenzie was an employee in terms of the Act. Having heard the evidence of McKenzie and Messrs N C Vermaas and J D Orr of the SABC, the industrial court made a determination in favour of McKenzie.

[3] The matter thereafter proceeded before Mr W F Maritz, an additional member of the industrial court. He made a determination in the following terms:

- ‘1. The circumstances of the termination of [McKenzie’s] contract with the [SABC] constituted an unfair labour practice.
2. The [SABC] is ordered to pay compensation to [McKenzie] in an amount of R 45 000.
3. The aforesaid shall be paid to the attorneys of record of the applicant for his account within 21 days of the date of the handing down of this determination.
4. Costs are awarded to [McKenzie] on the Supreme Court scale such costs to include the costs related to the initial hearing in respect of the determination of the jurisdiction of the Court.’

- [4] The SABC appeals against the ruling that McKenzie was its employee, the finding that it committed an unfair labour practice, the award of compensation and the order for costs.

Was McKenzie an employee of the SABC?

The law

- [5] Unless McKenzie was an employee as defined in the Act, the industrial court had no jurisdiction to make a determination in terms of s 46(9). The onus was on McKenzie to prove that the industrial court had jurisdiction to determine the dispute, which meant that he bore the onus of proving on a balance of probabilities that he was an employee, as defined, of the SABC: c.f. Kloof Gold Mining Co Ltd v National Union of Mineworkers a o (1986) 7 ILJ 665 (T) at 674H-J; Dempsey v Home and Property [1995] 3 BLLR 10 (LAC) at 17F-G.
- [6] The definitions of ‘employee’ and ‘employer’ in s 1 of the Act were:
- “employee” means any person who is employed by or working for any employer and receiving or entitled to receive any remuneration, and subject to subsection (3), any other person whomsoever who in any manner assists in the carrying on or conducting of the business of an employer; and “employed” and “employment” have corresponding meanings;...
- “Employer” means any person whomsoever who employs or provides work for any person and remunerates or expressly or tacitly undertakes to remunerate him or who subject to subsection (3) permits any person whomsoever in any

manner to assist him in the carrying on or conducting of his business; and “employ” and “employment” have corresponding meanings;’. (Subsection (3) is irrelevant to this judgment.)

- [7] The first part of the definition of ‘employee’, which refers to a person who is employed by or working for an employer and who receives or is entitled to receive remuneration, has been interpreted to mean a person who works for another in terms of the common law contract of service: P A K Le Roux and A Van Niekerk, The South African Law of Dismissal, 57. The second part, which refers to a person who in any manner assists in the carrying on or conducting of the business of the employer, has received a mixed reception from the courts. In one case it was said that there was ‘no reason why the ordinary meaning of the words ought not to be given effect to in the present circumstances’ (Boumat v Vaughan (1992) 13 ILJ 934 (LAC) at 939H-I) whereas in another it was held that ‘[to] adopt a literal interpretation...would clearly result in absurdity’ (Liberty Life Association of Africa Ltd v Niselow (1996) 17 ILJ 673 (LAC) at 683A). The purpose of the second part is stated to be ‘to limit the possibility of parties structuring their relationship in such a way as to exclude the application of the Act...’: Le Roux and Van Niekerk above at 59. What has been accepted by the courts and the commentators is that an independent contractor is not an employee as defined by the Act: South African Master Dental Technicians Association v Dental Association of South Africa a o 1970 (3) SA 733 (A) at 741B; Borcherds v C W Pearce and J

Sheward t/a Lubrite Distributors (1993) 14 ILJ 1262 (LAC) at 1276D-E; Liberty Life Association of Africa Ltd v Niselow at 683A-D; Brassey et al, The New Labour Law, 381; Wallis, Labour and Employment Law, para 58; Mureinik, 'The Contract of Service: An Easy Test for Hard Cases' , 1980 (97) SALJ 246

fn 2. The distinction between an employee and an independent contractor has been formulated over the years in different ways: one must ascertain 'whether he renders the service in the course of an independent occupation representing the will of his employer only as to the result of the work and not as to the means by which it is accomplished' (Colonial Mutual Life Assurance v Macdonald 1931 AD 412 at 426); '[a] test of service is sometimes said to be whether B is about A's business or about his own. In a sense B is always working both for A and for himself, and the distinction may be easier to state than to apply; but in substance it seems to have the root of the matter in it' (R v AMCA Services Ltd a o 1959 (4) SA 207 (A) at 213H); '[the] object of the contract of service is the rendering of personal services by the employee...to the employer...The services or the labour as such is the object of the contract. The object of the contract of work is the performance of a certified, specified work or the production of a certain specified result. It is the product or the result of the labour which is the object of the contract' (Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A) at 61A-B); 'the independent contractor "sells the job" whereas the employee "sells his hands", ...

[e]mployment is a relationship in which one person is obliged, by contract or otherwise, to place his or her capacity to work at the disposal of another....an

employee is to be distinguished from an independent contractor, who undertakes to deliver, not his or her capacity to produce, but the product of that capacity, the completed work' (Brassey, 'The Nature of Employment', (1990) 11 ILJ 889 at 899, 935-6; Liberty Life Association of Africa Ltd v Niselow at 681D-E).

- [8] Various tests have been formulated for identifying the contract of employment (or service). The first is the supervision and control test: '...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; in 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 such work has to be done' (Colonial Mutual Life Association v Macdonald at 434-5, R V AMCA Services at 212H). The second is the organisation test: a person is an employee of he is 'part and parcel of the organisation' (Bank voor Handel en Scheepvaart NV v Slatford [1953] 1 QB 248 (CA) at 295) whereas the work of an independent contractor 'although done for the business, is not integrated into it but is only accessory to it' (Stevenson Jordan and Harrison Ltd v Macdonald and Evans [1952] 1 TLR 101 (CA) at 111). The third test is the dominant impression test: 'Dit was ook gemene saak dat waar 'n verhouding elemente van sowel 'n diensverhouding as van 'n ander soort verhouding het, 'n mens moet probeer vasstel welke soort verhouding die sterkste uit al die feite spreek, of, soos dit

in the uitspraak van die Hof *a quo* gestel word, wat die “dominante indruk” is wat die kontrak op ‘n mens maak. Ek meen dat hierdie siening van die saak noodwendig juis moet wees, want as ‘n verhouding nie oorwegend dié van heer en dienaar is nie, sou ‘n mens dit beswaarlik met reg so kon noem’ (Ongevallekommissaris v Onderlinge Versekeringsgenootskap A.V.B.O.B. 1976 (4) SA 446 (A) at 457A, Smit v Workmen’s Compensation Commissioner at 62H). The dominant impression test has been severely criticised. Mureinik, 258, states: ‘...the “dominant impression” test offers no guidance in answering the (legal) question whether the facts are of such a nature that the propositus may be held to be a servant within the meaning of the common law in difficult (penumbral) cases. Indeed, it is no test at all. To say that an employment contract is a contract which looks like one of employment sheds no light whatsoever on the ‘legal nature’ of the relationship between a master and his servant.’ Brassey, “The Nature of Employment”, 920, while accepting that the judgment in the AVBOB case may be valuable for its rejection of the notion that any one factor can be decisive in determining the nature of the relationship, states: ‘but beyond that the test is unhelpful; indeed it is no test at all, but merely a shorthand way of saying that the decision must not be taken without considering all the relevant factors’. In Smit v Workmen’s Compensation Commissioner the right of supervision and control was downgraded as a factor. The Court held that the existence of such a right ‘...is indeed one of the most important indicia that a particular contract is in all probability a contract of service. The greater the degree of

supervision and control to be exercised by the employer over the employee the stronger the probability will be that it is a contract of service. On the other hand, the greater the degree of independence from such supervision and control the stronger the probability will be that it is a contract of work....notwithstanding its importance the fact remains that the presence of such a right of supervision and control is not the sole indicium but merely one of the indicia, albeit an important one...' at 62D-G. See, too, Liberty Life Association of Africa Ltd v Niselow at 682G-I. Despite the criticisms of the dominant impression test it has been consistently followed by the High Court, the industrial court, the Labour Court and the Labour Appeal Court: See Le Roux and Van Niekerk at 59 fn 22; Medical Association of South Africa a o v Minister of Health a o (1997) 18 ILJ 528 (LC) at 536C-E.

[9] Some of the important characteristics of the contract of employment and the contract of work, respectively, are:

1. The object of the contract of service is the rendering of personal services by the employee to the employer. The services are the object of the contract.

The object of the contract of work is the performance of a certain specified work or the production of a certain specified result.
2. According to a contract of service the employee will typically be at the beck and call of the employer to render his personal services at the behest of the employer.

The independent contractor, by way of contrast, is not obliged to perform the work himself or to produce the result himself, unless otherwise agreed upon. He may avail himself of the labour of others as assistants or employees to perform the work or to assist him in the performance of the work.

3. Services to be rendered in terms of a contract of service are at the disposal of the employer who may in his own discretion subject of course to questions of repudiation decide whether or not he wants to have them rendered.

The independent contractor is bound to perform a certain specified work or produce a certain specified result within a time fixed by the contract of work or within a reasonable time where no time has been specified.

4. The employee is subordinate to the will of the employer. He is obliged to obey the lawful commands, orders or instructions of the employer who has the right of supervising and controlling him by prescribing to him what work he has to do as well as the manner in which it has to be done.

The independent contractor, however, is notionally on a footing of equality with the employer. He is bound to produce in terms of his contract of work, not by the orders of the employer. He is not under the supervision or control of the employer. Nor is he under any obligation to obey any orders of the employer in regard to the manner in which

the work is to be performed. The independent contractor is his own master.

5. A contract of service is terminated by the death of the employee whereas the death of the parties to a contract of work does not necessarily terminate it.
6. A contract of service terminates on expiration of the period of service entered into while a contract of work terminates on completion of the specified work or on production of the specified result. See Smit v Workmen's Compensation Commissioner at 61A-H.

[10] The legal relationship between the parties must be gathered primarily from a construction of the contract which they concluded (Smit v Workmen's Compensation Commissioner at 64B; Liberty Life Association of Africa Ltd v Niselow at 683D-E), 'although the parties' own perception of their relationship and the manner in which the contract is carried out in practice may, in areas not covered by the strict terms of the contract, assist in determining the relationship' (Borcherds v C W Pearce and J Sheward t/a Lubrite Distributors at 1277H-I). In seeking to discover the true relationship between the parties, the Court must have regard to the realities of the relationship and not regard itself as bound by what they have chosen to call it (Goldberg v Durban City Council 1970 (3) SA 325 (N) at 331B-C). As Brassey, "The Nature of Employment", at 921, points out, the label is of no assistance if it was chosen to disguise the real relationship between the parties, 'but when they are bona

vide it surely sheds light on what they intended.'

The reasoning of the industrial court

[11] The industrial court (de Klerk SM) accepted that an independent contractor was not an employee in terms of the Act, applied the dominant impression test, had regard to the 'wider meaning of a statutory employee as defined in the Act', and formed 'the overall impression' that McKenzie was an employee as defined in the Act. Factors which the court held indicated that McKenzie was an independent contractor were that he was engaged for fixed periods of twelve months and less at a time as a freelance contributor to produce and present two programmes at specific times of the day on fixed days of the week; he was paid a fixed sum of money per programme as remuneration not only for those services, but also for certain rights, such as copyrights which the SABC acquired in terms of the agreements; McKenzie made a conscious decision to engage himself as a freelance contributor rather than a permanent member of staff as it gave him more freedom and independence and he thereby forfeited any entitlement to a pension, medical aid and other benefits; and McKenzie held out to the Receiver of Revenue that he conducted his own business and described his remuneration as 'fees'. The industrial court, however, found that those factors were 'less compelling' than the following: the SABC provided McKenzie with an office, a desk, a telephone, stationery, a typewriter, typing and fax facilities; he was invited to attend staff meetings; he was paid monthly and received an annual increase in his remuneration; he

was given paid leave or time off and he devoted all his productive capacity over a period of six years to his task; he kept office hours on a similar basis to other broadcasters who were permanent staff members; McKenzie performed his functions under the direction and supervision of the programmes manager in Johannesburg and the station manager in Cape Town; and he was regarded 'as a co-employee (part of the furniture) which was not the case with ordinary freelance contributors.'

The facts

[12] The SABC draws a distinction between its employees, of whom there are about 5 000, and its freelance contributors ('freelancers'), of whom there are about 30 000. There are two classes of freelancers: writers, for whom one kind of standard contract is used, and other artists, such as actors, directors, producers, presenters, and continuity announcers, for whom another standard contract is used. McKenzie, as will be seen later, was bound by the latter type of standard contract. The contracts of employment of the SABC's employees, in general, differ widely from the standard contracts concluded with freelancers:

- an employee is paid a salary whereas a freelancer is paid a fee for performing a specific task;
- an employee is obliged to contribute to a group life insurance scheme, a pension fund, and a medical aid, whereas a freelancer is not - it follows that a freelancer does not receive a pension, life insurance, medical aid, or a

housing subsidy from the SABC;

- an employee is entitled to annual leave whereas a freelancer is not;
- an employee usually receives an annual bonus in the form of a thirteenth cheque, whereas a freelancer does not;
- an employee receives an annual increase in salary which is negotiated between the SABC and the union representing the employee, whereas a freelancer receives an increase in fees, fixed by the SABC, which is usually an increase of about ten percent;
- an employee is entitled to sick leave, whereas a freelancer is not;
- an employee is subject to the discipline of the SABC, whereas a freelancer is not;
- unlike an employee, a freelancer is entitled to take other work, without obtaining the permission of the SABC, unless there is a potential for conflict;
- an employee has tax deducted from his salary each month, depending on the applicable tax rate, whereas a freelancer, by arrangement with the Receiver of Revenue, has a flat rate of 25% per month deducted from his fees.

[13] McKenzie was employed by the SABC from about 1959 until 1968 and from 1983 to 1986, when he resigned. For most of those periods he was employed as a radio broadcaster. For about two years after 1986 he worked for a video company in Cape Town. In about September 1988 Mr B Jones asked McKenzie whether he would be interested in taking over an afternoon talk

show called 'Second House' on Radio South Africa, the SABC's English language broadcast channel. McKenzie expressed interest. It was agreed that there would be a trial period of three months. He was engaged in terms of an oral contract as a freelancer. McKenzie testified that he 'preferred the option' of being a freelancer:

'One had to weigh up what you perceived as benefits of being one form of employee or the other form of employee. In one case you received benefits in the form of additional car loans, housing loans at senior-levels of seniority, leave, medical aid and various other staff benefits. On the other hand that cost you an awful lot of your own freedom. You had to apply for all sorts of things. You couldn't do anything without a letter of authority, you had to discuss everything, so one had to make up one's own mind which was more beneficial, which was more suitable for one's own requirements.'

- [14] The name of the programme was later changed to 'Talkabout'. McKenzie produced and presented it. It was broadcast live every weekday lunchtime from the Cape Town studios. Guests participated on the programme and listeners were invited to telephone McKenzie and ask the guest questions on non-controversial topics such as pets and gardening. Music was played. Subsequently a second contract was concluded in terms of which McKenzie produced and presented a radio programme on Saturday mornings called 'Traveller's Check'. It was a fifteen minute pre-recorded programme which

contained travel news and interviews.

[15] From about 1991 each year the parties signed the standard form contract for freelancers ('freelance contract'); one for the Talkabout programme and one for the Traveller's Check programme. At all times separate and parallel contracts existed for the two programmes. Each contract was for a fixed period. McKenzie was paid a fixed fee per programme. As an illustration reference is made to the contracts concluded on 31 January 1991. McKenzie is referred to as 'the Performer' in the contracts:

'1. THE PERFORMER undertakes to take part in the programme at the times set out hereunder:

Programme	Date and Time
TALKABOUT	MONDAY TO FRIDAY 13:30 - 14:15 01/01/91 TO 30/09/91

2. THE SABC undertakes to pay the performer the amount of R 200,00 per programme as remuneration for his services and the rights acquired in terms of this agreement. This amount shall be payable as soon as the programme has been approved and/or broadcast by the SABC.'

The Traveller's Check contract was for the same period at remuneration of R 175,00 per programme.

[16] From 1991 the practice developed that new freelance contracts for both

programmes were signed at about the time that the existing contracts expired. On occasions the new contracts were concluded after the expiry of the existing contracts, while the programmes continued to be broadcast. The last written freelance contract for the Talkabout programme was for the period 1 October 1992 to 31 March 1993. McKenzie testified that he 'assumed that the agreement regarding time off or leave [as to which see paragraph 22 below] was the only further additional clause to the standard agreement.'

- [17] Prior to March 1995 Radio South Africa's audience was mainly white and over 50 years of age. Management wished to appeal to a more inclusive English audience, which was younger. Impetus to change the radio station was provided by the appointment of Mr G Reddy as chief executive of radio at the beginning of 1994. He gave management a mandate to change. Two reviews were done, one by Mr R Wurth, of the Australian Broadcasting Corporation, and another by Miss A Tonks. Miss Tonks found: 'Radio South Africa is an old fashioned radio station with a predominantly older English speaking white audience. The presentation of the station has an overwhelmingly English rather than English-speaking South African sound.' She recommended turning Radio South Africa 'into a lively modern information based network, providing access to all English speaking South Africans, whatever their colour or home language'. Management accepted that the new target audience 'would be people who wished to be entertained,

informed, educated in English, who were 35 and upwards, and who were by definition...primarily urban or metropolitan listeners.’ One of the consequences of changing the target audience was the possibility that McKenzie’s two programmes would be discontinued. In March 1994 Vermaas and Mr J Mullen, Radio South Africa station manager, visited Cape Town. Mullen informed McKenzie that there was ‘a very real possibility’ that McKenzie’s contracts would not be renewed. During the course of the year the SABC established a transitional committee consisting of members of management of Radio South Africa, the staff of Radio South Africa and some trade union representatives. Five meetings of the transitional committee took place in August 1994. One of the members of the committee was Mr J Richards, the representative of the Cape Town region of the SABC. Richards, after each meeting of the transitional committee, reported back to persons working from the Cape Town studio. McKenzie attended one of the meetings. The message which Richards conveyed to the Cape Town studio was that considerable changes were to take place and that the new radio station ‘would be driven by perception of a new...audience that was being sought by ...the SABC broadcaster...’. On 16 August Vermaas informed all freelancers that Radio South Africa had delayed its usual programme changes, that it would continue to broadcast according to its present schedule for the month of October, and requested freelancers to regard the memorandum ‘as a one month extension of your present contract’. On 9 September Vermaas, in a letter to McKenzie, referred to ‘our new schedule’

and stated: '...we would be looking at a new kind of phone-in. We have someone in mind whom I hope will still be available after all this faffing about! And the whole thing might well bomb and we'll be saying 'where is Leslie now we need him' and Leslie will be in the Bahamas...'. On 22 September Vermaas informed McKenzie that Radio South Africa would continue with its present programme schedule until 1 March 1995. He expressed the hope that McKenzie would be willing to be part of the schedule until then. A copy of a Traveller's Check freelance contract was enclosed. On 28 September Vermaas requested McKenzie to continue with the Talkabout programme until the end of February 1995. McKenzie's response on 4 October to the letter of 28 September was: 'Your proposal is quite acceptable, and in fact gives me a bit more breathing space!'. On 23 January 1995, in a letter of that date, Vermaas told McKenzie that the two programmes would not continue beyond 28 February.

[18] The fee that McKenzie was paid compensated him for preparation, pre- and post- production work and for the actual broadcast. The fee remained constant no matter how much work he put into a particular programme. The preparation varied 'tremendously' from programme to programme.

[19] McKenzie was paid only if he presented the programme himself. Save for a period of about six months (during which a contrary request by him was accommodated) out of the six and a half years of the relationship, he was not

paid if he did not present the programme, even if he had done all the preparatory work.

[20] McKenzie represented to the Receiver of Revenue each year that he was an independent contractor. He said he conducted business under the name of 'Leslie McKenzie' - he did not describe himself as an employee of the SABC. His income was stated to be 'fees' and expenses were deducted from his income. An analysis of McKenzie's income tax returns reveals that he benefited to the extent of the following deductions:

YEAR	FEES	EXPENDITURE
	NET INCOME	
1989	12185 5353	
	6832	
1990	48887 7086	
	41799	
1991	104635	9884
		94751
1992	108563	11583
	96980	
1993	71000 11651	
	59349	

[21] At a time when he was producing and presenting the two programmes for the SABC, McKenzie used a letterhead in which he described his business as 'programme and advertising productions for television and radio.'

[22] In keeping with the relationship between the SABC and other freelancers, McKenzie did not contribute to the pension fund, the medical aid and the life insurance policy: accordingly, he was not entitled to a pension, medical aid, life cover or the annual bonus. He was not subject to the SABC's disciplinary code and personnel regulations.

[23] In terms of the freelance contract, McKenzie was not entitled to leave and in fact he took no leave for the period 1988-1993. In October 1993 he raised his need to take leave with Mullen. The SABC's response was to agree to give him three weeks 'time off'. The contract the SABC drafted, which is dated 19 October 1993, but which was never signed by the parties, recorded the SABC's understanding of the agreement in regard to leave in these terms: '8. During the period of your engagement you shall be exempted from your duties for a period of 3 (three) weeks. This period of exemption shall not be regarded as paid leave, but merely a concession to attend to your personal affairs. The SABC will maintain the remuneration stipulated above during such period or periods of exemption provided that the programme manager shall be given sufficient prior notice thereof.'

The 'time off' agreement applied to the Talkabout programme only and did not

apply to the Traveller's Check programme (which was recorded in advance).

[24] McKenzie was not entitled to sick leave in terms of the freelance contracts.

The draft agreement of 19 October 1993 contained the following term: 'In the event of your inability to perform by reason of illness or physical incapacity, a certificate of a fully qualified medical practitioner certifying such inability shall be submitted to the SABC and the SABC shall, in its own discretion, decide whether any payment should be made for such period or periods of absence.'

That term was never discussed with McKenzie, let alone agreed with him, and was never implemented.

[25] McKenzie was entitled to take on other work as long as he did not present a similar programme for a rival radio station. In fact, he contributed to other radio programmes on the basis, to use his words, of 'freelance assignments' and for about two years he broadcast a breakfast programme and later a midnight programme for Radio Algoa in Port Elizabeth. He signed a separate freelance contract, also with the SABC, for that work.

[26] McKenzie was paid a separate fee per programme for all additional work. He was paid only for work done in terms of the freelance contracts.

[27] The factors which the industrial court held to be in favour of a finding that McKenzie was an employee of the SABC were that in the period of over six

years that McKenzie broadcast the two programmes from Cape Town, he was indistinguishable from an employee of the SABC; he went to work at the Cape Town studio every day; he spent almost a working day at the office; he had the use of an office and facilities such as a telephone, fax machine and stationery; he attended staff meetings; he dealt with telephonic queries from the public; he performed day to day administrative functions such as distributing faxes and mail; he resolved problems such as those which arose between staff members, with the studio booking staff and in the canteen; his advice and counsel was sought and given; he accepted awards in respect of his programmes on behalf of the SABC. The industrial court suggested at one stage during the evidence that McKenzie was 'part of the furniture'. Orr adopted that phrase and also referred to McKenzie as 'part of the family'. Orr's explanation for giving McKenzie the use of the SABC's facilities was '[b]ecause he did six programmes a week for us and it would have been quite difficult for him to have done that without the benefit of office accommodation and the use of a telephone and a desk and access to the fax machine and access to studio bookings and so on, typewriter.' Orr's evidence was that McKenzie was invited to attend staff meetings - it was not obligatory for him to do so and he could not be compelled to do so. Orr admitted that McKenzie had resolved problems at his request - he had not instructed McKenzie to do so, and he could not instruct McKenzie to do so.

The application of the law to the facts

[28] The question is whether McKenzie was an independent contractor as at 28 February 1995 when the contractual relationship between the parties terminated. Mr Reynecke, who appeared for the SABC, conceded that if McKenzie was **not** an independent contractor, he was an employee in terms of the Act.

[29] In advancing his argument that McKenzie was an employee, Mr Stelzner, who appeared for McKenzie, laid emphasis on the second part of the definition of employee in the Act. He submitted that McKenzie, by producing and presenting the programmes in terms of the freelance contracts and by performing the additional work described in paragraph 29 above, assisted the SABC in carrying on or conducting its business. However, the fact that McKenzie assisted the SABC in carrying on or conducting its business does not in itself justify the finding that McKenzie was an employee of the SABC. The question remains whether he did so as an independent contractor or an employee.

[30] For the reasons that follow, on a balance of probabilities, McKenzie was an independent contractor and not an employee of the SABC.

[31] Prior to concluding the freelance contracts McKenzie had been an employee of the SABC. He knew that the SABC drew a clear distinction between its employees and freelancers. At the time he agreed to produce and present

the predecessor to the Talkabout programme he made an informed and deliberate decision to do so as a freelancer. The advantages to him outweighed the disadvantages. For example, he preferred to make his own arrangements for a pension and medical aid rather than to make the compulsory contributions to a pension fund and a medical aid fund. He elected to contract with the SABC on the terms contained in the freelance contract. There is no doubt that had anyone asked McKenzie in September 1988 whether he was an employee of the SABC his answer would have been an unequivocal 'no'.

- [32] At all times from 9 December 1991, when the first freelance contract was signed, until 28 February 1995, when the contractual relationship between the parties ended, McKenzie was bound by the terms of the freelance contract. In terms of that contract McKenzie was an independent contractor:
- he undertook to produce and present two radio programmes for a fixed period; the object of the contract was the product of McKenzie's capacity to work, not his capacity to produce;
 - he earned a fee for each programme paid to him monthly - he was not paid a salary;
 - a separate and distinct freelance contract was concluded for each piece of extra work such as presenting the programmes for Radio Algoa;
 - he was paid a separate fee per programme for all additional work;
 - he was not at the beck and call of the SABC;

- each contract with the SABC terminated on the expiry of the period for which it was agreed he would produce and present a particular programme;
- save for a period of about six months he was not paid if he did not present the programme, even if he had done all the preparatory work;
- he did not contribute to the pension fund, the medical aid and the life insurance policy, and he was not subject to the SABC's disciplinary code and personnel regulations;
- save for the 'time off' arrangement concluded by concession for 1993, McKenzie was not entitled to leave;
- he was not entitled to sick leave;
- he was entitled without permission or consultation to take on other paid work for the SABC or other bodies as long as he did not present a similar programme for a rival radio station.

These are clear indications that McKenzie did not, in the description of Brassey, "make over his capacity to produce", but much rather committed himself to the "production of a given result by his labour", he did not transact his "capacity to work" but rather "the product thereof".

- [33] Mr Stelzner submitted that the SABC exercised a large degree of supervision and control over McKenzie: McKenzie devised the format of the Talkabout programme under a predecessor to Vermaas, who was the programme manager; McKenzie was initially required to produce and present the programme for a probationary period; there was close supervision during the

initial period; McKenzie reported to different programme managers over the years; there was a constant flow of information between McKenzie and Vermaas; Vermaas gave feedback to McKenzie as to whether the programme worked or not and McKenzie had to get approval from Vermaas for topics aired; Vermaas could and would provide criticism; Vermaas gave McKenzie instructions on which topics he should introduce and which topics he should avoid; Vermaas could effectively veto a decision of McKenzie's, for example on a topic for the programme, and McKenzie was obliged to obey the instruction; the budget for the programme was set by Vermaas and the expenditure controlled by Orr, the Western Cape regional manager; temporary staff for McKenzie's programmes was hired by McKenzie for and on behalf of the SABC, subject to Orr's approval; some of the guests on the programmes were paid for by McKenzie on behalf of the SABC, subject to Orr's approval; Vermaas had the right to approve McKenzie's replacement when he went on leave. Reference was made to the draft contract of 19 October 1993 which reflected the SABC's view on supervision and control in the following clauses:

‘2. You undertake to perform your duties in accordance with the SABC's Standing Instructions that will be placed at your disposal on your request as well as strictly according to the job description of the SABC in similar capacity.

3. You undertake to perform your duties:

3.1. in accordance with the instructions which may be given to

you from time to time by the PROGRAMME MANAGER or his nominee: and

3.2. in accordance with the standards expected of a person in similar capacity in the television and broadcasting industry.

4. You undertake that:

4.1. the performance of your services shall comply with the terms and conditions with which the SABC must comply as the holder of a broadcasting licence, the provisions of which you declare yourself to be conversant with:

4.2. you shall at all times adhere to the security rules and other applicable regulations of the SABC.'

[34] McKenzie did testify that during the probationary period he was closely supervised, but it was put to Vermaas, under cross examination, that McKenzie would testify that that supervision was 'diluted to some extent because...there was a good trust relationship between him and his superiors'. It is correct, for example, that McKenzie and Vermaas communicated with each other regularly, that Vermaas gave McKenzie feedback, and that Vermaas could veto a decision of McKenzie. Nevertheless, the impression one nevertheless gets from the evidence is that McKenzie was left very much to his own devices. The programmes were uncontroversial and had a particular audience, hence their prolonged life, until the review which took place in 1994, about which more later. Vermaas described his contribution to

McKenzie's programmes in this way:

'Q: Would Mr McKenzie be required to submit to you before a programme was to be broadcast on a weekly or daily or whatever basis, information relating to the specific topic that would be discussed on that day, who the guest was going to be, whether they are going to talk about roses or whatever, what music he is going to play, in other words was the programme content checked? Given to you first?

A: The short answer is no. But what we did try and encourage programme makers to do was to give us some idea what topics they were going to do for a week, so that we can just check that there weren't any clashes in programming. That somebody else was possibly not doing that. But it wasn't a question of submitting the programme material for me to say yes or no that is a good or bad topic.

Q: Could Mr McKenzie in that respect determine who the guests were going to be, what music was going to be played, what the topic was?

A: Yes.'

That evidence of Vermaas was not disputed by McKenzie.

- [35] It does not follow from the fact that Vermaas had the right to give McKenzie instructions as to the content of the programmes and that McKenzie had to perform his duties in accordance with certain editorial standards that the SABC exercised the control over him of an employer. The SABC, as a public broadcaster, has the right to exercise editorial control over the programmes it

broadcasts.

[36] The factors set out in paragraph [26] prevailed from the time McKenzie commenced broadcasting the Talkabout programme in September 1988 until he stopped broadcasting at the end of February 1995. It is true that to an outsider he would have been indistinguishable from employees of the SABC in the Cape Town studio: he kept office hours; he used the facilities of the SABC, such as an office and telephone; he attended staff meetings; and he helped to deal with problems as they arose. What militates against a finding that those factors are indicative of an employment relationship are the following:-

- It was convenient for the SABC and McKenzie to accommodate McKenzie in the SABC studio as he was producing and broadcasting a programme five days a week. It was perhaps inevitable, given McKenzie's enthusiasm, that once he was accommodated in the Cape Town studio he would integrate himself with the organisation.
- Throughout the six and a half year period the parties periodically re-affirmed that their contractual relationship was one between the SABC and a freelancer. Neither the SABC nor McKenzie, and his conduct in this regard is the more significant, at any time took any steps to change the nature of the contractual relationship. Each new programme or contribution to a programme was broadcast in terms of a freelance contract. Payment was only made per programme.

- McKenzie represented to the outside world that he carried on a business, which he described as 'programme and advertising productions for television and radio'. He represented to the Receiver of Revenue each year that he was an independent contractor. Income tax was deducted on the basis that he was a freelancer and he benefited, substantially, to the extent of the expenditure which the Receiver of Revenue allowed each year on the assumption that McKenzie's representation - that he was an independent contractor - was true. The remarks of Bulbulia D P in Callanan v Tee-Kee Borehole Castings (Pty) Ltd and another (1992) 13 ILJ 1544 (IC) at 1550D-E are apposite: '...I must also point out that the applicant cannot have his proverbial cake and eat it. He cannot say that he was not the respondent's employee as a machinist for purposes of taxation (or for wishing to avoid the pension scheme of the industrial council), but simultaneously be regarded as an employee for the purpose of the Labour Relations Act.' See, too, CMS Support Services (Pty) Ltd v Briggs [1997] 5 BLLR 533 (LAC).
- Just as there was no obligation on the SABC to provide its facilities to McKenzie, there was no obligation on him to attend staff meetings and he was not obliged to take any instructions from the station manager or anyone else as to solving problems, and so on. The only control which the SABC was entitled to exercise over McKenzie, and which it did exercise, related to the content of the programmes he broadcast.
- The conduct of the parties in the twelve month period preceding the termination of their relationship described in paragraph 17 was inconsistent

with an employer/employee relationship and consistent with the relationship between principal and independent contractor.

[37] In any event, if McKenzie was an employee of the SABC, the studio did not act unfairly. By renewing the freelance contracts each year, usually after the expiry of the existing contracts, for a period of six years, the SABC assumed an obligation in fairness to give McKenzie reasonable notice of its intention not to renew the contracts. And, as the industrial court correctly found, reasonable notice was given (in September 1994) of the intention to discontinue the programmes and not to use McKenzie as a broadcaster (after March 1995). There was no further obligation to consult McKenzie before taking that decision. The format of the programme schedule was entirely the prerogative of the SABC. Each year the SABC exercised that prerogative in holding its annual programme review. In August 1994, with the establishment of the transitional committee, a more dramatic review took place. At no time in the six and a half years of his relationship with the SABC did McKenzie ever contend that he had a right to be consulted about the programme schedule. And in March 1994 at the meeting with Vermaas and Mullen, and during the course of the next year, McKenzie never claimed that right. As McKenzie testified, the SABC had the right to decide what programmes it wished to broadcast and whether it wished to continue with a particular programme.

[38] The appeal is upheld, with costs.

[39] The orders of Messrs De Klerk and Maritz in the industrial court are set aside.

The order of Mr De Klerk is substituted with the following:

“The preliminary point, namely, whether the applicant was an employee of the respondent, is decided in favour of the respondent.”

It is in accordance with the requirements of the law and fairness that no order as to costs should be made in respect of the industrial court proceedings:

National Union of Mineworkers v East Rand Gold and Uranium Co Ltd 1992

(1) SA 700 (A).

Myburgh J P

I agree

Froneman D J P

I agree

Cameron J A

Date of Hearing: 30 September 1998

Date of Judgment:

Counsel for Appellant: J J Reyneke SC instructed by Smit & Lowndes

Counsel for Respondent: R G L Stelzner instructed by Sonnenberg, Hoffmann &
Galombik

This judgment is available on the internet at: <http://www.law.wits.ac.za/labourcrt>