REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1854/09

In the matter between:

TOTAL SA (PROPRIETARY) LIMITED	**Applicant**
and	
NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRY	**First Respondent**
LYNCH, DESMOND *N.O*	**Second Respondent**
LIMO ILUNGA KALAVUANDA	**Third Respondent**

Heard: 7 February 2012

Delivered: 31 August 2012

Summary: Review of ruling that the third respondent was an employee. Issue- the true nature of the relationship between the parties.

JUDGMENT

Molahlehi J

Introduction

1] This is an application to review the ruling made by the second respondent under case number GPC HEM410 – 08/09 dated 30 June 2009. The issue, which was before the Commissioner, concerned the point in *limine* regarding the employment status of the third respondent. The Commissioner found contrary to the applicant's contention that the third respondent was an employee.

Background facts

2] It is common cause that the parties concluded an oral agreement during 1999 in terms of which the third respondent was to provide French lessons to those employees of the applicant who needed training in that language.

3] It is common cause that the contract concluded in 1999 was characterised by the third respondent in his answering affidavit as being "more casual," and the job was rendered "as and when required." The situation according to the third respondent changed as the groups of employees requiring training increased. According to him, the employment relationship was formalised as the number of the trainees increased. As a result of the formalisation of employment relationship, the status changed to that of an employee. The third respondent says that he received an electronic access card, an employee number and month deduction from his salary as from 1 November 2002.

4] In terms of the agreement, the third respondent was required to provide invoices at the end of every month for the lessons provided. The third respondent contends that the invoices were required to show the hours of work and the number of students taught. In this regard, he contends that he believed that he was an employee because of his monthly salary payments, the breakdown of which reflected payslip and the tax deductions and UIF.

5] The third respondent, however, conceded that he had to submit travelling claims as reimbursement for travelling expenses. He further conceded that he had to submit invoices for the French translations but contends that that did not change the nature of the relationship because that was done outside his normal duties as an employee. As concerning time for reporting for work, the respondent contended that he worked flexitime, which was controlled by the applicant.

6] The third respondent attributes the reason for his dismissal to the fact that the CEO employed his wife to do the work that he was doing. According to him, it was only after the employment of the CEO's wife that complaints were raised regarding his invoices including timesheet.

7] The applicant contends that the third respondent was never employed as an employee. According to the applicant, the reason for the third respondent to receive a payslip, and deductions of from his salary was because of an error in 2006 when the applicant implemented a new technology system in seeking to comply with the new taxation legislation which required that tax deductions be effected for both employees and independent contractors. In other words, the third respondent was loaded to the system, resulting in UIF contributions also been deducted from his salary. The applicant further contends that the third respondent could not be regarded as an employee for the following reasons:

"16.1 The amount which Kaluanda invoice the Applicant for French lessons provided fluctuated from month to month and was never a fixed sum and was based purely on a number of hours worked.

16.2 Kaluanda was never restricted by the Applicant to offer lessons to other people were not employed by the Applicant.

16.3 Kaluanda would not have invoice the Applicant for translating a French document into English had he been an employee.

16.4 Kaluanda was not required by the Applicant to work a certain number of hours per day.

16.5 The Applicant did not diligently the times that Kaluanda would report to work and part.

16.6 Kaluanda was not required to report any employee at the Applicant and there was no control supervision in the way that the he provided the French lessons.

16.7 Kaluanda was under no obligation to, and did not, informed the Applicant when he was on leave and never formally applied for leave. When Kaluanda did not render a service he was not paid.

16.8 The new system of the applicant, which Kaluanda was erroneously on, automatically at on leave to anyone Ward is on the system. This does not mean that Kaluanda was entitled to leave. In any event, Kaluanda knew that he was not entitled leave as he was not an employee and never applied for leave hence the unusually high number of leave days reflected on the immune system and payroll document handed to him.

16.9 If he was an employee, Kaluanda would not have billed the Applicant for travelling to and from the Applicant's offices.

16.10 Kaluanda did not make use of the applicants facilities in the form of telephones, computers and e-mail which are facilities provided to all employees of the Applicant.

16.11 All the employees of the applicant received a medical eight benefit which is not reflected on the document issued by the payroll department to Kaluanda because he was not an employee.

16.12 If Kaluanda wish to obtain further assistance of other individuals in providing the French lessons he was not precluded from doing so."

Grounds for review.

8] The applicant contends that the Commissioner committed gross misconduct in relation to his duties as an arbitrator by excluding or disregarding the relevant evidence, including failing to apply his mind thereto.

9] The applicant further contends that the decision reached by the Commissioner is one which a reasonable decision maker could not reach.

10] In the supplementary affidavit, the applicant contends that the Commissioner misdirected himself, in finding that the third respondent had discharged the onus of establishing that an employment relationship existed between him and applicant.

The ruling

11] In arriving at the conclusion that the third respondent has discharged his onus on showing the existence of the employment relationship, the Commissioner states that the person is presumed to be an employee if the following factors are established:

"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 control and direction

c) The degree of integration with the present organisation.

d) The person has worked for that other person for an average of at least 40 hours to month over the last 3 months

e) The person is economically dependent on the other person for who he or she works or render services

f) The person is provided with the tools of trade work equipment by the application

f) The person is provided with the tools of trade or work equipment by the other person

g) The person only works for or render services to one person."

12] The Commissioner reasoned that he was left with a dominant impression from the submissions of the parties that the third respondent was an employee for the following reasons:

> "His degree of integration within the respondent's organisation was considerable.
>
> He had employee number, tax and UIF been deducted, and received a payslip."

<u>Evaluation</u>

13] The key issue in this matter concerns the jurisdiction of the bargaining council to entertain the dispute which had been referred to it by the respondent.

14] It is now trite that bargaining councils being creatures of statutes like the CCMA cannot determine their jurisdiction. The power to determine whether a bargaining council has jurisdiction lies with the court. In jurisdictional reviews, the court is not faced with having to determine the reasonableness or otherwise of the ruling but rather whether the facts as were presented point towards the existence of an employment relationship between the parties.[1]

15] The court has over the years applied various tests in determining the complex issue of whether the true relationship that exists between the parties is that of employment. In seeking to address this issue, the legislature defined the word "employee" as follows:[2]

> '(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.'

16] The authorities are in agreement that the label that the parties generally place on the nature of the relationship is not helpful. It is the realities of the relationship that has to determine the true nature of the relationship. [3]

17] In *State Information Technology Agency*,[4] the court per Davis JA, held that when determining the question of an employment relationship the following criteria should be applied:

> '1 an employer's right to supervision and control;
>
> 2 whether the employee forms an integral part of the organization

1 *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others* (2008) 29 ILJ 2218 (LAC). As to the status of the rulings made by bargaining council panellists and the CCMA Commissioners concerning jurisdiction *see Workforce Group (Pty) Ltd v CCMA and Other*s (2012) 33 ILJ 738 (LC) at para 2.

2 See section 213 of the Labour Relations Act of 1995.

3 See *SA Broadcasting Corporation v Mckenzie* (1999) 20 ILJ 585 (LAC) at para 9.
4 (2008) 29 ILJ 2234 (LAC) at para 12.

with the employer; and

3 the extent to which the employee was economically dependent upon the employer.'

18] Turning to the facts in the present case, it has been indicated above that in 1999 when the oral agreement was concluded between the parties, the relationship was that of an independent contractor. The dispute as to the nature of the relationship seems to have arisen later when the applicant introduced technology-based employment system.

19] The applicant says that the third respondent was in error loaded onto the system. It was however contended on behalf of the applicant that it was never intended that the relationship between the parties was to change from that of an independent contractor to that of employment.

20] Whilst I agree with the third respondent that the use of payslips, PAYE and UIF deductions are factors that may point towards an employment relationship, that does not constitute conclusive evidence of the true nature of the relationship. Similarly, as has been stated, in a number of decisions of the court non usage of payslip or PAYE and UIF deductions are not indicative of the true nature of the relationship.

21] The objective analysis of the facts of this case reveals that contrary to the contention of the respondent there existed no employment relationship between the parties for the reasons set out here under.

22] The third respondent does not deny that he was paid on the basis of invoices submitted for the French lessons provided and this fluctuated from month to month. Whilst the third respondent may not have offered his services to any other person, he does not say that he was prohibited to do so in terms of the agreement or by the applicant. The third respondent does not dispute the contention of the applicant that he was free to do other work. There is no evidence in this regard that the third respondent was economically dependent on the applicant.

23] It seems to me strange that the third respondent, who on his own version was employed on a flexitime basis, was entitled to receive payment from the applicant as and when he did, French translations would say he was an employee. This is so more particularly when regard is had to the hours of work for third respondent which was determined by the availability of students. Except for saying that his time of arrival and departure was controlled by the applicant's employee Ms Raditladi, there is insufficient evidence to show the extent of control over him by the applicant. There is also no evidence as to whether the supervision entailed supervising him on the work he was performing.

24] It would seem that the applicant was accountable to Ms Raditladi for the purposes of the performance of the terms of the contract between the parties. It would further seem that he had to make students to sign attendance register as part of proof of delivering such a service.

25] On the basis of the above, I am of the view that the respondent has failed to produce sufficient evidence to show that he was an employee and not an independent contractor. It is for this reason that I find that the third respondent was not an employee but an independent contractor and therefore the first respondent did not have jurisdiction to entertain his dispute.

26] I do not, however, belief that it would be fair to allow the costs to follow the results.

<u>Order</u>

27] In the premises, the following order is made:

27.1 The second respondent's ruling that the third respondent was an employee is reviewed and set aside

27.2 The second respondent's ruling is substituted with the following ruling:

"1. There was no employment relationship between the parties and accordingly the first respondent does not have jurisdiction to entertain the applicant's dispute."

27.3 There is no order as to costs.

Molahlehi J

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Edward Nathan Sonnenberg Attorneys

For the Respondent: De Haan Denton Attorneys