THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

Case No: PR163/21

In the matter between:

MONWABISI MICHAEL GUWA	**Applicant**
and	
GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL (GPSSBC)	**First Respondent**
MOPP, JR *N.O.*	**Second Respondent**
DEPARTMENT OF HUMAN SETTLEMENT	**Third Respondent**

Heard: **22 October 2025**

Delivered: **24 October 2025**

Summary: Review of jurisdictional ruling – test applicable to review of jurisdictional ruling reiterated - Employee v independent contractor – test applicable to enquiry – applicant earning more than the threshold determined by the Minister in terms of s 6(5) of the BCEA – s 200A and s 83A not applicable - Court to respect wishes of the parties – applicant failed to establish employment relationship – review application dismissed

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of hand down is deemed to be 24 October 2025.

JUDGMENT

MAKHURA, J

[1] On 12 and 18 October 2011, the applicant and the Department of Human Settlement: Eastern Cape (Department), respectively signed a Service Level Agreement (SLA) in terms of which the applicant was appointed as a Technical Coordinator for Emergency Housing Programs, for a period of two years from 1 August 2011 to 31 July 2013[1], at R795 000.00 per annum, excluding disbursements. The applicant was contracted to work Mondays to Fridays, and each day was deemed eight hours, from 8h00 to 16h30. He was entitled to additional remuneration for work that fell outside the scope of the agreement.

[2] In terms of the SLA, the applicant, in his capacity as the Technical Coordinator, was expected to provide professional services and expertise to the Department's emergency housing programs. The SLA incorporated a skills transfer plan. He reported to the Director: Emergency Housing Program (Director) and was required to comply with all reasonable instructions and directions issued by the Director. The deliverables were defined in the SLA. The applicant was required to submit a duly certified claim or fee invoice every month, for the services performed during the month, and the Department committed to pay him within the same month of submitting the invoice. He reported to the Director: Emergency Housing Program and the Department provided him with a desktop and office line, internet connection and cellphone allowance. In keeping with the

[1] Although the SLA stipulates the period as 1 August 2011 to 31 July 2013, the letter of appointment issued on 28 August 2011 stated that his appointment takes effect from 1 October 2011 to 31 September 2013. The applicant was advised to contact the Supply Chain Management unit to sign the acceptance and the SLA.

agreement, the applicant submitted monthly invoices, which were checked, verified and paid for by the Department. This SLA was renewed on several occasions, and the last renewal expired on 30 June 2017.

[3] On 4 and 7 May 2018, the applicant and the Department respectively signed a new SLA. This time, the applicant was appointed as a Community Support Professional for a period of 36 months, starting from 1 May 2018 to 30 April 2021. The applicant was engaged as a service provider at R2 560.00 per day and was required to provide the services for a maximum of 15 days per month. The applicant was required to submit a payment claim or fee invoice monthly on or before the seventh day of the month, reflecting the value of the portion of the service rendered or performed. The Department committed to paying the invoice within 30 days of receipt thereof. The applicant reported to the Head of Department (HoD) and was expected to comply with all reasonable instructions and directions from the HoD.

[4] On or about 4 March 2019, the applicant, represented by his attorneys of record, completed a referral form to the first respondent (GPSSBC). The nature of the dispute referred to the GPSSBC was *"failure to re-instate in terms of an agreement"*. He stated in the referral form that he was appointed as a Technical Coordinator on 1 September 2011 for a period of two years, and that:

> 'The post was for service professional, not a company, envisaging that the successful candidate would be a professional employee…
>
> After the expiry of two years, a series of thirteen extensions for him to perform same work with less benefits.
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> Mr Guwa has since continuously engaged with the senior officials regarding the rolling over of his contracts.'

[5] As part of the special features of the dispute, the applicant stated that the matter should be processed urgently because he was *"forced to retrench"* some of his people that he contracted to assist him due to the *"unlawful reduction of his*

salary payout". He stated further that he renewed his contract *"on less favourable terms"* which affected his *"subcontracted employees"*. The outcome required from the GPSSBC was:

> 'Contract renewed to five (5) times
>
> Salary not reduced at all and rolling over of continuous required.'

[6] In simple terms, the applicant wanted the SLA to be renewed for five years, from 1 May 2018 to 30 April 2023, on the same *"salary"* or payment and a guarantee that the SLA would be continuously renewed. The Department raised a jurisdictional point. It submitted that the applicant was not an employee.

[7] The applicant bore the onus of proof. He testified that when he was appointed, he was required to submit his curriculum vitae, that the only distinction between him and the employees of the Department is that he was paid through a system named Basic Accounting System (BAS) and that he signed the SLAs for the purpose of having his money released for the work he had performed. He further relied on an internal legal opinion that effectively recommended, based on the number of times his SLA was renewed, that his contract be for a period of five years.

[8] The Department argued that based on the terms of the SLA, the services rendered, the payment method and the budget which did not come from salaries, the allocation of tools of trade and remedy for resolving any disputes emanating from the contractual relationship, the applicant is not an employee.

[9] The commissioner considered that the applicant was engaged in terms of a SLA and not a contract of employment, that he was remunerated via a BAS payment system and did not have a PERSAL number, he was paid based on the invoices he submitted monthly and had no payslip, that he was not subjected to performance agreement and his appointment was not in terms of the recruitment and interview process. The commissioner concluded that the law of contract

applies to the relationship between the applicant and the Department, that the applicant was not an employee, and his remedies may lie in the High Court.

[10] Aggrieved, the applicant approached this Court to review and set aside the ruling. He also seeks costs. He raised two grounds of review. First, he submits that the commissioner misapplied the law and second, that he failed to properly analyse the facts and apply the correct legal principles. The complaint amounts to the commissioner's failure to apply the correct legal principles to the facts of the case and the failure to properly analyse the facts. These grounds are intertwined and dealt with below.

[11] Before dealing with the review application, the applicant applied for reinstatement of the review application. The reinstatement application is unopposed. I have considered the application for reinstatement and decided, in the interest of justice, to grant. Although the Department did not appear on the date of the hearing nor file heads of argument, it had filed an answering affidavit opposing the review application. Accordingly, the review application is determined on the opposed basis.

[12] The applicant complains that although the commissioner referred to the correct applicable test of the dominant impression, he misapplied it to the facts. Further, the commissioner is accused of failing to consider the requirements in section 200A of the Labour Relations Act[2] (LRA) and section 83A of the Basic Conditions of Employment Act[3] (BCEA).

[13] The review test applicable to the present matter is that set out in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*[4]. The jurisdictional ruling may be reviewed on objectively justifiable grounds, and the question is whether there are facts that give the GPSSBC the jurisdiction to entertain and

[2] Act 66 of 1995, as amended.
[3] Act 75 of 1997.
[4] (2008) 29 ILJ 2218 (LAC); [2008] ZALAC 3 at paras 39 – 41.

arbitrate the dispute.[5] Absence these facts, the GPSSBC would lack the jurisdiction to entertain the dispute. This Court is therefore not concerned with the reasonableness of the award.

[14] The nature of the dispute, which the applicant indicated is a failure to reinstate in terms of any agreement, is regulated in terms of section 186(2)(c) of the LRA. This section defines unfair labour practice to mean any unfair act or omission that arises between the employer and the employee involving *"a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement"*. To enjoy these LRA benefits and protections, the applicant had to establish that he was an employee. The commissioner found that he was not. He must now persuade this Court on review that the commissioner's decision was wrong. He relies on the presumption in section 200A of the LRA and section 83A of the BCEA, the commissioner's alleged failure to apply the presumption and the commissioner's failure to analyse the facts and correctly apply the dominant impression test to the facts.

[15] Section 200A deals with the presumption as to who is an employee, and subsection (1) set out the presumptions.[6] However, subsection (2) states that the presumption does not apply to any person who earns in excess of the amount

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[5] Ibid; see also *Zeuna – Starker BOP (Pty) Ltd v NUMSA* [1998] 11 BLLR 1110 (LAC); (1999) 20 ILJ 108 (LAC) at para 6; *De Milander v MEC for the Department Finance: Eastern Cape and Others* [2012] ZALAC 37; (2013) 34 ILJ 1427 (LAC) at paras 2 and 23; *South African Municipal Workers Union obo Manentza v Ngwathe Local Municipality and Others* [2015] ZALAC 26; [2015] 9 BLLR 894 (LAC) at para 20; *Ukweza Holdings (Pty) Ltd v Nyondo NO & others* (2020) 41 ILJ 1354 (LAC); [2020] ZALAC 7 at para 12.

[6] Section 200A provides that:

> '(1) Until the contrary is proved, for the purposes of *this Act*, any *employment law* and section 98A of the Insolvency Act, 1936 (Act No. 24 of 1936), 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 trade or work equipment by the other person; or
> *(g)* the person only works for or renders services to one person.'

determined by the Minister in terms of section 6(3) of the BCEA. At the time the dispute arose, which the applicant alleged was on 7 November 2018, the Minister had determined that section 200A did not apply to a person who works for or renders services for another earning in excess of R205 433.30 per annum.[7] Section 83A of the BCEA sets out the same requirements for the presumption. These two provisions do not apply because the applicant earned in excess of the amount determined by the Minister.

[16] Section 213 defines an employee to mean:

> '(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.'

[17] Whether or not the person who works for another is an employee or an independent contractor is to be determined primarily on the terms of the contract concluded between the parties.[8] The Labour Appeal Court (LAC) in *SA Broadcasting Corporation v McKenzie (McKenzie)* held that the Court must focus on the substance of the relationship, the *"realities of the relationship"* and not the form or what the parties opted to label their relationship.[9]

[18] In *Vermooten v Department of Public Enterprises and others*[10] *(Vermooten)*, the LAC commented as follows regarding the legal position, the nature of employment in the public sector and the legal obligation on the state departments as contracting parties:

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[7] GN 531 of 1 July 2014: Determination: Earnings Threshold (Government Gazette No. 37795).
[8] *Niselow v Liberty Life Insurance Association of Africa Ltd* (1998) 19 ILJ 752 (SCA) at 754C; *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC); [2005] 9 BLLR 849 (LAC) at para 93; *SA Broadcasting Corporation v McKenzie* [1998] ZALAC 13; (1999) 20 ILJ 585 (LAC); at para 10; *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* [2008] ZALAC 1; (2008) 29 ILJ 2234 (LAC) at para 10.
[9] Ibid, fn 7 above.
[10] [2017] 6 BLLR 606 (LAC); (2017) 38 ILJ 607 (LAC).

'Mr Gerber referred to the various tests, which had been adopted by the courts of law in order to determine whether a person is an employee, including the dominant impression test, the organisational test and the economic dependency test as outlined in the *Denel* decision. The *Denel* judgment was in turn, adopted by this court in *State Information Technology Agency (Pty) Ltd v CCMA and others*. The weakness in the economic dependency test, which describes itself as a reality test, is that it does not pay attention to all the facts including the contractual relationship between the parties. But this test needs not be applied where the person in question is, in reality, an independent contractor, then he or she is not an employee as defined by the LRA.

In *Chirwa v Transnet Ltd and others*, Ngcobo J (as he then was) quoted the Explanatory Memorandum to the LRA that:

> "The political dimension of the state as employer, more particularly the fact that its revenue is sourced from taxation and that it is accountable to the Legislature, gives rise to unique and distinctive characteristics of state employment. For example, the state can invoke legislation to achieve its purposes as employer and its levels of staffing, remuneration and other matters are often the product of political and not commercial considerations. This uniqueness does not, however, justify a separate legal framework."

Unlike the private sector, a State department such as the DPE may not remunerate employees as it sees fit. The doctrine of legality and legislation dictate that only the remuneration that is prescribed, from time to time, may be paid. The PERSAL used by the civil service is based on and reflects the authorised remuneration payable to a civil servant on a specific rank. Remuneration bands are linked to the ranks within a State department. A civil servant may only be remunerated through the PERSAL system. PERSAL also functions as a means of ensuring that State departments abide by the law as regard remuneration of their officials.'[11]

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[11] Ibid, at paras 18 – 20.

[19] Vermooten had opted for a consultancy agreement, which offered him higher remuneration compared to an option to be an employee. The Department of Public Enterprises (DPE) was desirous to engage him because of his specialised knowledge and expertise. It accepted his suggestion and appointed him as a consultant. The LAC dealt with the motive for the consultancy agreement, which it found to be valid. It found that although the agreement was entered into to avoid the limitations of the remuneration prescribed for the post, this was not an *“illegal purpose”*.[12]

[20] In response to Vermooten’s argument that his employment need not be linked to the organisational structure and that he could simply be declared an employee, the LAC held that whilst that approach may apply in different circumstances, the state department may not have a floating employee without a rank and a prescribed remuneration level.[13] The LAC concluded that Vermooten made a conscious and deliberate election to structure his relationship with the DPE as one of consultancy, and that:[14]

> ‘… in the absence of any overriding policy considerations, neither a tribunal nor a court may ignore its terms. Where the parties are in a relatively equal bargaining position and consciously elect one contract or relationship over another, the legal effect should be given to their choice. To allow one of these parties to change or contend that the legal relationship between them is something else holds important implications for the integrity of the legal framework of departments of State.’

[21] In his referral form to the GPSSBC, the applicant stated that he holds the position of director. However, he reported to the Director, which becomes an anomaly if it is to be accepted that he was employed as a director. It was not the applicant’s case that the position of Technical Coordinator on the Department’s structure. For the Technical Coordinator contract, the payment was at the level of a director. However, the dispute, which according to the applicant arose on 7

[12] Ibid, at para 23.
[13] Ibid, at para 24.
[14] Ibid, at paras 25 – 26.

November 2018, arose during the period he was appointed as a Community Support Professional. Having agreed to provide services as a Community Support Professional for 15 hours per month, he now claims that he is employed as a director in terms of the consultancy agreement which commenced on 1 August 2011, and that the Department had committed an unfair labour practice by reducing his *"salary"* and he seeks reinstatement of his contract as a Technical Coordinator.

[22] On the record before this Court, the Technical Coordinator consultancy agreement lapsed at the end of June 2017. To the extent that he seeks to be declared an employee in that position, that contract had lapsed more than a year before the date of the alleged dispute. He cannot claim that he continued to work in that position beyond 30 June 2017. His appointment as a Community Service Professional from May 2018 was not a renewal and/or extension of the contract that lapsed over 10 months ago in June 2017. That should mark the end of the enquiry.

[23] Regardless, for nine years, the applicant was satisfied with the arrangement. There is no evidence of any complaint against the arrangement. He did not work for the period July 2017 to the end of April 2018. He was then appointed as a Community Support Professional in May 2018. Almost a year later, on 4 March 2019, he referred this dispute, claiming to be employed in terms of the consultancy agreement that lapsed 21 months prior.

[24] Although he was engaged to work Mondays to Fridays and a day was presumed to be eight hours, nothing barred him from gaining employment elsewhere or providing his professional services to other entities or departments. Therefore, whether he worked exclusively for the Department and may have been economically dependent on the Department, which was not his argument anyway, is of no significance because he was not prohibited from undertaking work or activities that could generate other income. He had no obligation to

inform the Department about his services should he be engaged by another client.

[25] In his own version, the applicant had *"subcontracted"* part of his work, or he had employed certain individuals to assist him in carrying out the service he was contracted for by the Department and was allegedly forced to retrench them due to the reduced contract price. Unlike consultants, employees, particularly at the director level, sign performance agreements. That the applicant could subcontract the work without the discussion and permission of the Department is a clear indication of the relationship being of a consultancy or an independent contractor.

[26] The applicant reported to and was expected to comply with the reasonable instructions and directions from the Director. This is a feature that is common in both employment and consultancy contracts. I cannot imagine a contract where a service provider is not expected to report to the client, nor can I imagine a contract where the service provider is not expected to comply with the client's reasonable instructions and directions. The significance of this factor is diminished in this matter. Indeed, the applicant did not seriously rely on it.

[27] The applicant was paid upon submission of the invoice. The invoice had to be certified by the Department. In other words, the Department had to check and verify that the applicant had performed the work. The invoice would be processed like all other service providers before payment is effected. He did not contribute to the Unemployment Insurance Fund, nor did he pay Pay-As-You-Earn to the South African Revenue Services. He was not a member of any medical aid scheme or provident fund. He was not subject to the policies of the Department, including the leave policy and the disciplinary code. The SLA embodied its own dispute resolution procedure, which had nothing to do with the labour laws.

[28] Having considered the terms of the SLA and the relationship between the parties, I am unable to find any single and unique feature in the relationship between the parties that is exclusively found in an employer and employee relationship. Their

agreement was a commercial transaction, and this Court should not disrespect the parties' wishes, particularly in circumstances where they were in a relatively balanced bargaining power. This Court should be slow to interfere in the decision of the parties and change the nature of their chosen legal relationship. The commissioner's ruling is correct. The review application stands to be dismissed, with no order as to costs.

[29] In the premises, the following order is made:

Order

1. The late delivery of the record is condoned, and the review application is reinstated.

2. The review application is dismissed with no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr X. Mvuthuza
Instructed by:	Madokwe Incorporated
For the Third Respondent:	No Appearance