

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JR 562/02

In the matter between :

**AVBOB MUTUAL ASSURANCE
SOCIETY**

Applicant

and

CCMA BLOEMFONTEIN

First Respondent

J MTHEMBU N.O.

Second Respondent

M A PIENAAR

Third Respondent

JUDGMENT

PILLEMER, AJ:

Respondent conducts business in the insurance industry and sells its insurance policies and its other funeral related products through the use of agents. In 1976 the Appellate Division had occasion to examine the standard form contract between the Respondent and such an agent appointed by it under the usual terms and conditions then applicable for

the purpose of deciding whether the contract was one of service or not. The court painstakingly analysed the document highlighting those aspects that tended to support an employment contract and contrasting such terms with those that went the other way. The issue before the court was whether or not the “agent” was covered by the Workmen’s Compensation Act, 1941, which the court held meant upon a proper interpretation of the legislation before it that it had to determine whether or not there was a contract of service under the common law. It held that the appropriate approach in a context where there were indications going both ways, was to determine what sort of relationship most strongly appears from all the facts or what the “dominant impression” is which the contract makes upon a person. In the result the court found that the contract was not an employment contract and the “agent” was in fact an agent or independent contractor. Factors that weighed heavily with the court were the provisions that the agent could employ others to do the work, even employ a temporary substitute, was paid commission and not a salary, had to bind himself as surety, was not obliged to work fixed hours and could take leave whenever he wanted.

See: Ongevallekommissaris v Onderlinge Versekeringsgenootskap A.V.B.O.B. 1976(4) SA 446 (AD) (“ the AVBOB case”)

This case is a leading authority on the test and the topic. It has been criticised by academics but nonetheless cited with approval by the Labour

Appeal Court in the leading case of SABC v McKenzie (1999) 20 ILJ 585 (LAC) at 590E-F. While it is clearly not binding on other agents who have agreed to bind themselves to similar contractual terms at the level of *res judicata* it is of such strong persuasive authority and constitutes the proper interpretation of the standard form contract in question, that in my view it must have the effect of rendering it practically impossible to argue that the contract constitutes an employment contract. Factors which are weighty and point strongly against the relationship being one of employment because they would not generally be found in an employment contract are set out in the judgment and they would apply whatever test was used. It is also worth noting that the agent does not pay UIF and PAYE and is obliged to register as a provisional taxpayer. The conditions of appointment also use terminology that is indicative of a relationship other than one of employment and there is no suggestion that this is a sham. The contract reveals that it is the fruits of the labour rather than the labour itself that is remunerated. These are all classic pointers to the conclusion that the relationship is that of principal and agent/independent contractor and not one of employment.

Against that background rather surprisingly the Applicant decided that with the passage of time and in the context of the Labour Relations Act, 1995 ("the LRA") and the definition of employee in that Act, the same reasoning would not apply to his contract, even though it was in substance identical to that considered in the AVBOB case. It contained

all the indicators that militated against an employment relationship. Even more surprisingly Applicant managed to persuade the Second Respondent that it was an employment contract and that he was therefore entitled to process an unfair dismissal dispute before the CCMA in terms of S 191 of the Labour Relations Act, 1995 ("the LRA"). It is that decision which the applicant seeks to review and set aside in these proceedings.

The applicant relied upon what was referred to as the "Green Bible", which is a voluminous set of rules and directions that are binding upon agents. These regulations find their source in the written conditions of appointment which has a clause authorising the issuing of regulations that do not conflict with the conditions of appointment. In my view the features of control that are embodied in the "Green Bible" add very little to the fact that there is a large measure of control in the conditions of appointment, but notwithstanding these features they do not detract from the interpretation of the contract as not being one of employment. Control is not decisive and is of little value in determining the relationship where the contract contains provisions inimical to an employment contract and, what is more, has actually been interpreted by the Appellate Division as not constituting a contract of service.

I am in respectful agreement with the interpretation in the AVBOB case and it follows therefore that I hold that the contract is not an employment contract and the applicant was not an employee of the respondent. The

existence of an employment relationship is a jurisdictional fact that must be present for s191 of the LRA, under which the Third Respondent sought relief, to be applicable. If, as I find, that jurisdictional fact is absent then it follows that the CCMA did not have jurisdiction to arbitrate the dispute and its finding that it did is wrong in law and must be reviewed and set aside for want of jurisdiction.

In Pinetown Town Council v President, Industrial Court 1984(3) SA 173

(N) Leon J explained the concept when he pointed out at 179B-D that

“where the jurisdiction of a tribunal is dependant on the existence of a particular state of affairs, it cannot give itself jurisdiction by incorrectly finding that the conditions for the exercise of jurisdiction are satisfied....[A] determination on the jurisdictional facts is always reviewable by the courts because in principle it is not part of the exercise of the jurisdiction but logically prior to it.”

I respectfully agree with the above approach, which was advanced in argument by Mr Franklin, SC for the Applicant, and on that approach I have to make the factual finding on whether or not the conditions for the exercise of jurisdiction were present and, if they were not, the review must succeed for want of jurisdiction by the Arbitrator.

In this case it was common cause that I had to have regard to the terms of the contract, which was embodied in the conditions of appointment or the so-called “Akte van Aanstelling”, a letter of appointment and the “Green Bible” and that this was what had been presented to the Second Respondent when he heard the arbitration. It seems to me that in a case

like this where no factual findings on evidence have to be made and it is just a matter of interpretation that the review simply turns upon the proper interpretation of the contract. In the circumstance the interpretation of the contract by the Second Respondent is no bar to the review succeeding if he was wrong. To the extent that Second Respondent's reasoning and finding is relevant, it seems to me that he failed to apply his mind to the AVBOB case, which was drawn to his attention because he referred to the test set out in that case in his award, or to apply his mind properly to the contract as his finding that "the contract is not only a subterfuge but a bizarre one designed to strip the agents of the protection to which they are entitled according to law and fair labour practice and to place them at the mercy of the Respondent" flies in the face of the provisions in the contract which the Appellate Division stressed created the dominant impression that it was not one of service. There was no evidence of subterfuge. The Second Respondent records in his award that he is simply being asked to interpret the contract and I am respectfully unable to appreciate how it is possible for him to have come to the conclusion he did, bearing in mind that the contract has obviously been in its present form since at least the mid 1970's. In my assessment he misdirected himself to such an extent that he cannot be said to have applied his mind properly to the matter, and if it was necessary to find that he committed a reviewable irregularity rather than simply came to the wrong conclusion then in my assessment he

committed such an irregularity. His finding was not justifiable on the evidence that he had to consider.

The review therefore must inevitably succeed.

The Applicant argued that I was precluded from dealing with the substantive issue, i.e. whether the CCMA had jurisdiction, because a certificate of outcome had been issued following the conciliation process. It was contended that on the strength of the judgment in Fidelity Guards Holdings v Epstein & Others (2000) 21 ILJ 2382 (LAC) I could not interfere until the certificate had been set aside. Since there was no application before me to review the issuing of that certificate, it was argued that I could not interfere and the review had to be dismissed. That argument is without merit. If the CCMA had no jurisdiction to arbitrate because the Applicant was not an employee it also had no jurisdiction to conciliate and its purported action is on no relevance once the jurisdictional point is taken before a forum that has power to decide the issue and is found to be good. In any event the Epstein decision has no bearing on the issue in this case. It dealt only with the other jurisdictional fact that has to be present before a matter may be arbitrated or adjudicated namely the certificate that the dispute remains unresolved. It did not deal in any way with the point in issue in this case. The general statement in paragraph [21] of the Epstein judgment at 2389I that “as long as the certificate of outcome stands, the CCMA has jurisdiction to

arbitrate the dispute” has to be understood in the context of that judgment and cannot apply to cases like the present. The Commissioner who conciliates the dispute ought not to make any finding on the factual matters that bear upon jurisdiction as that is something that is dealt with at arbitration and not conciliation. (See Dempster v Kahn NO & others (1998) 19 ILJ 1475 (LC), BHT Water Treatment(a division of Afchem (Pty) Ltd v CCMA and others (2002) 23 ILJ 141 (LC) at 145-6). The issuing of a certificate of outcome is therefore no bar to a challenge of the kind made in these proceedings.

It was also argued that the AVBOB case was of no moment because it was decided before the LRA was promulgated and related to a different statute. I have dealt with these submissions above and for the reasons there set out they are rejected. I have to decide whether or not the Applicant was an employee and to do so have to look principally at the conditions of service. These reveal that the contract is not an employment contract for the reasons set out above. He is therefore not an employee, but rather an independent contractor. He has no remedies under the LRA because by definition he is excluded from its ambit.

I accordingly make an order in the following terms:

1. The review succeeds and the finding by the Second Respondent that the Applicant was the employer of the Third Respondent is set aside.
2. It is declared that the First Respondent has no jurisdiction to arbitrate the dispute that has been referred to it by the Third Respondent.
3. The Third Respondent is ordered to pay the Applicant's costs.

PILLEMER, AJ

Date of hearing: 24 January 2003.

Date of judgment: 31 January 2003.

For Applicant: A Franklin SC
instructed by Deneys Reitz

For Third Respondent: J P Breytenbach
instructed by HV Jordaan care of Symington
and De Kock (Welkom)