



- (1) Reportable Yes
(2) Of interest to other Judges: Yes
(3) Revised

Signature

27 August 2026
Date

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

CASE NO: JR 2479/23

In the matter between:

PASCALE MCKEEVER

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER LINDOKUHLE DLAMINI, N. O.

Second Respondent

STANLIB ASSET MANAGEMENT (PTY) LTD

Third Respondent

Heard: 26 July 2026

Delivered: 27 August 2026

JUDGMENT

LEKWAPE, AJ

Introduction and the Nature of the Proceedings

- [1] This is a section 145 review of the Commissioner's jurisdictional ruling issued on 13 November 2023 under the Commission for Conciliation, Mediation and Arbitration (CCMA) case number GAJB 16588-23. The ruling upheld a *point in limine* that the Applicant was not an employee of STANLIB and that the CCMA therefore lacked jurisdiction to arbitrate her unfair dismissal dispute.
- [2] At the outset, it is necessary to define the nature of the enquiry before this Court. This is not an appeal recast in the language of review. It is a review under section 145 of the Labour Relations Act (the LRA)¹, concerned not with whether this Court would have reached the same conclusion as the Commissioner, but with whether the jurisdictional ruling was reached through a fair process and whether it is sustainable in law. The Court must exercise restraint and should not interfere merely because another outcome may have been possible. That restraint, however, is not indifference. Where a commissioner determines a jurisdictional fact on an incomplete record and does so after excluding evidence that may bear directly on that fact, the integrity of the process is compromised. In such circumstances, judicial restraint does not require deference to an unsafe ruling. It requires correction.
- [3] The review standard is now well settled. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,² Constitutional Court held that the question on review is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach. The Supreme Court of Appeal in *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)*³, and the Labour Appeal Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*⁴ made clear that a review court must consider whether any irregularity was material and whether it prevented a fair trial of the issues. The inquiry is therefore not

¹ Act 66 of 1995.

² [2007] ZACC 22; 2008 (2) SA 24 (CC) at par110.

³ [2013] ZASCA 97; 2013 (6) SA 224 (SCA) at para 25.

⁴ [2013] ZALAC 28 at paras 14, 20-21.

concerned with every error, but with errors that distort the process or render the outcome unreasonable.

- [4] The issue is narrow, but its consequences are not. For the Applicant, the characterisation of the relationship determined whether she had access to the statutory protections of the LRA and to the CCMA as the forum created to vindicate those protections. For STANLIB, the issue was whether its commercial arrangement with intermediaries placed the Applicant outside the employment relationship altogether. The Commissioner held that the CCMA lacked jurisdiction because the Applicant was not STANLIB's employee. The question for this Court is whether that conclusion can safely stand where the enquiry into the true nature of the relationship was decided without hearing evidence directed at how the relationship actually operated in practice. In a matter of this kind, the law does not permit form to eclipse substance, nor does fairness permit the decisive issue to be resolved while the evidence capable of illuminating it remains unheard.

Chronology of Material Events

- [5] The Applicant applied for and was interviewed for the Technology Programme Manager position during 2022. Following the interview process, correspondence was exchanged concerning the position, its requirements, the working arrangements and the terms on which the Applicant would render services.
- [6] In January 2023, the Applicant commenced rendering services at STANLIB in respect of an IT integration project. The formal commercial structure involved a Service Request Agreement between STANLIB and Dimension Data, with remuneration administered through Phoenix Business Consulting (Pty) Ltd t/a Bobby Brokers.
- [7] Between January and June 2023, the Applicant performed her work from within STANLIB's operational environment. She worked at STANLIB's premises, used STANLIB's tools, accessed and operated within its systems and processes, and discharged the functions of Technology Programme Manager as part of STANLIB's organisational structure.

- [8] On 14 June 2023, the Applicant's services were terminated. She contends that the termination was sudden and effected without notice, reason or procedure. Internal communications were thereafter circulated regarding the termination of her assignment within STANLIB's organisation.
- [9] On 20 September 2023, the arbitration proceedings commenced before the CCMA. The Applicant initially sought to join Dimension Data and Bobby Brokers as additional respondents but later abandoned that joinder application and pursued STANLIB as the true employer.
- [10] The arbitration proceedings were reconvened on 30 October 2023. The Commissioner thereafter signed the jurisdictional ruling on 10 November 2023, and the CCMA issued the award on 13 November 2023, finding that the Applicant was not an employee of STANLIB and that the CCMA accordingly lacked jurisdiction.
- [11] On 14 December 2023, the Applicant instituted these review proceedings. Heads of argument were filed by both parties during June 2026, and the matter was enrolled for hearing before this Court on 26 June 2026.

The Factual Matrix and the Arguments of the Parties

- [12] The factual background reflects a recurring feature of contemporary labour arrangements: while an engagement may be documented through intermediaries, the practical reality of the work may point to a different legal relationship. The Applicant rendered services through a triangular arrangement involving STANLIB, Dimension Data (Pty) Ltd and Phoenix Business Consulting (Pty) Ltd t/a Bobby Brokers. From January 2023 until the termination of her services on 14 June 2023, she was placed at STANLIB as a Technology Programme Manager on an IT integration project. For purposes of jurisdiction, the enquiry could not stop at the entity that generated the contractual documents or processed remuneration. The substantive question was whether, in reality, the Applicant worked within STANLIB's undertaking, under its operational direction, and in furtherance of its business objectives.

- [13] That question was sharpened by the manner in which the Applicant's work was allegedly performed in practice. She reported daily to STANLIB's premises, used STANLIB's tools, and worked within its systems and operational processes. The objective material, on the Applicant's case, indicated that STANLIB determined the work she performed, where she performed it, and when it had to be completed. These were not peripheral features of the arrangement; they went directly to the indicators of control, supervision and integration.
- [14] The same theme emerged from the material relied upon to show organisational integration. The Applicant pointed to reporting lines to senior STANLIB functionaries, including the Programme Director and the CIO, as well as an organogram and related documents said to place her within STANLIB's operational hierarchy. She also contended that she managed or coordinated work involving STANLIB personnel. If established, those matters would bear directly on whether she operated as an external commercial actor or had, in practical terms, become part of STANLIB's undertaking.
- [15] The Applicant's reliance on the intensity and regularity of the work flowed from that alleged integration. On her material, she worked approximately 827 hours over about five and a half months. That level of commitment is not easily reconciled with the position of an independent contractor freely operating a business in the market. It suggested, at least in the Applicant's case, that her working capacity was substantially absorbed by STANLIB. Her fixed monthly remuneration of R213 300 and negotiated leave entitlement reinforced the relevance of economic dependence to the enquiry.
- [16] The payroll documents formed part of that broader picture but could not decide the issue on their own. Although the payslips described the Applicant as an independent contractor, they also reflected deductions which she said were consistent with employment, including the skills development levy. Labels and deductions may inform the statutory enquiry, but they do not replace it. Their significance lay in the need to weigh them with the evidence on control, integration, economic dependence and the manner in which the work was actually performed.

- [17] The termination correspondence raised a related question about how the relationship was treated when it came to an end. The Applicant relied on communications concerning the termination of her assignment and on documents said to reflect the work she performed for STANLIB. If STANLIB's role was truly limited to receiving services through a third-party provider, the manner in which the termination was communicated, implemented and absorbed within STANLIB's operations required scrutiny. The commissioner could not properly stop at the contractual chain while leaving unanswered whether STANLIB dealt with the Applicant as an external supplier or as a person integrated into its working structures.
- [18] Against that factual case, STANLIB anchored its answer in the formal contractual structure through which the engagement was arranged. It relied on the service request agreement concluded with Dimension Data (Pty) Ltd, the absence of a direct written employment contract with the Applicant, the role of Phoenix Business Consulting (Pty) Ltd t/a Bobby Brokers as the payroll vehicle, and the Applicant's abandonment of her joinder application against Dimension Data and Bobby Brokers. Relying on *National Union of Metalworkers of South Africa v Intervolve (Pty) Ltd*⁵, STANLIB submitted that it could not be drawn into an employment dispute where the commercial documents pointed elsewhere. That submission had legal force, but it did not dispose of the enquiry. The remaining question was whether the formal arrangement reflected the true working relationship, or whether it obscured the identity of the entity that, in substance, directed, received and benefited from the Applicant's labour.
- [19] The Applicant's answer was correspondingly directed at substance rather than form. She contended that contractual nomenclature and payment routing could not conclude the statutory enquiry where the practical incidents of the relationship pointed in another direction. She relied on her alleged integration into STANLIB's operational structure, reporting lines to senior STANLIB personnel, the management or coordination of work involving STANLIB staff, fixed and demanding working hours, annual leave, fixed

⁵ [2014] ZACC 35; 2015 (2) BCLR 182 (CC) at paras 32–33, 40–43 and 47–50

monthly remuneration and payroll deductions. Those features, she submitted, were inconsistent with an entrepreneur operating independently in the market and were relevant to whether she was economically dependent upon, and integrated into, STANLIB's undertaking.

The Procedural Irregularity

- [20] The Applicant's complaint is not a technical objection to procedure. It concerns the fairness of the jurisdictional enquiry itself. The commissioner was required to decide whether the Applicant was, in substance, an employee of STANLIB. That question could not fairly be answered without hearing evidence capable of explaining how the relationship worked in practice. On the Applicant's version, the subpoenaed STANLIB witness was able to speak directly to those practical realities. If that evidence was excluded, the enquiry was deprived of material central to its proper determination.
- [21] That difficulty is important because employment status is rarely proved by documents alone. This is especially so where the arrangement is layered through more than one entity. The statutory enquiry is concerned with reality, not paperwork in isolation. It asks who allocated the work, who supervised it, who benefited from it, whether the worker was integrated into the enterprise, and whether the worker retained the risks and freedoms of an independent business. Those matters often require oral evidence. In this case, they made such evidence necessary.
- [22] The Court accepts the Applicant's submission that, in the circumstances of this matter, the commissioner's decision to determine the jurisdictional point on statements and documents alone constituted a material irregularity. It is trite that section 138 of the LRA permits commissioners to conduct arbitration proceedings with minimal legal formality; however, it does not permit commissioners to sacrifice fairness.
- [23] The issue before the commissioner was not confined to the interpretation of a contract. It required a fact-sensitive enquiry into the true nature of the working relationship. That enquiry required evidence on control, supervision,

reporting lines, integration, economic dependence and the practical operation of the triangular arrangement. By determining the jurisdictional point on the papers, and by declining to receive evidence directed at those matters, the commissioner denied himself the evidentiary material necessary to determine jurisdiction objectively. He also curtailed the Applicant's right to a fair opportunity to place her case before the tribunal on the very issue that determined jurisdiction.

[24] STANLIB submitted that the Applicant cannot complain about the procedure because her representative offered, in the alternative, to take the commissioner through the documents. That submission cannot be sustained when the transcript is read fairly and as a whole. Mr Horn first placed on record that the Applicant wished to make a statement and that a subpoenaed witness, Mr De Lange, was available to clarify the relationship between the Applicant and STANLIB. The offer to proceed on the documents was made only after the commissioner indicated a preference for that course. It was an accommodation of the commissioner's approach, not an unequivocal waiver of the right to lead evidence.

[25] Waiver is not lightly inferred and, in law, requires conduct that is clear, unequivocal and inconsistent with the continued assertion of the right relied upon. That threshold was not established on the transcript. The Applicant's representative identified the evidence to be led, explained its relevance to the relationship between the Applicant and STANLIB, and thereafter proceeded in the manner preferred by the commissioner. Properly characterised, that course reflected compliance with the commissioner's procedural direction rather than consent to the exclusion of oral evidence. It therefore could not justify deciding the jurisdictional issue without receiving evidence that bore directly on it.

[26] The decisive point is that the commissioner bore an independent duty to conduct a fair and proper jurisdictional enquiry, a duty owed not only to the parties but also to the sound administration of justice. That duty was not displaced because a representative, confronted with the commissioner's procedural preference, sought to proceed by reference to the documents.

Where the existence of an employment relationship in a triangular arrangement was disputed, and where evidence was tendered on control, integration and reporting lines, the commissioner was required to receive and assess that evidence before determining jurisdiction. A tribunal charged with deciding its own jurisdiction cannot narrow the process in a manner that leaves the central facts untested, because to do so compromises both procedural fairness and the reliability of the jurisdictional ruling.

[27] The duty of fairness is not satisfied by the mere fact that a tribunal reaches a conclusion within its statutory powers. Justice must not only be done; but it must be seen to be done. That principle applies with equal force to commissioners exercising statutory adjudicative functions. A commissioner presiding over a jurisdictional enquiry must therefore conduct the proceedings in a manner that is both impartial in fact and reasonably perceived as fair by the parties. Where a party identifies material evidence on the decisive jurisdictional issue, and the commissioner elects not to hear it, the concern is not simply one of procedure. It bears directly on confidence in the fairness and integrity of the adjudicative process.

[28] The transcript of 30 October 2023 demonstrates why the procedural course adopted by the commissioner materially affected the jurisdictional enquiry. The Applicant sought to call a subpoenaed STANLIB witness to address the substantive realities of the working relationship, including the relationship between the Applicant and STANLIB. Her representative placed the relevance of that evidence on record in the following terms:

Applicant's representative: *'Firstly, Commissioner, there are two parts of our submission that we want to make. One is basically calling the Applicant to make the statement. Secondly, we have the witnesses. Mr Jan De Lange that we subpoenaed for today, that is available, that can also clarify the relationship between her and STANLIB instead of Dimension Data or any other party... however, if you prefer that we only state our case based on what has been submitted, then I can take you through the documentation itself.'*

[29] The commissioner responded:

Commissioner: *'I will prefer the latter part of your statement ...'*

[30] The Applicant's representative then proceeded as follows:

Applicant's representative: *'What I am going to do then is to take you through the documentation and go through all the documentation ... let me take you to page 33 of the bundle.'*

[31] That exchange is significant because it demonstrates that the Applicant sought to lead evidence on the very issue that determined jurisdiction, and that the commissioner elected instead to confine the enquiry to the documents. The procedural consequence was material. The jurisdictional fact was determined while evidence directed at its proper resolution remained unheard, leaving the decisive issue to be decided on an incomplete evidentiary foundation.

[32] While Section 138(1) of the LRA grants a commissioner broad discretion to conduct arbitration proceedings in any manner they deem appropriate to resolve the dispute fairly and quickly, with a minimum of legal formalities, and Section 138(2) preserves a party's right to give oral evidence and call witnesses, this procedural flexibility is not boundless. Jurisdictional issues must be treated as a strict exception to the general flexibility permitted under Section 138. Because such a ruling determines whether the CCMA has the power to entertain the dispute at all, the commissioner was required to ensure that the evidentiary foundation was sufficient and that the parties had a fair opportunity to present and test material evidence.

[33] Therefore, a commissioner cannot rely on the broad discretionary powers under section 138(1) to bypass oral testimony and substitute it with a preference for documentary material where the existence of an employment relationship is squarely contested. Section 138 is a tool for accessible justice; it is not a licence to decide a disputed jurisdictional fact on an evidentiary record from which material oral evidence has been excluded.

[34] A jurisdictional ruling reached on that basis cannot withstand review, because the irregularity was neither formal nor peripheral. It went to the

commissioner's capacity to determine the real issue before him on a fair and reliable evidentiary foundation. The authorities in *Herholdt* and *Gold Fields* require a reviewing court to consider whether the irregularity prevented a fair trial of the issues or caused the commissioner to misconceive the nature of the enquiry. On the facts of this matter, the refusal to hear material evidence on the jurisdictional fact had both consequences.

The Law

- [35] Section 213 of the LRA defines an employee as any person, excluding an independent contractor, who works for another person and receives remuneration, or who assists in carrying on or conducting the business of an employer.
- [36] Where a ruling concerns the existence of the CCMA's jurisdiction, the question for this Court is a precise one: was the CCMA correct to conclude that it lacked jurisdiction? The issue is not whether the commissioner's view was merely reasonable, but whether the jurisdictional fact on which the ruling depended was objectively established. In *South African Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*⁶, the Labour Appeal Court held that where jurisdiction depends on the existence of an employment relationship, the reviewing court must determine that jurisdictional fact objectively. The enquiry is therefore whether, on the proven facts, the Applicant was an employee for purposes of section 213 of the LRA.⁷⁸
- [37] The determination of employment status cannot be surrendered to labels chosen by contracting parties, nor to the convenience of contractual intermediaries. Labels may assist, but they cannot decide the matter. If that were so, the statutory definition of employee could too easily be avoided by careful drafting. The Court must examine the substance of the relationship and the practical incidents of the work performed, because labour legislation

⁶ 2008) 29 ILJ 2218 (LAC) at para 39 – 40.

⁷ See *Sanlam Life Insurance Ltd v CCMA* (2009) 30 ILJ 2903 (LAC).

⁸ See *Universal Church of the Kingdom of God v Myeni and Others* (2015) 36 ILJ 2832 (LAC) at para 6, 27 – 34.

protects real working relationships, not merely the language used to describe them.

- [38] The starting point for identifying the relevant indicia of employment remains with the older authorities. In *SABC v McKenzie*⁹, the Court distinguished a contract of service from a contract for services by considering, among other indicators, control, the obligation to render personal service and organisational integration. Those factors remain useful, but they must not be applied mechanically. In light of the protective purpose of labour legislation, the enquiry must look beyond commercial form and contractual description to the substance of the relationship. The adjudicator must evaluate the totality of the circumstances and determine the objective reality of how the work was performed, regulated and integrated into the alleged employer's undertaking.
- [39] In the leading authority of *State Information Technology Agency (Pty) Ltd v CCMA and Others*,¹⁰ the Labour Appeal Court identified three primary considerations (*SITA* factors) relevant to the reality of an employment relationship as follows:
- (i) the employer's right of supervision and control.
 - (ii) whether the person forms an integral part of the organisation.
 - (iii) the extent of economic dependence.
- [40] Having regard to those considerations, the Applicant's case could not properly be dismissed by reference to the contractual chain alone. On the material before the commissioner, there were indicators that STANLIB exercised practical control over the work, that the Applicant performed her functions within STANLIB's operational and reporting structures, and that the intensity of the engagement, fixed remuneration and asserted leave arrangements raised a real question of economic dependence. Those facts did not finally determine the issue without being tested, but they were plainly

⁹ (1999) 20 ILJ 585 (LAC) at para 9.

¹⁰ *State Information Technology Agency (Pty) Ltd v CCMA and Others* [2008] ZALAC 1; (2008) 29 ILJ 2234 (LAC) at para 11 – 12.

sufficient to require a full enquiry into the reality of the relationship. The commissioner was therefore required to assess the *SITA* factors against the evidence of how the work was actually performed, rather than treating the commercial form of the arrangement as conclusive.

- [41] The Labour Appeal Court in *Denel (Pty) Ltd v Gerber*¹¹ similarly emphasised that substance must prevail over terminology. This principle has particular force in mediated or triangular work arrangements. Without it, the protective reach of the LRA could be defeated by inserting intermediaries between the worker and the entity that actually directs, benefits from and controls the work.
- [42] Furthermore, the Labour Court in *Goliath v SA Broadcasting Corporation SOC Ltd*¹² emphasised that a genuine independent contractor retains entrepreneurial capacity and freedom to contract with others. Economic independence relates to the entrepreneurial position of the person in the marketplace.
- [43] The Constitutional Court's reasoning in *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa and Others*¹³ reinforces that triangular labour arrangements must be approached with proper regard to the purpose of the LRA. Although that case concerned section 198A, its broader lesson is apposite, courts should be astute not to allow commercial form to obscure the identity of the party that, in substance, receives and controls the labour.
- [44] This approach aligns with international labour standards, specifically the ILO Employment Relationship Recommendation, 2006 (No. 198)¹⁴, which adopts the principle of the primacy of facts which states that employment status must be determined by the facts relating to the performance of work, regardless of how the relationship is characterised in an opposing commercial arrangement.

¹¹ (2005) 26 ILJ 1256 (LAC) at para 22.

¹² [2022] ZALCCT 10; (2023) 44 ILJ 185 (LC) at paras 20–23 and 69–70.

¹³ *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22; [2018] 9 BLLR 837 (CC); (2018) 39 ILJ 1911 (CC); 2018 (5) SA 323 (CC); 2018 (11) BCLR 1309 (CC).

¹⁴ ILO Employment Relationship Recommendation, 2006 (No. 198) at para 9.

- [45] Applying the SITA criteria, the cumulative indicators point persuasively towards an employment relationship with STANLIB. The Applicant did not merely deliver an external product to STANLIB from the outside. On the available material, she worked within STANLIB's operational structures, under its reporting lines, for its project objectives, and as part of its organisational machinery. The interposition of Dimension Data and Bobby Brokers does not answer those indicators; it merely explains the route through which the arrangement was documented and paid.
- [46] On the control criterion, the evidence is compelling. The Applicant did not decide independently what project work to perform, where to perform it, or how to place it within STANLIB's delivery priorities. She worked on STANLIB's premises, used STANLIB's tools, and performed within STANLIB's systems. Those are practical signs of subordination to STANLIB's operational authority.
- [47] On integration, the evidence points in the same direction. The question is not whether the Applicant appeared on a formal STANLIB human-resources organogram, but whether the work she performed placed her functionally within STANLIB's organisational structure. The record indicates that she reported to senior STANLIB functionaries, worked within STANLIB's systems, coordinated or managed work involving STANLIB personnel, and performed project functions directed at STANLIB's operational objectives. Viewed through the *SITA* criterion of integration, those facts support the conclusion that she was not operating as an external supplier delivering an independent product from outside the enterprise. She was, in practical terms, working from within STANLIB's organisational machinery.
- [48] The allocation of a STANLIB email address is not, in itself, conclusive of employment status. It is, however, not an irrelevant fact. In a jurisdictional enquiry concerned with the substance of the relationship, it is a practical indicator of the extent to which the Applicant was enabled to function within STANLIB's internal working environment. A person provided with an email address on the alleged employer's domain is, at least outwardly and operationally, placed within that organisation's communicative infrastructure.

That fact assumes greater significance when considered together with the evidence that the Applicant worked on STANLIB's premises, used STANLIB's tools and systems, reported to STANLIB personnel, and performed project functions directed at STANLIB's business objectives.

- [49] The Applicant also produced an organogram as part of the evidence relied upon to demonstrate her alleged integration into STANLIB's operational structure. That evidence reinforces, rather than independently establishes, the conclusion on integration. The Applicant relied on the organogram at arbitration to illustrate the reporting lines she said operated in practice and the structure within which she performed her work at STANLIB. It was not tendered, and is not treated, as a formal STANLIB-authored corporate document. Its evidentiary value lies instead in its capacity to explain the Applicant's version of her operational placement within STANLIB's hierarchy.
- [50] Mr Moolla's objection that the organogram was not prepared by STANLIB therefore went to the weight to be attached to the document, not to its relevance to the jurisdictional enquiry.
- [51] It is significant that while counsel for the Third Respondent did not admit the organogram's accuracy, no positive case was advanced to demonstrate that it was factually flawed. Crucially, Mr Moolla fairly conceded that the Applicant might have authored the document to reflect her day-to-day experience of the reporting lines at STANLIB. In those circumstances, the document was capable of serving as demonstrative evidence of the Applicant's alleged reporting lines. If its accuracy was disputed, the appropriate course was to permit oral evidence and cross-examination on the reporting structure. The Commissioner instead concluded that the Applicant did not form part of STANLIB's organisational structure without properly testing or engaging with the very evidence tendered on integration. That failure materially weakened the jurisdictional ruling.
- [52] On economic dependence, the Applicant's recorded hours, fixed remuneration and practical inability to offer her services freely to other clients are significant. The evidence of approximately 827 hours over five and a half

months is difficult to reconcile with the picture of an entrepreneur carrying on business on her own account. It points instead to a person whose labour capacity was substantially absorbed by STANLIB.

- [53] The material relating to working hours, project commitments and reporting structures was particularly significant. A person who is required, in practical terms, to devote their working capacity to a single enterprise and to perform that work within that enterprise's operational and reporting structures may not readily be characterised as an independent businessperson. Economic dependence is not assessed only by identifying the source through which remuneration is paid. It also requires consideration of whether the person retained any real entrepreneurial freedom to offer their labour or services in the market independently of the alleged employer.
- [54] STANLIB's reliance on *National Union of Metalworkers of South Africa v Intervolve (Pty) Ltd and Another*¹⁵ does not dispose of the issue in this matter. *Intervolve* concerned the referral of a dismissal dispute against separate corporate entities and the jurisdictional consequences of failing to refer the dispute against the employer concerned. It did not decide that a commissioner must accept a contractual chain at face value where the issue is whether the cited respondent was, in substance, the employer in the actual working relationship. The present enquiry is therefore not whether referral requirements may be disregarded. It is whether, on a proper consideration of the evidence, STANLIB was the employer for purposes of section 213 of the LRA. That question required a full evaluation of the practical incidents of the relationship, including control, integration, supervision and economic dependence.
- [55] The Applicant's case was that her daily work was performed within STANLIB's environment, she worked at STANLIB's premises, used STANLIB's systems and tools, reported through STANLIB's structures, and performed work directed at STANLIB's project objectives. If those facts are established, the involvement of Dimension Data and Bobby Brokers would explain how the arrangement was administered commercially and how

¹⁵ [2014] ZACC 35; 2015 (2) BCLR 182 (CC); [2015] 3 BLLR 205 (CC); (2015) 36 ILJ 363 (CC).

payment was processed. It would not, without more, answer the statutory question whether the Applicant was in substance working as part of STANLIB's undertaking. The distinction is important. *Intervale* is concerned with the legal consequences of referral against the correct employer. This matter concerns the prior factual and legal question of who the employer was, having regard to the reality of the working relationship. That is the enquiry required by section 213 of the LRA.

- [56] Having regard to the definition of employee in section 213, the commissioner was required to assess the relationship as it operated in practice, rather than to decide the matter by reference to its contractual description. The ruling does not reflect that assessment. By giving undue weight to the Applicant's description as an independent contractor, without properly evaluating the evidence on control, supervision, integration and economic dependence, the commissioner approached the jurisdictional enquiry on an unduly formal footing.
- [57] Properly interpreted, section 213 requires a substantive enquiry into the real working relationship. The statutory distinction is drawn not by the parties' description of the arrangement, but by whether, viewed objectively, the person's labour was integrated into and deployed for another's undertaking, or whether she was genuinely conducting an independent business on her own account. That interpretation gives effect to the protective purpose of the LRA and provided the lens through which the commissioner was required to assess the evidence.
- [58] Put differently, the enquiry required the commissioner to look past the outer shell of the arrangement and to identify its true substance. The fact that the work was channelled through intermediaries, described as independent contracting, or paid through a third-party mechanism did not, without more, remove the Applicant from the protection of the LRA. If her labour was in reality deployed within STANLIB's undertaking, subject to its operational direction, integrated into its structures and dependent upon it for remuneration, those facts had to be confronted directly and could not be

answered by the vocabulary of the contract or by the administrative route through which payment was made.

- [59] It follows that the statutory enquiry could not properly be confined to contractual labels or administrative form. It required an objective assessment of the relationship as a whole, directed at whether the Applicant was carrying on an independent enterprise of her own, with the attendant entrepreneurial risk and market freedom, or whether her labour was in substance absorbed into STANLIB's undertaking and performed under its operational authority.
- [60] Such question cannot be answered by invoking the language of independent contracting, payroll descriptions, or the presence of intermediaries. It required a careful assessment of the lived reality of the relationship, including control, supervision, integration, economic dependence, reporting lines and the manner in which the work was actually performed. To hold otherwise would permit statutory protection to be defeated by drafting, routing or commercial form, rather than by the real character of the working relationship.
- [61] In *Smith v Mouille Grange Body Corporate and Others*,¹⁶ the Court stated that:

[30] Where an employee earns above the threshold, as is the case here, the Code of Good Practice: Who is an Employee, as contemplated in terms of subsection (4) of section 200A of the LRA, sets out the guidelines for determining whether that person is, in any event, an employee. The Code of Good Practice sets out six distinguishing factors between an employee and an independent contractor as follows:

30.1 An employee renders personal service, whereas an independent contractor performs specified work and produces a specified result;

30.2 While an employee performs the service personally, an independent contractor may perform the service through others;

¹⁶ [2024] ZALCCT 55 at para 30.

30.3 The employer chooses when to make use of the services of an employee, whereas an independent contractor performs work or produces a result within the period fixed by the contract;

30.4 An employee must obey the lawful instructions from the employer, whereas an independent contractor is subservient to the contract but is not under the supervision or control of the employer;

30.5 The contract with an employee terminates on such employee's death whereas the death of an independent contractor does not necessarily terminate the contract; and

30.6 An employee's contract terminates on the expiry of the period of service, whereas an independent contractor's contract terminates upon completion of work or production of the specified result.

[31] Various tests have been formulated to determine whether a person is an employee, and even though it has received heavy criticism, the dominant impression test has generally been followed. In terms of this test, the realities of the relationship are ascertained irrespective of how parties have described or termed their relationship. Substance prevails over form.

[62] The significance of that authority lies in its confirmation that, even where the statutory presumption in section 200A does not apply because the person earns above the threshold, the enquiry does not revert to contractual formalism. The Code continues to provide a structured and practical guide to the distinguishing features of employment and independent contracting. Its factors point the decision-maker away from nomenclature and towards the real incidents of the relationship: whether the work was rendered personally, whether the worker was subject to supervision and lawful instruction, whether she was integrated into the employer's business, whether the engagement was for ongoing service rather than the production of a discrete result, and whether she retained the freedom to deploy others or conduct an independent enterprise.

[63] Read with the dominant-impression test, the Code required the commissioner to evaluate the cumulative weight of all relevant indicators and

to determine the objective reality of the relationship. That is precisely where the jurisdictional enquiry miscarried. On the Applicant's version, the decisive indicators could not properly be assessed without evidence on her reporting lines, supervision, integration into STANLIB's operational structure, economic dependence and the practical manner in which her work was performed. By deciding the point without receiving and testing that evidence, the commissioner did not merely omit a procedural step; he failed to undertake the very enquiry which the Code and the authorities required.

[64] It therefore follows that the commissioner was not entitled to determine the jurisdictional question by placing decisive reliance on the formal contractual structure or on the description of the Applicant as an independent contractor. The authority requires a broader evaluative enquiry directed at the dominant impression created by the relationship as a whole. In the present matter, that enquiry required the commissioner to test, and not merely note, the evidence bearing upon personal service, supervision, control, integration into STANLIB's business, economic dependence, and whether the Applicant was engaged to produce an independent contractual result or to render ongoing service within STANLIB's operational framework. Absent that assessment, the conclusion that she fell outside the protection of section 213 of the LRA was reached prematurely and on an inadequate foundation.

[65] The Third Respondent's reliance on the payroll documentation must be considered, but it cannot carry the weight assigned to it. It submitted that the payslip did not reflect PAYE in the ordinary sense, but a voluntary tax deduction; that the Applicant was described in the documentation as an independent contractor; and that payment was processed through the Dimension Data cost centre. These matters are plainly relevant to the evidentiary matrix, but they are not determinative of the statutory enquiry. Section 213 of the LRA does not make employment status dependent on payroll descriptions, payment routing or the nomenclature selected by the parties.

[66] The Court must still determine, objectively and upon the totality of the relationship, whether the practical incidents of control, integration and

economic dependence disclose employment. On that enquiry, the manner in which remuneration was administered may inform the analysis, but it cannot displace the substance of the working relationship.

- [67] It follows that the payroll treatment of the Applicant is an evidentiary consideration and not a statutory shortcut to a finding of employment. The enquiry remains one of substance and must be determined by reference to the totality of the relationship. Properly understood, the payroll evidence therefore neither conclusively establishes nor conclusively excludes employment. It is one indicator to be weighed together with the other evidence bearing upon control, integration, economic dependence and the practical manner in which the work was performed.

Appropriate Remedy: Substitution or Remittal

- [68] The remaining issue is the appropriate remedy. Section 145(4)(a) of the LRA empowers this Court, after reviewing and setting aside an award, to determine the dispute in the manner it considers appropriate. That remedial discretion includes, in a proper case, the power to substitute the commissioner's decision with the decision that ought to have been made. Substitution, however, is not the automatic consequence of a successful review, even where the ruling under review concerns jurisdiction. The Court must determine whether the record is sufficiently complete, whether the material facts have been properly ventilated, and whether the interests of justice favour final determination by this Court rather than remittal to the CCMA.
- [69] The Applicant sought, in the alternative, that the jurisdictional ruling be replaced with an appropriate order and, if substitution is not competent or appropriate, that the matter be remitted to the CCMA for determination before a commissioner other than the second respondent. The relief sought therefore requires this Court to consider whether the interests of justice are better served by substitution or by remittal.
- [70] Ordinarily, substitution may be appropriate where the record is complete, the material facts are not in dispute, the outcome is a foregone conclusion, and

remittal would serve no practical purpose. Those requirements are not satisfied in this matter. The very basis upon which the ruling falls is that the commissioner determined the jurisdictional issue on a materially incomplete evidentiary foundation.

[71] The Applicant's complaint, as advanced in these proceedings, is that she was not permitted to testify or to call a subpoenaed witness on the factual incidents of the relationship, including control, supervision, reporting lines, integration, economic dependence and the practical operation of the triangular arrangement. Those matters were not peripheral; they went directly to the question whether the Applicant was an employee as contemplated in section 213 of the LRA. In consequence, the procedural defect engaged the *audi alteram partem* principle in its most practical form, a party whose rights depend on a disputed jurisdictional fact must be afforded a fair opportunity to place material evidence before the decision-maker. The exclusion of that evidence meant that the Applicant was not heard on the very issue that determined whether the CCMA could entertain her dismissal dispute.

[72] It would be inconsistent with that conclusion for this Court to determine the jurisdictional fact finally on a record in which the material issues were not fully ventilated. Although the documentary material raises substantial questions about the correctness of the commissioner's conclusion, the excluded evidence is said to bear directly on the very issue that this Court would be required to decide. The outcome cannot therefore be treated as inevitable in the absence of a complete ventilation and proper testing of the evidence relevant to the true nature of the relationship.

[73] In these circumstances, the appropriate remedy is to review and set aside the commissioner's ruling and to remit the jurisdictional issue to the CCMA to be heard *de novo* before a commissioner other than the second respondent. The parties must be afforded a fair opportunity to lead oral and documentary evidence relevant to whether the Applicant was an employee of STANLIB as contemplated in section 213 of the LRA.

Conclusion

- [74] The commissioner was required to determine a jurisdictional fact of consequence, whether the Applicant was an employee of STANLIB for purposes of section 213 of the LRA. That enquiry could not properly be resolved by treating the service request agreement, payroll routing, or contractual labels as decisive. The law required the commissioner to examine the real relationship as it operated in practice.
- [75] The documentary material before the commissioner raised substantial questions about the correctness of the conclusion reached. It included material bearing on the Applicant's alleged integration into STANLIB's operational structure, the nature of her duties, the reporting arrangements, the manner in which the work was performed, remuneration, and the practical operation of the triangular arrangement. Those matters were relevant to the jurisdictional enquiry and required proper evaluation.
- [76] The commissioner failed to appreciate that the broad discretion conferred by section 138 of the LRA could not displace the fundamental requirement of a fair evidentiary enquiry. Although section 138 permits commissioners to conduct proceedings with minimal legal formality, that flexibility is constrained where a jurisdictional fact is squarely disputed, and material oral evidence has been tendered. Because such a finding determines whether the CCMA may exercise power over the dispute at all, the commissioner was required to ensure that the parties had a fair opportunity to present and test evidence bearing on the existence of the employment relationship.
- [77] The commissioner's failure was therefore twofold. First, he curtailed the evidentiary enquiry by refusing to hear potentially material oral evidence on the very issue that determined jurisdiction. Secondly, he gave decisive weight to the formal commercial structure without adequately confronting the substance of the relationship. Both errors affected the fairness and reliability of the ruling.
- [78] This Court is not concerned, at this stage, with whether the Applicant's dismissal was substantively or procedurally fair. That issue remains for

arbitration if jurisdiction is established. Nor is it appropriate for this Court to determine finally whether the Applicant was an employee of STANLIB where the material issues bearing on that question were not fully ventilated, and the relevant evidence was not properly tested. The excluded evidence is said to bear directly on the very question this Court would otherwise be required to decide.

[79] Accordingly, remittal is the appropriate remedy. The jurisdictional ruling must be reviewed and set aside, and the jurisdictional issue must be determined afresh by the CCMA after the parties have been afforded a fair opportunity to lead oral and documentary evidence on the true nature of the relationship.

[80] In the result, the following order is made:

Order

1. The jurisdictional ruling issued by the second respondent on 13 November 2023, under CCMA case number GAJB 16588-23, is reviewed and set aside.
2. The jurisdictional issue is remitted to the first respondent, the Commission for Conciliation, Mediation and Arbitration, to be heard *de novo*.
3. The *de novo* jurisdictional hearing must be conducted by a commissioner other than the second respondent.
4. At that hearing, the parties must be afforded a fair opportunity to lead oral and documentary evidence relevant to whether the Applicant was an employee as contemplated in section 213 of the Labour Relations Act 66 of 1995.
5. There is no order as to costs.

M.J. Lekwape

Acting Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

For the Applicant: H. Horn, instructed by Makayla Pillay Attorneys,
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For the Respondent: M. Moolla, instructed by Salijee Govender Van der
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LABOUR COURT