REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1334/2012

In the matter between:

MCBAYE LOUFULUABO BEYA AND OTHERS **Applicants**

and

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL **First Respondent**

M J RALEFATANE N.O. **Second Respondent**

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **Third Respondent**

Heard: **6 August 2014**

Delivered: **27 November 2014**

Summary: **Bargaining council arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Review concerning issue of jurisdiction – Test of rationally and reasonableness does not apply – issue considered *de novo***

Employment – consideration of nature of relationship – principles considered – assessment and determination of evidence – relationship not one of employment but independent service providers

Employment – section 200A – principles considered and applied

Dismissal – no dismissal as no employment relationship exists – finding of arbitrator that no employment relationship and thus no dismissal exists correct – award upheld

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JUDGMENT

SNYMAN AJ

INTRODUCTION

[1] The applicants have applied to review and set aside a determination of the second respondent, being the arbitrator appointed by the first respondent as the bargaining council having jurisdiction in this matter, to the effect that the applicants were not employees of the third respondent and consequently not dismissed. This application has been brought in terms of section 158(1) (g) of the Labour Relations Act[1] ('the LRA').

[2] The applicants had pursued a dispute to the first respondent based on a contention that they had been dismissed by the third respondent. The third respondent, on the other hand, contended that the applicants were not employees but independent contractors, and consequently were not dismissed by it. The second respondent first had to determine whether the applicants were indeed employees of the third respondent. The matter started out with 31 individual applicants, but ultimately only 14 remained at the time of arbitration, being the current applicants as well. Only McBaye Beya ('Beya'), the current first applicant, testified in the arbitration proceedings, for all the applicants. In an award dated 2 May 2012, the second respondent determined that the applicants were not employees of the third respondent and thus had not been dismissed by the third respondent. This brought the arbitration proceedings to an end. It is this

[1] Act No 66 of 1995.

determination by the second respondent that forms the subject matter of the review application brought by the applicants.

Background facts

[3] The applicants were all engaged by the third respondent as foreign language interpreters, rendering interpreting services at various courts, but principally at the court in Johannesburg. Also, most of the applicants were based at the Magistrates Court in Johannesburg.

[4] There was never any dispute that the applicants indeed rendered interpreting services to the third respondent from time to time, for a number of years. In the case of Beya, this period has been since December 2005.

[5] According to Beya, the applicants, on 11 July 2011, were fulfilling their normal duties when they were called one by one from the various courts, by the Chief Interpreter ("Calison") and the Acting Court Manager ("Mather"), and taken to the interpreters' room. Also, and at this time, new interpreters were being introduced to the various prosecutors.

[6] Beya further said that in the interpreters' room, Calison told the applicants that their services were no longer required because there were too many interpreters. Calison also told them that they were casual employees and said the applicants stole from the third respondent and would be removed pending investigations in this regard. Beya stated that the applicants' positions were still needed and that their positions were in fact advertised whilst they were still working.

[7] Beya stated that the third respondent advertised the foreign language interpreters' positions on 15 April 2011 whilst the applicants were still on their existing contracts of employment, and they all re-submitted their CVs' and were then actually interviewed. Beya then contended that the interview panel refused to recommend the appointment of the applicants because they refused to pay R500.00 each in exchange for being appointed.

[8] The applicants could produce no employment contracts between themselves and the third respondent, and Beya contended the third respondent had the contracts. Beya stated that the applicants received a salary based on an hourly rate, but no other benefits. Beya further stated that the applicants worked from 07h30 to 16h00 every day even if they had no cases to interpret. Finally, Beya stated that the applicants received pay slips and each had a Persal number and the pay slip reflected an 'appointment' as interpreter.

[9] The third respondent's case was that since 2006, the need for additional foreign language interpreters was identified because of a high demand for such services. The third respondent would then interview such interpreters, assess their suitability, and if satisfied, the principal interpreter would recommend the names of the candidates for appointment and submit what was called a Z83 form, to the regional office. The regional office would then confirm the appointment. Prior to 2010, these kinds of appointments were made without advertising available positions, but after 2010, the third respondent started advertising for these positions as well.

[10] The third respondent explained that the foreign language interpreters only worked as and when required and would only be paid for time actually worked. They received no benefits. These interpreters were 'casual employees' who could avail themselves for work as an when they wanted to. However, and when an interpreter availed himself or herself on a particular day, such interpreter would be dedicated to one particular court for the day. But if their services were no longer needed on a particular day, they would be released. Also, the Prosecutors and Magistrates would have to sign confirmation that the services of the interpreter was utilized in court on that day, on a claim form, which the interpreter would use to claim payment for services rendered.

[11] The former principal interpreter at the Johannesburg court, Msimang, testified for the third respondent, and stated that when the applicants (together with the other

interpreters) were asked to sign a daily attendance register, they refused, contending they were not employees, and had other jobs elsewhere as well.

[12] The third respondent also led the evidence of Benade, the Deputy Director in the third respondent's finance department. Benade stated that the interpreters were engaged as contract workers and would only be paid on the submission of claim forms by such interpreters, and once these claims are verified by the third respondent. Insofar as it concerned the applicants, they were such workers, had no contracts of employment, and were used only when needed.

[13] Benade stated that the 2011 advertisements for interpreters came about as a result of a pilot project in terms of which more interpreters were to be appointed for Johannesburg and Kempton Park, and in the end 25 such interpreters were appointed. According to Benade, and despite these appointments, the applicants actually continued to work and evidence was provided of some of the applicants even being paid for services rendered after the alleged date of dismissal.

[14] The second respondent had these two conflicting cases to decide between. The second respondent accepted the case for the third respondent. In doing so, the second respondent reasoned as follows:

14.1 The second respondent considered the definitions and concepts of who would be an employee in terms of the LRA, the BCEA and the Constitution, and concluded that these definitions were indeed wide enough to cover the applicants in this instance;

14.2 The second respondent then specifically considered section 200A of the LRA and section 83A of the BCEA;

14.3 The second respondent then considered each of the individual components as set out in these two sections, and concluded that the applicants failed to satisfy any of these components so as to justify a conclusion that they were employees;

14.4 The second respondent, in short, concluded that because: (1) the applicants submitted claim forms that had to be approved for them to be paid; (2) if they did not work they were not entitled to be paid; (3) they could work when they wanted without explanation; (4) they could leave when they wanted; and (5) there was no agreement as to hours, dates and times worked, the applicants were not employees;

14.5 The second respondent held that the applicants could best be described as "freelancers".

[15] The second respondent, extensively, dealt with each and every one of the contentions raised by the applicants, in a detailed award. I must admit that on occasion the award of the second respondent was difficult to follow, but overall, in the end, all issues placed before him was properly dealt with by him. The question now is whether this award is sustainable.

The relevant test for review

[16] The issue as to whether employment exists is a jurisdictional fact. If there is no employment relationship between the two parties to the dispute, then the bargaining council would have no jurisdiction to determine the matter, and consequently there can be no dismissal in terms of the LRA. This being the situation, the review test as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2] does not apply. In specifically considering the judgment in *Sidumo*, the Labour Appeal Court in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[3] said:

> 'Nothing said in *Sidumo*, supra, means that the grounds of review in section 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness. Nothing said in *Sidumo* means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA

[2] (2007) 28 *ILJ* 2405 (CC).
[3] (2008) 29 *ILJ* 964 (LAC) at para 101.

had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also, if the CCMA made a decision that exceeds its powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise.' (emphasis added)

The same reasoning would clearly also apply to the review of bargaining council arbitration awards.

[17] When deciding a review on the basis of jurisdiction, the proper review test where the existence of the requisite jurisdictional fact is objectively justiciable in court, would be whether the determination of the arbitrator was right or wrong. This was so held in *SA Commercial Catering and Allied Workers Union v Speciality Stores Ltd*[4] where the court said:

'… Where the precondition is an objective fact or a question of law, its existence is objectively justiciable in a court of law and if the public authority made a wrong decision in this regard the decision may be set aside on review…'

And in *Zeuna-Starker Bop (Pty) Ltd v National Union of Metalworkers of SA,* it was held[5]:

'The commissioner could not finally decide whether he had jurisdiction because if he made a wrong decision, his decision could be reviewed by the Labour Court on objectively justiciable grounds…'

[18] In *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others,*[6] the Labour Appeal Court specifically articulated the enquiry as follows:

'The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there

[4] (1998) 19 *ILJ* 557 (LAC) at para 24.
[5] (1999) 20 *ILJ* 108 (LAC) at para 6:
[6] (2008) 29 *ILJ* 2218 (LAC) at paras 39 – 40.

was no dismissal, then, the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.

The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court…'

[19] There are several recent applications of this 'jurisdiction' review test by the Labour Court, starting with *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others*[7] where Steenkamp J reasoned:

'The test I have to apply, therefore, is not whether the conclusion reached by the commissioner was so unreasonable that no commissioner could have come to the same conclusion, as set out in *Sidumo*, but whether the commissioner correctly found that Van Rooyen had been dismissed.'

The same approach was followed in *Hickman v Tsatsimpe NO and Others,*[8] *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others,*[9] *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others,*[10] *Workforce Group (Pty) Ltd v CCMA and Others*[11] and *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others.*[12] I conclude with the following reference to what I said in *Trio Glass t/a The Glass Group v Molapo NO and Others*[13]:

'The Labour Court thus, in what can be labelled a 'jurisdictional' review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review, but can in fact determine the issue de novo in order to decide whether the determination by the commissioner is right or wrong.'

[7] (2012) 33 *ILJ* 363 (LC) at para 23.
[8] (2012) 33 *ILJ* 1179 (LC) at para 10.
[9] (2013) 34 *ILJ* 392 (LC) at paras 5–6.
[10] (2012) 33 *ILJ* 1171 (LC) at para 14.
[11] (2012) 33 *ILJ* 738 (LC) at para 2.
[12] (2013) 34 *ILJ* 1272 (LC) at para 21.
[13] (2013) 34 *ILJ* 2662 (LC) at para 22.

[20] All of the above means that in determining the question whether the applicants were in fact employees of the third respondent, and consequently whether they were thus dismissed, the determination is based on a conclusion as to whether the second respondent's award in this regard was right or wrong. In dealing with the very issue as to whether an employment relationship existed, the Court in *Melomed Hospital Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[14] the Court followed this exact approach. The actual reasoning of the second respondent plays little role my determination in this regard, as I, in essence, must consider the issue *de novo*. I will now proceed to determine this matter on this basis. This approach is fully in line with what the Court said in *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[15] where it was held:

> 'It was, therefore, incumbent upon the Labour Court to deal with the issue whether or not there had been an employment relationship between the appellant and the third respondent and, therefore, whether the CCMA had the requisite jurisdiction to deal with the dispute… The Labour Court was called upon to decide de novo whether there was an employer-employee relationship between the parties. It was not called upon to decide whether the commissioner's findings were justifiable or rational.'

The evidence to be considered

[21] As a point of departure, it must be pointed out that a formidable obstacle in the way of the case of the applicants, save for Beya (who testified), is that none of the other applicants testified in the arbitration. Beya was simply not in a position to testify as to all the individual work circumstances of all the other applicants. This relates to how they individually came to be engaged by the third respondent and in the absence of individual contracts being produced, what conditions governed their services with the third respondent and on what basis and how

[14] (2013) 34 *ILJ* 920 (LC) at para 44.
[15] (2009) 30 *ILJ* 2903 (LAC) at para 17.

they were remunerated. For example, and from the record, it was apparent that there was a material difficulty with evidence as to what the other applicants actually earned. The only issue that Beya could testify about and which related to all the applicants was the events on 11 July 2011 which was contended, constituted the dismissal of the applicants by the third respondent. In my view, it was imperative for the other applicants to have testified about their own personal circumstances or at least conclude a pre-arbitration agreement with the third respondent as to an alternative form of introduction of such kind of evidence.

[22] The above being said, I shall have regard to the entire record of evidence, as it stands, including the documentary evidence, and so determine the issue of the existence of an employment relationship *de novo*. As I have said above, the actual reasoning of the second respondent himself holds little sway in the making of my determination.

[23] A proper consideration of the evidence, as a whole, reveals a number of pertinent facts, which in my view are central to the determination as to whether the applicants are employees or not, and which are either undisputed or common cause. In short, these undisputed or common cause facts are:

23.1 Part of the record was the salary advice slips of the applicants. A consideration of these slips show, that the applicants each had a Persal number and a job title of court interpreter. But the slips equally show that the applicants received no benefits of any kind, and reflect that the only earnings were either what was called ‘periodical payments’ or travel allowances, which materially fluctuated. In addition, there are no deductions of any kind from these earnings, save for taxation;

23.2 The applicants actually received no benefits of any kind normally associated with permanent government service employees;

23.3 The applicants had to complete claim forms in order to be paid, which claim forms had to be approved by the Magistrate and Prosecutor. If these

claim forms had queries, the applicants would not be paid until the queries are resolved;

23.4 There was never any written notice of termination of contract (be it employment or otherwise) provided to the applicants by the third respondent;

23.5 The applicants were actually told by the third respondent to apply for the interpreter employee positions advertised in April 2011, which positions were advertised, even whilst the applicants were still rendering services.

[24] I will now turn to the disputed issues. I will first deal with the issue of working hours. Beya testified that the applicants had to sign in at 07h30 and sign out at 16h00. He also testified that they worked every day. Msimang, the former head of the foreign language interpreters, testified that foreign language interpreters were needed every day, but in the case of the casual interpreters, they would only come to work when needed and leave as soon as his or her work finishes. The permanently employed interpreters had to come to work every day, even if there was no interpreting work to do, and remain at work to the end of the day. Msimang testified that the applicants where not these permanent employees but the casual kind. Msimang said that the applicants actually refused to sign the attendance register she used for the permanently employed interpreters, when she tried to have them sign it so as to properly manage the utilization and deployment of interpreters. Msimang stated that comings and goings of these casual interpreters were not monitored, and that discipline against them could not be enforced if they did not come to work. She said that if they came to work and there was work, they would be paid, and if not, they would not be paid. She also said that some of these applicants actually worked elsewhere, as well.

[25] Dealing then with Beya's contention that he was earning a fixed salary of R11,600.00 per month, the only documentary evidence on record is one pay slip for him, and this pay slip simply does not substantiate this contention. The pay

slip is for 21 January 2010 and reflects three 'periodical payments' and a travel allowance, which is far less than what Beya claimed to be his fixed monthly salary. In addition, this pay slip is consistent with Beya only being paid when he worked and that he did not work every day. It was put to him under cross examination that he had no proof of being paid a fixed salary and he could provide no satisfactory answer. The third respondent's Deputy Director of finance, Benade, testified that the foreign language interpreters (such as the applicants) only worked when needed, and they were only paid for actual work done by way of submitting a signed off claim. Benade also said that the applicants could claim for transport to travel to Court. All these claims were in terms of a prescribed tariff.

[26] Beya further said UIF was deducted from the applicants' salary. But the pay slips handed in at the arbitration does not bear this out. As I said, it appears that taxation was indeed deducted. The taxation deduction was dealt with in evidence, with it being put to Beya that tax had to be deducted from all earnings as a result of a taxation deduction requirement in law, and Beya answered, in effect, that he did not know if this was so. Benade however, explained in her evidence that the third respondent was compelled to deduct tax by law, and this did not mean the applicants were employed.

[27] As referred to above, Beya testified in chief that the interpreter posts were advertised in April 2011 and the applicants applied for them. Under cross examination, Beya was confronted with the proposition that why would the applicants apply for positions when they are already employed. Beya then changed tune, and came up with the explanation that he was simply 'resubmitting' his CV and not applying. He was questioned as to why he would submit something again that he submitted in 2005 already, and he then answered that he submitted it every year. As skeptical as I may be about the truth of this explanation, I am compelled to point out that even if true, this is not the kind of behaviour one would expect from a permanent and full time

employee. Simply put, a permanent employee on a fixed salary will not submit his CV every year. Msimang in any event said that these posts that were advertised were indeed for interpreters on a written contract, and were employment posts. These posts had to be applied for and the successful incumbents would then be employed in terms of the proper process. Benade confirmed this testimony, and said these posts advertised were part of a pilot project of new employment posts.

[28] In dealing with the contention that he was dismissed on 11 July 2011, it was put to Beya that he was actually being paid from July 2011 to February 2012 in various fluctuating amounts, every month for services rendered in this period. Beya conceded being so paid, but sought to explain that it was 'backlog salaries' he was being paid every month, month to month. I find this suggestion by Beya ridiculous. It is untenable that the third respondent would pay Beya month to month, in arbitrary and varying amounts, for more than six months, just to clear a backlog in salaries. In any event, and in her testimony, Benade refuted this explanation, and actually explained how, for example, the payment to Beya in October 2011 was for services rendered in September 2011. Benade also specifically said there was no such payment backlog as suggested by Beya. Finally, and at the very least, Beya conceded under cross examination that he was indeed later contacted to do interpreter work at Roodepoort court (which he refused), which in my view is in itself not compatible with a situation of him being dismissed on 11 July 2011.

[29] There was also an issue as to whether the applicants had actual signed contracts of employment. What is beyond doubt was that there was not one contract of employment presented as part of the documentary evidence in this matter. Beya was challenged on the fact that he could produce no written contract, and his answer was the third respondent had them. There were some appointment letters of some of the applicants as interpreters submitted as part of the documentary evidence, but these letters take the matter no further. The simple truth is that no matter whether services by an interpreter are rendered as an employee or an

independent contractor, the interpreter must still be properly appointed as a court interpreter. It is this appointment that these letters appear to confirm. As opposed to the contentions of Beya as stated, Msimang testified as to the correctness of the interpreter appointment process as referred to in the background facts above, and said that all these foreign language interpreters were casual interpreters and not employees. Msimang further stated that when interpreters are actually given contracts, there must be post that is advertised and contracts that are then concluded. The evidence of Msimang was confirmed by Benade, who explained in detail as to how permanent employees are appointed, as opposed to the positions occupied by the applicants. Benade was adamant that the applicants were nothing more than casual interpreters who worked on a case by case basis when needed, and had no contracts. Benade actually explained that the applicants rendered a service just like any other independent service provider.

[30] I accept that there was one letter dated 27 October 2008 for one of the individual applicants, as part of the record, which letter reflected that such applicant was employed and was earning R8 000.00 per month. This applicant to which the letter relates (being Ntoko) however, did not testify as to why this letter was written and on what basis was it written, and even more importantly, whether it corresponded to any pay slips of this applicant, which does not seem to be the case. Msimang, who was the author of the letter, testified that what she meant was not that this applicant was permanent employed, and simply that he was working there.

[31] In dealing with the testimony by Beya to the effect that the foreign language interpreters had to come with R500.00 to be paid to the interview panel in the April 2011 advertisement and application process, or they would not be appointed, it is my view that this testimony simply does not take this case any further, since the issue of the lawfulness and/or fairness of the consideration of the applicants' applications for positions in April 2011 (accepting they did apply and not just submit CV's as contended by Beya) was not part of the issue before

the first and second respondents, especially considering that their case was that they were already permanent employees that were dismissed on 11 July 2011. It must also be considered that Beya's own case was that he was not actually applying for a position in April 2011 and was just submitting his CV. Benade conceded that she was aware of an instance where one Mr Sebahle was 'selling jobs' and this situation had been dealt with. This whole issue is the proverbial 'red herring' where it comes to this case, and is neither here nor there in deciding the case.

[32] A final consideration is one of credibility. I must say that I have some difficulty with the evidence of Beya as it appears from the transcribed record, even as incomplete as it is. It is clear that he simply failed to provide a proper or direct answer to two pertinent issues explored with him under cross examination, being whether the applicants had contracts of employment, and whether he actually received a fixed salary of R11,600.00 per month irrespective of whether he worked and interpreted every day or not. I have doubts about his credibility, and gained the distinct impression from reading the record that he was making up evidence as he went along. As opposed to this, the evidence of Msimang and Benande remained largely unscathed and consistent, and these two witnesses' evidence supported one another in all material respects. I have little hesitation in preferring the evidence of Msimang and Benade over that of Beya.

[33] Beya did lead testimony about the financial hardship of some of the applicants and it did seem that the applicants were largely economically dependent on the income they earned from the third respondent. This evidence was not really challenged by the third respondent, other than the third respondent contending that there was still a need for foreign language interpreter work, and that the applicants could, and still did, work. The third respondent also said that if they refused to work, they only had themselves to blame.

[34] Accordingly, and based on the above testimony where it came to the disputed facts, and based on a proper consideration of the evidence, it is my view that, in short, the following is the evidence that must be accepted as the true evidence when determining this matter:

34.1 The applicants did not have written contract of employment, as was actually the case with the permanently employed interpreters;

34.2 The applicants actually did not have prescribed working hours, and would only work as and when required. They were not required to report for work if they did not want and would not be allocated work if there was no work. The applicants could also leave when their work was concluded;

34.3 Other than being formally appointed as interpreters, and of course having to comply with the rules relating to such appointment, the applicants did not work under the supervision or control of the third respondent, and were not subject to its discipline;

34.4 The only control exercised over the applicants by the third respondent was allocating them actual work, and in what court this work had to be done;

34.5 The posts advertised in April 2011 were indeed new posts, and were employment positions, for which the applicants applied. Such application for such positions was inconsistent with them already being permanently employed at the time;

34.6 There was no actual termination, be it of employment or service agreement or otherwise, in respect of the applicants, on 11 July 2011. The applicants were actually still utilized and rendered services after that date, and where they refused to do so, it was of their own volition;

34.7 The applicants could, and did, work for other third parties rendering the sane services.

Application of legal principles to the evidence

[35] I will now proceed to apply the above factual matrix to the applicable legal principles, starting with a consideration of section 200A. I must immediately say that I have no evidence of the actual earnings of each of the applicants on record, and I will, for the purposes of the consideration of this matter, accept that such earnings are less than the threshold in terms of section 6(3) of the BCEA, and that section 200A does find application. Section 200A reads:

> '(1) Until the contrary is proved, 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.'

[36] Applying the factual matrix to all these provisions in section 200A, and firstly considering paragraph (a), it is immediately clear that this consideration – being control and supervision – is not met. The applicants in reality do not work under the control and supervision of the third respondent, save for the third respondent allocating work when available and deploying the applicants to a court. The applicants were not subject to the discipline of the third respondent, only reported

for work when they wanted and were not managed or controlled like the full time employees of the third respondent. In short, the control exercised by the third respondent was in the form of the proper allocation of available resources, and simply not the kind of control and supervision normally associated with an employment relationship. In *Colonial Mutual Life Assurance v MacDonald*[16] it was said:

> *'….* one thing appears to me to be beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract; in other words, unless the master not only has the right to prescribe to the workman what work has to be done, but also the manner in which such work has to be done…'

The applicants are certainly not subject to prescription as to the manner in which the work must be done. After all that is in the realm of their own expertise. And other than sending the applicants to a particular court, that is where any prescribing as to what work must be done ends. In my view, and *in casu*, there is the absence of the kind of control and supervision contemplated in *MacDonald*.

[37] In *SA Broadcasting Corporation v McKenzie*[17] the Court held as follows:

> 'The employee is subordinate to the will of the employer. He is obliged to obey the lawful commands, orders or instructions of the employer who has the right of supervising and controlling him by prescribing to him what work he has to do as well as the manner in which it has to be done. The independent contractor, however, is notionally on a footing of equality with the employer. He is bound to produce in terms of his contract of work, not by the orders of the employer. He is not under the supervision or control of the employer. Nor is he under any obligation to obey any orders of the employer in regard to the manner in which the work is to be performed. The independent contractor is his own master.'

[16] 1931 AD 412 at 434.
[17] (1999) 20 *ILJ* 585 (LAC) at para 9.

I am comfortable in saying that *in casu*, the applicants are far more akin to the independent contractor as described in *McKenzie* than being employees. In effect, the applicants simply provide interpretation services for the third respondent when they want and/or when the third respondent needs it. And when rendering these services, the applicants are left to their own devices. As said, the applicants are not subject to the third respondent's discipline and supervision. In fact, and in *LAD Brokers (Pty) Ltd v Mandla*[18] the Court applied the above ratio in *McKenzie* as follows:

> '… It is not unusual for independent contractors to be subject to some measure of contractual control in respect of standards, employees, working hours and the like. That is not the type of control referred to by this court in the quoted portion of the judgment. The control envisaged in point 4 is immediate and recurring. It is incorrect to describe contractual terms which are of a limiting nature or introduce some sort of supervision in respect of set standards as derogating from the notional footing of equality between the contracting parties in an independent contractual relationship. Such limitations upon conduct or standard do not bring about the supervision or control envisaged by this court…'

And, in my view, this is exactly applicable to the current matter. There is no immediate and recurring control of the applicants. Any control exercised is just to ensure a standard and properly allocate available resources. It does not derogate from the independent nature of the relationship and services provided by the applicants to the third respondent on this basis.

[38] Insofar as it may be argued that the interpretation services are subject to the rules and provisions relating to the terms of being a court appointed interpreter in the first instance, it being accepted that the applicants are indeed so appointed, this does not serve to establish control and supervision to the extent necessary establish employment. In *AVBOB Mutual Assurance Society v Commission for*

[18] (2001) 22 *ILJ* 1813 (LAC) at paras 23–24.

Conciliation, Mediation and Arbitration, Bloemfontein and Others,[19] the Court said:

> '… 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 authorizing 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.'

These same considerations would in my view equally apply to any rules and regulations applicable to the appointment of any applicant as a court interpreter, and it would not follow that they are employees as a result. Accordingly, and as a whole, the provisions of section 200A(1)(a) cannot assist the applicants.

[39] I will next consider the requirements in paragraph (b) – control and supervision over the hours of work. Again, the application of the factual matrix leaves this provision unfulfilled so as to assist in establishing an employment relationship. Despite Baye trying to say that the applicants worked all day every day from 07h30 to 16h00, this was simply not the case. The applicants worked when they pleased, and left if there was no work or their work was completed. In fact, and when the third respondent tried to implement some measure of control when requiring the applicants to sign an attendance register, they refused. In the end, the remuneration of the applicants is not calculated based on a monitoring and control by the third respondent of the hours that they work, but is based on a

[19] (2003) 24 *ILJ* 535 (LC) at 538E-H.

claim submitted by the applicants which they themselves must have signed off by the prosecutor and magistrate in the court to which they are allocated. I thus conclude that section 200A (1) (b) equally does not assist the applicants.

[40] The next consideration is whether the applicants are an integral part of the third respondent – being paragraph (c) of section 200A (1). There are several issues forming part of this consideration. The first consideration is that the applicants have no contracts of employment, whilst in the case of the third respondent's actual employees there were proper contracts of employment concluded and in place. Similarly, the applicants have none of the benefits that employees of the third respondent have. As to the work done in terms of the relationship between the parties, it is in my view not about the personal services of the applicants to the third respondent per se, but is only about specified work in the form of interpretation services. The Court in *Smit v Workmen's Compensation Commissioner*[20] said:

> 'the object of the contract of service is the rendering of personal services by the employee... to the employer... The services or the labour as such is the object of the contract. The object of the contract of work is the performance of a certain, specified work or the production of a certain specified result. It is the product or the result of the labour which is the object of the contract.'

As I have said, it the product of the labour, being the interpretation services, that is the only purpose of the relationship between the applicants and the third respondent.

[41] Further issues to consider in determining whether the applicants are a part of the third respondent's organization is the fact that deductions are made from the remuneration of the applicants for taxation, and that pay slips are provided to the applicants. Whilst it is so that this may point in the direction of the existence of an employment relationship, it is not decisive per se. In *Total SA (Pty) Ltd v National*

[20] 1979 (1) SA 51 (A) at 61A-B.

Bargaining Council for the Chemical Industry and Others[21] the Court said:

> '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.'

The evidence was that all persons being paid by the third respondent have a pay slip and are subject to the deduction of taxation. It was specifically testified to by the third respondent that this situation was not limited to employees. What is also important to consider is the fluctuating nature of the remuneration reflected on the pay slips, and the fact that there are no other deductions of any kind other than taxation. In any event, the deduction is taxation is indeed required by taxation law, and its deduction does not translate into employment. The Court recognized this in *LSRC and Associates v Blom,*[22] where the Court said:

> '…. the aims and objectives of the LRA and its provenance as a statute drafted to give expression to the Constitution, and in particular the constitutional right to fair labour practices. This provenance means that the characterization of an employment relationship for the purposes of the LRA will often be at variance with one geared to ensure the necessity for the levy of taxes for the fiscus.'

[42] Another aspect is that the applicants simply do not work at the beck and call of the third respondent. They work when they want. And added to that, the third respondent would only allocate work as and when available or needed. The applicants are not monitored or managed in the rendering of their work. The applicants could also provide the same work to other parties, and from the evidence it appeared that they, at least occasionally, did. These are considerations that would apply to an independent service arrangement and not

[21] (2013) 34 *ILJ* 1006 (LC) at para 20.
[22] (2011) 32 *ILJ* 2685 (LC) at para 27.

an employment contract. In *McKenzie,*[23] the Court held:

> '…. According to a contract of service the employee will typically be at the beck and call of the employer to render his personal services at the behest of the employer. The independent contractor, by way of contrast, is not obliged to perform the work himself or to produce the result himself, unless otherwise agreed upon. He may avail himself of the labour of others as assistants or employees to perform the work or to assist him in the performance of the work.
>
> Services to be rendered in terms of a contract of service are at the disposal of the employer who may in his own discretion subject, of course, to questions of repudiation decide whether or not he wants to have them rendered. The independent contractor is bound to perform a certain specified work or produce a certain specified result within a time fixed by the contract of work or within a reasonable time where no time has been specified'

[43] There is no indication or evidence that any of the applicants applied for paid leave or was ever given approved paid leave. The same consideration applies to the issue of sick leave. I have mentioned the fact that the applicants did not have to report for work on a daily basis and account to the third respondent as to why they were not at work. In comparison to the current matter I refer to *Dempsey v Home and Property*[24] where the Court held:

> '…. The appellant had no set business hours, provided only that he attended to the needs of the estate agents. The appellant was further entitled to leave as and when he desired. His only obligation being to advise the respondent in advance so that alternative arrangements could be made. The contract between the appellant and the respondent could be terminated on 24 hours' notice either way. The contract between the parties made no reference to leave, sick leave or any other terms or conditions customarily forming part of a contract of service. The appellant was not even required to tender a medical certificate in respect of periods of absence due to illness or incapacity. These factors, not specifically

[23] *SA Broadcasting Corporation v McKenzie (supra)* at para 9.
[24] (1995) 16 *ILJ* 378 (LAC) at 384F-J.

> relevant to the appellant's management function, indicate an absence of control, or to put it another way, a large degree of autonomy of the appellant.'

[44] All of the above leads me to the conclusion that the applicants were not part of the organization of the third respondent. They were indeed, as the second respondent concluded, freelancers. They tendered services of their own volition, and were allocated work only when available. The applicants completed and submitted claim forms for work done, at a prescribed rate, and were paid on approval of these claims. Although the applicants were provided with pay slips and taxation was deducted, they received no employment benefits and there were no other kind of deductions from remuneration. The comings and goings of the applicants were not monitored and controlled by the third respondent and they were not subject to the third respondent's discipline. Overall, the relationship between the applicants and the third respondent was that of independent service providing, and not that of employment as part and parcel of an organization. This matter is comparative to that in the judgment of *Total,*[25] where the Court held as follows:

> '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 from doing 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.
>
> 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

[25] (*supra*) at paras 22 – 23. Compare also *Miskey and Others v Maritz NO and Others* (2007) 28 *ILJ* 661 (LC) at paras 26 – 27.

> which were determined by the availability of students. Except for saying that his times of arrival and departure were 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.'

The Court in *Total* concluded that the individual respondent party in that case was not an employee but an independent contractor.[26] I hold a similar view with regard to the matter *in casu*.

[45] Dealing with paragraph (d) in section 200A(1), there was no evidence that the applicants worked for the third respondent for an average of at least 40 hours per month over the last three months prior to July 2011. In addition, and when considering paragraph (f), it is clear that the nature of the services being provided by the applicants to the third respondent, means that there is no issue of the applicants being provided with any tools of trade as they are, in effect, the tools in themselves. And finally, as to paragraph (g), the applicants were not required to work only for the third respondent and actually did work for other parties from time to time. Accordingly, none of the provisions as contained in section 200A (1) (d), (f) and (g) support the case of the applicants that they are indeed employees.

[46] This only leaves the requirement of economic dependency as provided for in section 200A (1) (f). I accept that the applicants are indeed economically dependent on the work they receive from the third respondent. There was undisputed evidence of prejudice caused to them where they receive no such work. But this in itself is not sufficient to establish the existence of an employment relationship. In fact, and in my view, an independent contract service provider who dedicates most of its services to one customer would equally be dependent, from an economic perspective, on such customer. Similarly, where this customer terminates the service relationship with such service provider, it would economically prejudicial to the service provider. But the service provider still

[26] Id at para 25.

remains economically active and can seek work elsewhere. In the case of the applicants, the fact also is that the applicants remain able to provide their interpreting services to any third party. In *Miskey and Others v Maritz NO and Others,*[27] the Court said the following, of comparative application *in casu*:

> '… Furthermore there is no prohibition against taking other employment or undertaking business operations by the members of the board in the Act under which they were appointed. The fact that they concentrated on the duties as members of the board was their own choice…'

I thus conclude that the economic dependency of the applicants on the work they received from the third respondent is not decisive in establishing that they were employees, which issue I will further touch on hereunder.

[47] In the end, none of the considerations in section 200A support the case of the applicants. The application of this section leads me to the conclusion that they were indeed not employees, but actually independent service providers, akin to any independent contractor. As the second respondent correctly concluded, in my view, they were 'freelancers', and not employees.

[48] In the interest of being thorough, I will also consider the dominant impression created by the relationship between the parties, as a whole. The traditional dominant impression test[28] underwent a makeover in the judgment of *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others.*[29] Davis JA referred with approval to an article by Paul Benjamin[30] where the learned author said:

> 'A starting-point is to distinguish personal dependence from economic dependence. A genuinely self-employed person is not economically dependent on their employer because he or she retains the capacity to contract with others.

[27] (2007) 28 *ILJ* 661 (LC) at para 27.

[28] See *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA 446 (A) at 457A; *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 *ILJ* 673 (LAC) at 682G-I.

[29] (2008) 29 *ILJ* 2234 (LAC).

[30] Appearing in the Industrial Law Journal at *(2004) 25 ILJ* 787 at 803.

> Economic dependence therefore relates to the entrepreneurial position of the person in the marketplace. An important indicator that a person is not dependent economically is that he or she is entitled to offer skills or services to persons other than his or her employer. The fact that a person is required by contract to only provide services for a single ''client' is a very strong indication of economic dependence. Likewise, depending upon an employer for the supply of work is a significant indicator of economic dependence.'

Davis JA then postulated what can generally be described as the dominant impression test, as follows:[31]

> 'For this reason, when a court determines the question of an employment relationship, it must work with three primary criteria:
>
> 1 an employer's right to supervision and control;
>
> 2 whether the employee forms an integral part of the organization with the employer; and
>
> 3 the extent to which the employee was economically dependent upon the employer.'

Davis JA further referred with approval[32] to the judgment in *Denel (Pty) Ltd v Gerber*[33] in which judgment the LAC adopted what was called a 'reality test' where Zondo JP (as he then was) said:

> '… it is, furthermore, clear from the authorities not only in this country but also in England and elsewhere that the law is that whether or not a person is or was an employee of another is a question that must be decided on the basis of the realities - on the basis of substance and not form or labels - at least not form or labels alone. In this regard it is important to bear in mind that an agreement between any two persons may represent form and not substance or may not reflect the realities of a relationship…'

[31] Id at para 12.
[32] Id at paras 10 and 14.
[33] (2005) 26 *ILJ* 1256 (LAC) at para 22.

All the above considerations then form part of the enquiry to establish a 'dominant impression' of the relationship.

[50] Applying this updated dominant impression test *in casu*, the reality of the relationship between the parties in my view is that of an independent service provider and customer. As I have already dealt with above, the relationship is lacking in control and supervision associated with an employment relationship, and the applicants are certainly not an integral part of the organization of the third respondent. As to economic dependency, I consider what Benjamin has said, and despite the fact that applicants indeed would suffer prejudice if they do not receive work from the third respondent, their interpreting services remain in demand and can be provided to any third party. Economic dependency, in the current proceedings, cannot on its own, charge the reality of the relationship. As was said in *Kambule v Commission for Conciliation, Mediation and Arbitration and Others:*[34]

> 'Reason dictates that the test is qualitative rather than quantitative. Even if it is useful to list factual indicators by category, the nature of the relationship cannot be determined simply by comparing the number of indicators for and against the existence of an employment relationship. This is because some indicators necessarily tell us far more about the substance of the relationship than others…'

[51] I conclude that the applicants were not employees of the third respondent. They were independent contractors and provided interpreting services to the third respondent on such basis. As the applicants were thus not employees of the third respondent, they could not have been dismissed by the third respondent as contemplated by section 186 of the LRA. The determination of the second respondent was in my view thus correct, must be sustained, and thus upheld.

[52] As the matter was unopposed, the issue of costs does not arise.

Order

[34] (2013) 34 ILJ 2234 (LC) at para 7.

[53] In the premises, I make the following order:

53.1 The applicants' review application is dismissed.

53.2 There is no order as to costs.

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Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: Mr K F Mphepya of Mabaso Attorneys

For the Third Respondent: None