THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 745 / 16

In the matter between:

SOUTH AFRICAN BROADCASTING	
CORPORATION (SOC) LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION	
AND ARBITRATION	**First Respondent**
ELEANOR HAMBIDGE N.O. (AS ARBITRATOR)	**Second Respondent**
SEAN BURKE AND 8 OTHERS	**Third and Further Respondents**

Heard: **22 September 2016**

Delivered: **8 March 2017**

Summary: **CCMA arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Review concerning issue of jurisdiction as to whether employment exists – Test of rationally and**

reasonableness does not apply – issue considered *de novo* on the basis of right or wrong award

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

Unfair labour practice – no unfair labour practice relating to benefits as no employment relationship exists – not necessary to consider review concerning arbitrator making no finding on benefits – review dismissed

CCMA arbitration proceedings – award that employment relationship exists wrong – award reviewed and set aside – substituted with award dismissing dispute

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award made by the second respondent in her capacity as an arbitrator of the CCMA (the first respondent), in terms of which she found that the third and further respondents were employees of the applicant. This application has been brought in terms of Section 145 of the Labour Relations Act[1] ('the LRA'). Also, the third and further respondents, in the capacity of applicants, have brought their own separate review application under case number JR 650 / 16, challenging the failure of the second respondent to award them consequential relief in terms of the unfair labour practice dispute they had brought to the CCMA, after having found them to be employees. This review application by the individual respondents was also brought in terms of Section 145 of the LRA. Both the review applications are before me. For the sake of convenience, in this judgment I will refer to the third and further respondents as the 'individual respondents', and when reference is made to a specific individual respondent, such individual respondent will be mentioned by name.

[1] Act 66 of 1995.

[2] This matter arose from the referral of an unfair labour practice dispute by the individual respondents to the CCMA, against the applicant, on 26 June 2015. The individual respondents contended that they were employees of the applicant and that they were entitled to the same employment benefits as all the other employees of the applicant, which they were not receiving. The applicant contended that the individual respondents were not employees of the applicant, but independent contractors. This dispute came before the second respondent for arbitration on 12 October and 8 December 2015, and concluded on 17 February 2016. Following completion of the arbitration proceedings, and in an arbitration award dated 7 March 2016, the second respondent found in favour of the individual respondents, and decided that the individual respondents were indeed employees of the applicant. However, other than finding that they were employees, the second respondent made no award of consequential relief in favour of the individual respondents. As stated above, both parties were not satisfied with this award, and sought to challenge the same on review.

[3] The award was handed down by the second respondent on 7 March 2016. The applicant served and filed its review application on 20 April 2016, and the individual respondents filed their review application under case number JR 650 / 16 on 11 April 2016. Both these review application were accordingly timeously brought and is properly before Court.

[4] In deciding both these review applications, the proper point of departure is to first decide the applicant's review application which concerns a challenge of the finding that the individual respondents were employees of the applicant. If this review application is decided in favour of the applicant, there will be simply no need to decide the review application of the individual respondents, because it would mean that no employment relationship exists between the parties, and consequently no unfair labour practice jurisdiction would exist. I will therefore proceed in deciding the applicant's review application, commencing with first setting out the relevant facts.

<u>The relevant facts</u>

[5] Fortunately, the factual matrix in this instance was either common cause, or mostly undisputed. The disputed facts related to mostly irrelevant issues. I will only set out those facts relevant to deciding whether the individual respondents were indeed employees of the applicant.

[6] The applicant conducts business as a public broadcaster. It has a large number of its own employees, but also engages the services of a number of individual persons as independent service providers. All these persons offer the kind of services that entails a particular skill attaching to such person, especially where it comes to technical personnel. Technical personnel include camera operators, editors, lighting technicians and similar personnel involved in the production and editing of broadcasts.

[7] Where it came to the individual respondents, they all rendered services as video editors. They were not employed by the applicant, but were all engaged as independent contractors. The applicant does have its own video editors under its employ, but this did not include the individual respondents.

[8] The individual respondent had each been engaged by the applicant in terms of written contracts. Their periods of engagement commenced between 2005 and 2009, respectively, and consisted of a number of contracts signed by them styled as 'independent contracts'. The most current contract concluded between the individual respondents and the applicant commenced on 1 April 2014, and was set to terminate on 31 March 2017 ('the contracts').

[9] It is clear that the contracts specifically describe the individual respondents as independent contractors, and not employees. The nature of services rendered under the contracts are prescribed as "video editing', for news. They are paid a contract fee per shift in exchange for the services rendered under the contracts, and would not be paid for any scheduled shift they do not work for whatever reason. The contracts specifically record that the engagement of the individual respondents shall not constitute appointment as an employee. Further in terms of the contracts, the individual respondents were entitled to pursue external remunerative interests. No provision is made for any form of leave, sick leave or other kind of employment benefits, in the contracts.

[10] The individual respondents were, as stated above, engaged as video editors. Video editing is the editing of recorded stories into a finished product suitable for the public, for the purposes of broadcasting same to television viewers as part of news bulletins. The actual video material to be edited is provided by the applicant's news department to the individual respondents, on the basis elaborated on hereunder.

[11] Where it comes to how the individual respondents are allocated work, this is done by way of a roster displayed at the entrance of the applicant's building. This roster is published weekly, and displays the name of the video editor working that particular week, and shifts they would be working. Themba Mathonzi ('Mathonzi'), who testified for the applicant and who was head of the department of News Video Editing, testified as to how shifts are allocated. According to Mathonzi, shifts are first allocated to the applicant's permanently employed as video editors. When there are, what is called 'gaps', the independent contractors are allocated work, and that is how the weekly shift rosters are drawn up. In simple terms, the independent contractors serve to cover work the applicant's employees are unable to deal with. Because there are more independent contractors than permanent employees, there would be regular work for the independent contractors.

[12] The editing itself is done in edit suites allocated by the applicant to the individual respondents. The allocation of the edit suites is done by what is called a co-ordinator or supervisor, who also draws up a roster that reflects which suite the video editor would be working in. If an individual respondent is then so allocated duties, such individual respondent would proceed directly to the suite, and start working. There is also only one video editor per suite, and the suite contains the equipment necessary to do the editing. The co-ordinator or supervisor is not in any way involved in the editing work, save for allocating what can be called 'emergency work' if needed.

[13] The amount of time spent working in the suite is variable. The evidence was that it could range from 6 hours to 8 hours. It depended on the shift allocated. The video editor works with a producer, who is assigned certain news stories. The producer checks the content of the story, hands it to the video editor, who then edits the story into a package that is saved onto the server, and then

broadcasted. As it was described in the evidence, the video editor "packages" the story. In order to 'prove', for the want of a better description, that the individual respondents did complete their shift, their rosters are signed at the completion of their working shift by the supervisor. However, and as stated, the supervisor does not in any way manage or control the work being done by the individual respondents, who as video editors are left entirely to their own devices when producing the end product. Whilst it was possible for the individual respondents to do the editing using their own equipment, this proved problematic, because the applicant has a 'closed server' for security purposes.

[14] When a shift is allocated to one of the individual respondents, but he or she were unable to work on that shift, they would 'lose' the shift and could not exchange it with someone else. The individual respondents could choose if they wanted to take an allocated shift or not. They would not be subject to discipline for absenteeism if they cannot or did not work an allocated shift, and they simply would not be paid for the shift. The individual respondents also do not apply for or get leave, or sick leave.

[15] At the end of every month, and based on the number of shifts that they worked, as reflected on the rosters signed off by the supervisor, the individual respondent would produce an invoice and submit it to the applicant for payment. The invoice would thus match the number of approved shifts worked, and would reflect the actual number of shifts worked. The individual respondents were paid per shift worked, no matter how many hours the shift was. The number of shifts worked also varied from month to month. Without submitting such an invoice, the individual respondents would not be paid. The invoices are paid via the applicant's finance department, with a remittance advice furnished, and not by way of the employees' payroll of the applicant. Taxation was however deducted from the invoices rendered, prior to payment, but the individual respondents were issued with an IRP5 based on payments made to an 'independent contractor'.

[16] As stated above, the applicant has video editors in its employ. These video editors discharged their duties in the same manner as the individual respondents. However, the individual respondents only edited news clips, whilst the employees also edited current affairs material. The video editors

actually employed by the applicant had proper employment contracts, received employee benefits, and were paid a fixed salary per month irrespective of hours or shifts worked.

[17] According to Mathonzi, individual negotiations had taken place with each individual respondent as to his or her contract, and their contract rates, which varied between them.

[18] The individual respondents were subject to the applicant's Standard Operating Procedure ('SOP') when doing their work. The applicant's full time employees were equally subject to the SOP. However, broadcasting regulation by law, required that the product of video editing must adhere to prescribed standards, which is the reason for the SOP. Where the individual respondent did not adhere to the SOP, they were admonished, and could have their contracts terminated. But the individual respondents were not in any way disciplined, as was the case with the applicant's employees. The SOP was there to ensure that the product of the video editing work of the individual respondents adhered to prescribed minimum standards.

[19] The individual respondents were free to render video editing services to any third party, despite having a contract with the applicant. It is so that most of the individual respondents did not work elsewhere, but they could if they wanted to, without any permission from the applicant. External work was thus not prohibited. Two of the individual respondents, Sean Burke ('Burke') and Mduduzo Nkosi ('Nkosi'), did external work for third parties from which they earned an income.

[20] The testimony also revealed that from an organizational perspective, there was a recognized distinction, which had been existence for a long period of time, between what was called 'freelancers' and the full time employees of the applicant. Freelancers were independent contractors, separate from the applicant's employees. The individual respondents conceded this, and in essence their case was that this state of affairs should be changed and they had to be 'converted' to being employees.

[21] One of the individual respondents, Mabiseng Nyandeli ('Nyandeli'), in fact testified that he had been an employee of the applicant in the past, and

explained the employment process how he came to be appointed as an employee. Nyandeli actually terminated this employment and became what was called a 'freelancer' (independent contractor). Mathonzi confirmed in evidence that in order to become an employee of the applicant, a person had to apply for a vacant position, and go thought the entire recruitment and then appointment process of the applicant, which was specifically regulated and prescribed, which was not the case where it came to contracting with the independent contractors.

[22] In the case of Nkosi, he testified about training that he had undergone to use certain equipment, and whilst being trained, he was not paid. Mathonzi confirmed this basis of training in his evidence, saying that the independent contractors would only be trained where there was a change in equipment, and were not part of the training programmes available to the employees of the applicant.

[23] Finally, the evidence showed that each of the individual respondents earned in excess of the threshold as prescribed by the Basic Conditions of Employment Act, which issue will be dealt with further, hereunder.

[24] Based on the above factual matrix, the second respondent decided that the individual respondents were not independent contractors, but employees of the applicant. It is this determination of the second respondent that now forms the subject matter of the applicant's review application.

The test for review

[25] The issue as to whether an employment relationship exists is a jurisdictional fact. If there is no employment relationship between the two parties to the dispute, then the CCMA would have no jurisdiction to determine the matter, and consequently there can be no unfair labour practice as contemplated by Section 186(2) of the LRA.

[26] Because this review application concerns an issue of jurisdiction, the review test as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd*

and Others[2] does not apply. As said in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[3]:

> '…. Nothing said in Sidumo means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA 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 …. ' (emphasis added)

[27] In cases such as these, where it is about whether the CCMA had jurisdiction, the Labour Court is entitled to, if not obliged, to determine the issue of jurisdiction of its own accord, by deciding *de novo* whether the determination by the arbitrator on jurisdiction is right or wrong.[4] In *Trio Glass t/a The Glass Group v Molapo NO and Others*[5] the Court said:

> '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.'

[28] In the case of a wrong decision by a CCMA arbitrator where it comes to the issue of jurisdiction, the decision of the arbitrator would be reviewable on objectively justiciable grounds.[6] It does not matter what the reasoning of the arbitrator may have been, it is up to the Court to, from an objective perspective, decide whether the requisite jurisdictional facts exist. In *Universal Church of the Kingdom of God v Myeni and Others*[7] the Court said:

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[2] (2007) 28 *ILJ* 2405 (CC).
[3] (2008) 29 ILJ 964 (LAC) at para 101.
[4] See *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 *ILJ* 363 (LC) at para 23; *Hickman v Tsatsimpe NO and Others* (2012) 33 *ILJ* 1179 (LC) at para 10; *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others* (2013) 34 *ILJ* 392 (LC) at paras 5–6; *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* (2012) 33 *ILJ* 1171 (LC) at para 14; *Workforce Group (Pty) Ltd v CCMA and Others* (2012) 33 *ILJ* 738 (LC) at para 2; *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others* (2013) 34 *ILJ* 1272 (LC) at para 21.
[5] (2013) 34 *ILJ* 2662 (LC) at para 22. See also *Kukard v GKD Delkor (Pty) Ltd* (2015) 36 ILJ 640 (LAC) at para 12; *Phaka and Others v Bracks NO and Others* (2015) 36 ILJ 1541 (LAC) at para 31.
[6] See *SA Commercial Catering and Allied Workers Union v Speciality Stores Ltd* (1998) 19 *ILJ* 557 (LAC) at para 24; *Zeuna-Starker Bop (Pty) Ltd v National Union of Metalworkers of SA* (1999) 20 ILJ 108 (LAC) at para 6.
[7] (2015) 36 ILJ 2832 (LAC) at para 27.

> '… the value judgment of the commissioner in a jurisdictional ruling has no legal consequence and that it is only a ruling for convenience. Therefore, the applicable test is simply whether, at the time of termination of his relationship with the church, there existed facts which objectively established that Mr Myeni was indeed the employee of the church. If, from an objective perspective, such jurisdictional facts did not exist, the CCMA did not possess the requisite jurisdiction to entertain the dispute, regardless of what the commissioner may have determined.'

[29] In the end, and as held in *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*[8]:

> '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…'

[30] Turning to the specific instance of the existence or not of an employment relationship as an issue of a jurisdictional fact needed to clothe the CCMA with jurisdiction, the Court in *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[9] 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.'

[31] Against the above principles and tests, I will now proceed to consider the applicant's application to review and set aside the arbitration award of the second respondent, where it comes to the issue of whether or not the individual respondents were in fact employees.

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[8] (2008) 29 *ILJ* 2218 (LAC) at para 40.
[9] (2009) 30 *ILJ* 2903 (LAC) at para 17. See also *Melomed Hospital Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 *ILJ* 920 (LC) at para 44; *Beya and Others v General Public Service Sectoral Bargaining Council and Others* (2015) 36 ILJ 1553 (LC) at para 20.

Evaluation

[32] *In casu*, this is simply a matter of deciding whether the individual respondents are independent contractors to, or employees of, the applicant. I must confess my concerns about what seems to be a growing trend of persons who had entered into independent service agreements with a third party contractor, but then claim the existence of an employment relationship, purely because it is considered to be opportune or in their financial interest to do so. This would often be the case where the relationship comes to an end, and the individual service provider then claims dismissal so as to extract relief from the other party flowing from a claim for unfair dismissal[10]. Or, as is the case *in casu*, the independent service provider claims employment so as to procure employment benefits the employees of the third party contractor would be entitled to. These situations are often more a case of opportunism, rather than a genuine attempt to establish the true nature of a relationship where that is unclear.

[33] What makes these kind of claims and cases possible is the fact that the Labour Court and the CCMA are entitled to go beyond what is contained in a contract so as to establish the true nature of the relationship between the parties. In *Denel (Pty) Ltd v Gerber*[11] the Court held:

> 'When a court or other tribunal is called upon to decide whether a person is another's employee or not, it is enjoined to determine the true and real position. Accordingly, it ought not to decide such a matter exclusively on the basis of what the parties have chosen to say in their agreement for it might be convenient to both parties to leave out of the agreement some important and material matter or not to reflect the true position.'

Therefore, and despite a contract being labelled and styled as an independent contract, the Court can still extract an employment relationship from it,

[10] This would be reinstatement, re-employment or compensation- see Sections 193 and 194 of the LRA.
[11] (2005) 26 *ILJ* 1256 (LAC) at para 19. See also para 22 of the judgment.

applying a number of tests and considerations with due regard to all objective facts.[12]

[34] The concern I have is that in the haste to apply the available tests in establishing the existence of an employment relationship, adjudicators often loses sight of the contract itself, how it came about, and the services provided in terms thereof. There are two parties to the contract, and the basis upon the third party contractor sought to enter into the relationship with the service provider must be an important consideration. Where parties to a service providing relationship have, with the necessary circumspection and on the basis of an informed decision, decided to structure their relationship in a particular way, an adjudicator should not readily interfere with this relationship as enshrined in the contract, after the fact. After all, *pacta servanda sunt* in principle equally applies in employment law.

[35] The LRA was never intended to banish the genuine independent service agreement concluded with individual service providers to the scrap heap of history, in favour of a default employment relationship. What the LRA was intended to do was to provide protection to unsophisticated and disenfranchised persons, in an environment where jobs are scarce and unemployment is rife, which persons would do and sign anything just to get a job. Further, the LRA was intended to protect employees against unscrupulous employers seeking to abuse the common law of contract to escape employment law obligations. In these kind of circumstances, it can hardly be contradicted that the CCMA and Labour Court would be entitled to intervene and classify the relationship between the parties for what it really was – an employment relationship.

[36] In this context, the adoption of Section 200A[13] makes sense, and in particular, that its application is limited to instances where the so-called employee earns less than the threshold prescribed by the Basic Conditions of Employment Act

[12] *LAD Brokers (Pty) Ltd v Mandla* (2001) 22 ILJ 1813 (LAC) at para 18; *SABC v McKenzie* (1999) 20 *ILJ* 585 (LAC) at para 10.

[13] Section 200A reads: '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…', with this Section then setting out all these factors.

('BCEA').[14] This lesser level of earnings is normally associated with that part of the employment corps that would be more unsophisticated and more likely to be unduly influenced into signing something they never intended to, so that the envisaged employer can avoid employment obligations.[15] Section 200A, in order to compensate for such a situation, creates a presumption of employment, as a default position, with the onus on the so-called employer party to rebut that presumption if employment is truthfully not the case.

[37] In cases where Section 200A does not apply, and the parties have concluded a written agreement establishing the nature of their relationship, it is this agreement that must be the default position in establishing the nature of the relationship. The onus would, in such case, be on the party seeking to contradict this agreement to show that the agreement does not reflect the true relationship between the parties, which is in reality not one of an independent contractor, but one employment.

[38] Since the case *in casu* is one where, on the evidence, Section 200A does not apply, the point of departure in deciding the nature of the relationship between the applicant and the individual respondents would be the contracts that they had concluded with one another. In *LAD Brokers (Pty) Ltd v Mandla*[16] the Court said:

> '… The legal relationship between the parties is to be determined primarily from a construction of the contract between them. …'

[39] In simple terms, the best place from which to establish the intention of the parties is to consider what is contained in the contract. In fact, Mathonzi, who testified for the applicant, testified that the intention in concluding the contracts was that that the individual respondents would be independent contractors. In *Phaka and Others v Bracks NO and Others*[17] the Court said:

> 'The repetitive references in the contract to the nature of the relationship, and the painstaking effort to define it, leave no doubt that the intention of the

[14] Act 75 of 1997. The threshold is determined in terms of Section 6(3) of the BCEA and currently stands at R205 433.00.
[15] See *Denel* (*supra*) at para 99.
[16] (2001) 22 ILJ 1813 (LAC) at para 15. See also *Niselow v Liberty Life Association of Africa Ltd* (1998) 19 ILJ 752 (SCA) at 754C-D; *Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo and Others* (2007) 28 ILJ 1100 (LC) at para 16.
[17] (2015) 36 ILJ 1541 (LAC) at para 32

> parties was to establish relationships overtly on a different footing to the previously existing employment relationships. This is confirmed … by the express wording of the contract and the purport of its terms …'

[40] Considering the contracts as they stand, it is clear from the terms thereof that it does not read like an employment contract. It is in fact specifically provided that it is not an employment contract. In terms of the contracts, the individual respondents provide services as video editors at a payment rate per shift, and are not paid for work done *per se*. They can also perform whatever external work they want, and decide themselves whether they want to work a shift or not. Overall, and if the contracts are considered as a whole, the most sensible meaning and underlying purpose that can be extracted therefrom is that the relationship between the parties is not one of employment, but that of independent service providers. As enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[18]:

> '…. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. ….'

As aptly described in *Commission for Conciliation, Mediation and Arbitration v MBS Transport CC and Others; Commission for Conciliation, Mediation and Arbitration v Bheka Management Services (Pty) Ltd and Others*[19]:

> 'It is trite that, when interpreting any document, regard must be had to the language used as well as the context under which the document saw the light of the day. …'

[18] 2012 (4) SA 593 (SCA) at para 18. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12.
[19] (2016) 37 ILJ 2793 (LAC) at para 15.

In this instance, the context under which the contracts saw the light of day was not to establish employment, but to found a relationship of independent service providing, especially considering the above factual matrix.

[41] It is also clear that the contracts contain no references to the kind of basic conditions of employment one would normally associate with an employment relationship. This includes, in particular, an absence or providing for leave, sick leave, a salary and specified working hours. In *Dempsey v Home and Property*[20] the Court considered the following factors in a contract as being inconsistent with an employment relationship:

> '…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. …'

[42] Further, the individual respondents are simply not those kind of persons as contemplated by the application of Section 200A, as discussed above. They are not unsophisticated and readily susceptible to being pressurized into agreeing to something they did not want. They have a particular skill, and are free and competent to contract as to the basis upon which this skill can be made available to anyone who want it. There was never any case or evidence lead that the individual respondents were coerced or misled into concluding the contracts. Similarly, there is no evidence that the individual respondents did not understand what the nature was of that they were concluding. They were free to contract as they wanted, and choose to pursue their profession in the manner as they wanted. Therefore, a consideration of the contract remains an important criterion in deciding the matter. The approach adopted by the individual respondents is in essence that of propagating that the contract must be ignored when deciding the nature of the relationship between the parties. That approach is not correct. In *Reddy v Siemens Telecommunications (Pty) Ltd*[21] the Court said:

> '… Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in

[20] (1995) 16 *ILJ* 378 (LAC) at 384F-G.
[21] 2007 (2) SA 486 (SCA) at para 15.

> economic life. In this sense freedom to contract is an integral part of the fundamental right referred to in section 22. Section 22 of the Constitution guarantees "[e]very citizen . . . the right to choose their trade, occupation or profession freely" reflecting the closeness of the relationship between the freedom to choose a vocation and the nature of a society based on human dignity as contemplated by the Constitution. …'

There is no reason why this kind of approach should not equally apply when considering the contracts, and how they should be applied in establishing the relationship between the parties.

[43] The above being said, and specifically considering the authorities analysed above, the enquiry however does not end just with a consideration of the contracts and what they contain, even though it may be an important consideration. In *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[22], Davis JA postulated the following test to consider whether an employment relationship exists, despite what is contained in a contract:

> '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.'

And in *Denel*[23] Zondo JP (as he then was) said:

> '… 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…'

[22] (2008) 29 *ILJ* 2234 (LAC) at para 12.
[23] (*supra*) at para 22.

[44] Starting with the criteria of control and supervision, an important consideration is the nature of the services provided in terms of the contract. In this respect, it must be asked whether the services are such that it flows from particular personal knowledge, skill, expertise and qualification of the individual service provider. In these kinds of instances, it would normally be the service provider that decides and dictates how the work is to be done. In simple terms, how the services are to be rendered falls within the realm of the service provider's own particular knowledge and expertise. The only control and supervisory functions of the recipient of the service would relate to issues such as making work available and exercising quality control. In short, the third party contractor is not interested in the work of the service provider *per se*, but it is interested in the particular skill brought to bear by the service provider and the outcome arrived at in applying that skill set. In *Colonial Mutual Life Assurance v MacDonald*[24] 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…'

[45] A pertinent example of this kind of situation, in a related industry to the one *in casu*, can be found in *Kambule v Commission for Conciliation, Mediation and Arbitration and Others*[25] where the Court dealt with a radio presenter that concluded an independent contract with the radio station. As part of the reasons for accepting that the presenter was an independent contractor, the Court considered the following:

> 'The fact that the station's contract with Kambule as a radio personality was clearly because it wanted to harness his unique style of presentation and edgy programme content to its station profile. …'

[24] 1931 AD 412 at 434.
[25] (2013) 34 ILJ 2234 (LC) at para 31.

[46] *In casu*, the individual respondents in reality do not work under the control and supervision of the applicant, save for the applicant allocating editing work and shifts when available. It is then up to the individual respondents to bring their own skills and experience to bear to produce an end product, being an edited clip that can be broadcasted. The further control and supervision then exercised by the applicant is only to conduct quality control of this end product. This kind of situation is inconsistent with control and supervision normally associated with a true employment relationship. Also, and in this context, the nature of the contracts and what they contain make sense.

[47] Further considerations are that the individual respondents were not subject to the discipline of the applicant, only reported for work when they wanted or were required, and were not managed or controlled like the full time employees of the applicant. In fact, and if an individual respondent could not make a shift, they would 'lose it', and this would not attract any kind of discipline for not being available. In short, this kind of control exercised by the applicant was in the form of the proper deployment of available resources, and again not the kind of control and supervision normally associated with an employment relationship. In *SA Broadcasting Corporation v McKenzie*[26] 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.'

The application of the aforesaid *dictum* to the facts *in casu* points towards the existence of an independent contracting relationship, and not one of employment.

[26] (1999) 20 *ILJ* 585 (LAC) at para 9.

[48] In *LAD Brokers*[27] 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 … 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…'

I am of the view that this *dictum* would comfortably equally apply to the current matter. There is no immediate and recurring control of the individual respondents. Any control exercised is just to ensure that an end product (a clip that can be broadcast) is produced, and properly allocating available resources. These considerations does not derogate from the independent nature of the relationship and services provided by the individual respondents to the applicant. This was recognized in *Kambule*[28] where the Court said:

> 'The extent to which he worked in the organisational context of the station was limited to what was strictly necessary for the purposes of producing and broadcasting his programme. …'

[49] Insofar as it may be said that the applicant prescribes certain guidelines and standards applicable to the rendering of services by the individual respondents, this is, in this matter, once again not the kind of control sufficient to establish an employment relationship. There is always some measure of control and supervision, even in independent contracting situations, normally to ensure that the services provided are of the required standard and the outcome of the work is what was contracted for. Surely it can never be said that the services rendered must be left to the absolute discretion of the service

[27] (2001) 22 *ILJ* 1813 (LAC) at paras 23–24.
[28] (*supra*) at para 38.

provider, in order to qualify as being part and parcel of an independent contract. In *Phaka*[29] the Court held:

> 'The levels of control and direction reserved to the company by the contract in relation to the routes, hours of performance, vehicle maintenance, branding etc, are all essential requirements of the contract intrinsic to the nature of the services to be performed by the company to its clients. The company transports sensitive financial information and does so in accordance with the needs of its clients. It is obliged to delegate those requirements to its subcontractors. By virtue of its character, the business of couriering financial documents must be done efficiently during business hours on conditions that cannot be left to the discretion of the subcontractors. These constraints do not in the operational circumstances of these peculiar contracts alter the relationship to one of employment …'

The same sentiment was echoed in *Beya and Others v General Public Service Sectoral Bargaining Council and Others*[30] where the Court said:

> '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.'

[50] Overall, I am satisfied that in this instance, the criteria of control and supervision, being the first criteria envisaged by the judgment in *State Information Technology Agency*, is insufficient to establish the existence of an employment relationship, especially considering the nature of the services provided, the absence of direct control and supervision, and the fact that the real interest of the applicant has in the relationship is a proper outcome of the services provided by the individual respondents, and not the services themselves.

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[29] (*supra*) at para 33.
[30] (2015) 36 ILJ 1553 (LC) at para 37. See also *AVBOB Mutual Assurance Society v Commission for Conciliation, Mediation and Arbitration, Bloemfontein and Others* (2003) 24 *ILJ* 535 (LC) at 538E-H; *Kambule* (*supra*) at para 30.

[51] The next consideration in terms of the judgment of *State Information Technology Agency* is whether the individual respondents can be considered to be an integral part of the applicant's undertaking. A number of factual considerations are pertinent. The first of these considerations is that the applicant in fact has a large number of employees, which include video editors as employees as well. This is therefore not a situation where the applicant is trying to avoid the obligations associated with an employment relationship by concluding independent contracts. The evidence showed that the video editors actually employed by the applicant did their work in the same way the individual respondents did, but yet they were employees. There accordingly has to be a reason why the individual respondents are treated differently, and this reason is found in the evidence which showed that there had been, for some time, a deliberate design perpetrated by all parties to the relationship, of having employees, side by side with contractors, in the applicant. All this, in my view, makes it likely that both the contracting parties purposefully decided not to integrate the individual respondents into the applicant's normal employment environment, which in fact could have been the case if this is what they wanted. This choice is clearly enshrined in the unequivocal terms of the contracts, and the individual respondents must be held bound to such kind of choices.[31]

[52] Although it is so that the individual respondents pursued an unfair labour practice claiming the benefits applicable to the applicant's employee corps, the fact remains that in terms of the contracts, none of the benefits applicable to employees of the applicant have been bestowed upon the individual respondents. Further, and throughout the service period of the individual respondents even up to the point where they pursued an unfair labour practice, spanning a number of years, they never received any of the benefits associated with the applicant's employees, which is again a situation inconsistent with integrating the individual respondents into the applicant as employees.[32]

[53] 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

[31] See *Phaka* (*supra*) at para 32.
[32] See *Beya* (*supra*) at para 40.

per se, but is only about specified work in the form of video editing services lending to a usable clip that can be broadcasted as part of the news. The Court in *Smit v Workmen's Compensation Commissioner*[33] 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 dealt with above, it the product of the labour, being the video editing services and the end product ready for broadcast, that is the only real purpose of the relationship between the parties.

[54] It is true that the individual respondents would utilize the applicant's infrastructure and equipment in discharging their services. But this does not detract from the fact that this is only done in order for the applicant to receive an acceptable outcome where it comes to the services provided by the individual respondents, and cannot serve to establish that the individual respondents are therefore integrated into the organization. This was aptly illustrated in *Kambule*[34] as follows:

> 'Similarly, the fact that the station provided the technical infrastructure necessary for production of the programme, is little different in my view from an airline using freelance pilots providing the aircraft which they fly. It is true that if Kambule had produced the programme in his own studios, that would have been a clear indication of his organisational independence, but the absence of that does not mean that Kambule's economic activities were all an integral part of the station's business. …'

[55] A further issue to consider in determining whether the individual respondents are a part of the applicant's organization is the fact that deductions were made from the invoice payments to the individual respondents, for taxation, and that IRP5's are provided to the individual respondents reflecting this. Whilst it is so

[33] 1979 (1) SA 51 (A) at 61A-B.
[34] (*supra*) at para 34.

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 Bargaining Council for the Chemical Industry and Others*[35] 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 fact is that even if the relationship is that of independent contracting, the applicant is compelled to deduct tax, unless there is a tax directive that indicates otherwise. This deduction of taxation is indeed required by taxation law, and its deduction does not translate into employment.[36] What is also important to consider is the fluctuating nature of the remuneration reflected on the invoices and remittance advices introduced into evidence, as well as the fact that there are no other deductions of any kind other than taxation. My view is that the deduction of taxation in this cannot serve to establish integration of sufficient impetus to establish an employment relationship.

[56] Another aspect is that the individual respondents simply do not work at the beck and call of the applicant. They work when they want, and it was their decision to take an allocated shift or not. And added to that, the applicant would only allocate work on the basis of being available and when needed. The individual respondents are not monitored or managed in the course of rendering of their work. The individual respondents could also provide the same work to other parties, and from the evidence it appeared that some of them did so. And even if the individual respondents did not render their services to someone else, this did not detract from the fact that they were always free to do so. In *Kambule*[37] it was held as follows:

[35] (2013) 34 *ILJ* 1006 (LC) at para 20.
[36] See *LSRC and Associates v Blom* (2011) 32 *ILJ* 2685 (LC) at para 27; *Phaka* (*supra*) at para 33; *Beya* (*supra*) at para 41.
[37] (*supra*) at para 37. See also *Beya* (*supra*) at para 42; *Total* (*supra*) at para 22.

> 'It may well be that the applicant did not pursue other remunerative opportunities with any enthusiasm and relied on his income from the contract with the station, but he never claimed he was prevented from doing so. I am satisfied that he retained sufficient independence to do other work in the media field or elsewhere.'

These aforesaid considerations therefore indicate the existence of an independent service arrangement, and is consistent with the existence of an employment relationship.

[57] There is no indication or evidence that any of the individual respondents applied for paid leave or was ever given approved paid leave. The same consideration applies to the issue of sick leave. In comparison, I refer to *Dempsey*[38] where the Court referred to the following considerations in deciding that no employment relationship existed:

> '…. 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. .... These factors, not specifically 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.'

[58] Where it came to the remuneration of the individual respondents, they submitted invoices for work done, at a prescribed rate, and were paid on approval of these invoices through the applicant's normal creditor payment system. In simple terms, they were not part of the applicant's payroll. They did not receive pay slips, but were given remittance advices upon payment of the invoices concerned. The invoices also varied. By comparison, and in *Total,*[39] the Court said:

[38] (*supra*) at 384G-J.
[39] (*supra*) at paras 22 – 23. See also *Kambule* (*supra*) at para 35; *Miskey and Others v Maritz NO and Others* (2007) 28 *ILJ* 661 (LC) at paras 26 – 27.

> '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. …
>
> 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. …'

[59] All of the above considerations lead me to the conclusion that the individual respondents were not part of the organization of the applicant. They were, for the want of a better description, and as they are actually called, freelancers. They tendered services of their own volition, and were allocated work when available and needed. They did not form part of the normal employee administration, and were paid for actual work done on the basis of invoices submitted. This criterion therefore also points to the existence of an independent contracting relationship, rather than an employment relationship.

[60] This only leaves the criteria of economic dependency. It can be legitimately argued that the individual respondents are indeed economically dependent on the work they receive from the applicant. It does not take much insight to appreciate the harm that the individual respondents would suffer should they be deprived of such work. But this kind of dependency and possible harm in itself is not sufficient to establish the existence of an employment relationship, and would be a situation experienced by most independent service providers who dedicate most of their services to one customer. In *Beya*[40] the Court said:

> '… 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 be economically prejudicial to the service provider. But the service provider still remains economically active and can seek work elsewhere. …'

[61] Even if the individual respondents lose their work with the applicant, and then experience the prejudice following on such loss, the particular skill and ability

[40] (*supra*) at para 46.

to render the service still remains attached to the individual respondents as service providers, who still remain economically active and can seek other work elsewhere. In the case of the individual respondents, as dealt with above, their particular skill and ability to do the work they were contracted for by the applicant remain attached to them, and they remain able to provide these services to any third party, without having to utilize any of the applicant's infrastructure, equipment or facilities. In *State Information Technology Agency*[41] Davis JA referred with approval to an article by Paul Benjamin[42] 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. 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.'

[62] Even if the individual respondents did not offer their services to other third parties, the fact is that this was their choice. They could offer these services to third parties, and their work remained in demand elsewhere other than in the applicant. And as touched on above, some of them did do work elsewhere. A comparative example can be found in the judgment of *Miskey and Others v Maritz NO and Others,*[43] where the Court said:

> '… 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…'

[41] (*supra*) at para 11.
[42] Appearing in (2004) 25 ILJ 787 at 803.
[43] (2007) 28 *ILJ* 661 (LC) at para 27. See also *Kambule* (*supra*) at para 38.

[63] The economic dependency of the individual respondents on the work they received from the applicant, although clearly not insignificant, is still in my view insufficient in order to establish the existence of an employment relationship between the parties. It must also be remembered that all the criteria must be considered together, and whatever impetus the issue of economic dependency may have, it substantially diminishes when thrown into the pot with all the other considerations as set out above. Economic dependency, *in casu*, cannot on its own, change the reality of the relationship. As was said in *Kambule*:[44]

> '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…'

[64] I thus conclude that the individual respondents are not employees of the applicant. In summary, my reasons for so concluding are based on what the written contracts between the parties specifically provide for and contain, the lack of existence of any direct control and supervision normally associated with an employment relationship, the fact that the individual respondents are not integrated into the organization of the applicant as is the case with all the applicant's other employees, and finally the absence of sufficient economic dependency. Overall, the dominant impression created by the contracts and the real relationship between the parties is that of independent contractors.[45]

[65] Because the individual respondents are not employees of the applicant, but independent contractors, they could not have pursued an unfair labour practice dispute as contemplated by Section 186(2) of the LRA against the applicant. The CCMA, and with it the second respondent, accordingly had no jurisdiction to entertain the dispute of the individual respondents. Their claim should have been dismissed on this basis, and the second respondent was

[44] (*supra*) at para 7.
[45] See See *Ongevallekommissaris v Onderlinge Versekerings Genootskap AVBOB* 1976 (4) SA 446 (A) at 457A; *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 *ILJ* 673 (LAC) at 682G-I.

wrong in not doing so. Therefore, the award of the second respondent falls to be reviewed and set aside.

Conclusion

[66] In all of the circumstances as discussed above, the second respondent's conclusion that the individual respondents were employees of the applicant is wrong. It is hereby reviewed and set aside.

[67] With the second respondent's award having been reviewed and set aside, where to now? As stated above, it is up to this Court to finally determine the issue of jurisdiction. I have all the facts before me to decide this issue of jurisdiction, *de novo*, and for myself. For all the reasons elaborated on above, I am satisfied that the CCMA, and consequently also the second respondent, had no jurisdiction to entertain the individual respondents' unfair labour practice dispute, as they were not employees of the applicant. Accordingly, the award of the second respondent must be substituted with an award to the effect that the CCMA had no jurisdiction to entertain such dispute, and the dispute referral of the individual respondents be dismissed.

[68] This then only leaves the review application brought by the individual respondents themselves under case number JR 650 / 16. Considering that I have found that they were not employees of the applicant, this review application simply serves no further purpose, and has become moot. It must therefore be dismissed.

[69] This then only leaves the question of costs. In terms of Section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. The individual respondents did oppose the matter, but I do not think the opposition was unreasonable. Each of the parties, in my view, had an arguable case. I am also mindful of the fact that there still exists a continuing working relationship, *albeit* not in the context the individual respondents believed it existed, between the applicant and the individual respondents. In all these circumstances, the appropriate order where it comes to costs, is to make no order as to costs.

Order

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

1. The applicant's review application under case number JR 745 / 16 is upheld.

2. The arbitration award of the second respondent dated 7 March 2016 and issued under case number GAJB 13298 – 15 is reviewed and set aside.

3. The arbitration award of the second respondent dated 7 March 2016 and issued under case number GAJB 13298 – 15 is substituted with a determination that the CCMA has no jurisdiction to entertain the dispute and the referral is dismissed.

4. The individual respondents' review application under case number JR 650 / 16 is dismissed.

5. There is no order as to costs.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant: Mr P Maserumule of Maserumule Attorneys

For the Third to Further

Respondents:	Adv R S Beaton SC
Instructed by:	Erasmus Scheepers Attorneys